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Shri Brij Mohan Khanna, Advocate.

Rajasthan

Shri Manakmal Singhvi, Advocate.

Tripura

Shri Monoranjan Chaudhury, M.A., B.L.,
Advocate.

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AIR 1970 SC 259

Lis Pendens, Doctrine of

2. Whether a transfer by the vendee during the pendency of suit for right of prior purchase, to a person possessing right of pre-emption equal or superior to that of plaintiff pre-emptor in order to defeat his right is affected by doctrine of lis pendens? (Yes)

AIR 1970 J & K 37, (FB)

Motor Vehicles

3. Where the conditions in a Stage-carriage permit are varied, whether only the permit-holder can appeal under Section 64.(b) of the Motor Vehicles Act? (Yes)

AIR 1970 All 182 (C N 24)

Wealth Tax Act

4. In giving relief under S. 50-A of Wealth Tax Act, 1957, can the assessee be deprived of the benefit in respect of the ten per cent credit given to him under S. 18 (1) of the Gift Tax Act, 1958, for making a voluntary payment of the Gift Tax? (No)

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All 146 B (C N 17) (FB)

— Pre. — Interpretation of Statutes — Power of Magistrate under sub-sec. (9)

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to summon any witness — Not subject to first proviso to sub-sec. (4) — Witness can be summoned to file affidavit — See Criminal P. C. (1898), S. 145, sub-sections (4) and (9) All 154 (C N 19)

—Pre. — Interpretation of Statutes — Reading or adding words into a statutory provision is permissible only where the language employed in the statute does not represent legislative intent — Construction of S. 2 (1) (d) of U. P. Act 9 of 1957 All 159 B (C N 20)

—Pre. — Interpretation of Statutes — Rule of construction All 165 A (C N 21)

—Pre. — Interpretation of Statutes — Scientific terms used in Sales-Tax Act should be given commercial meaning — See Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 3A(1) All 191 (C N 27) (FB)

—Pre. — Interpretation of Statutes — Language of doubtful import— More than one interpretation possible — That which advances remedy and suppresses mischief to be accepted Bom 86 B (C N 12)

—Pre. — Interpretation of Statutes — Bye-Laws made under statutory powers — Must be clear, definite and free from ambiguity Bom 93 B (C N 13)

—Pre. — Interpretation of Statutes — Implied repeal — See Municipalities — Bengal Municipal Act (1932), S. 6(1) (b) Cal 127 A (C N 19)

—Pre. — Interpretation of Statutes — Implied repeal — It can only be of an older provision by a later provision Delhi 60 D (C N 12)

—Pre. — Interpretation of Statutes — Construction of sub-section — See Essential Commodities Act (1955), S. 3 Goa 35 C (C N 7)

—Preamble — Interpretation of Statutes — Clauses contained in section must be so interpreted as not render any clause otiose and in such a way as well harmonise with other relevant provisions in Act Mys 60 B (C N 14)

—Preamble — Interpretation of Statutes — Strict construction — See Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), S. 13 Mys 73 (C N 17)

—Pre. — Interpretation of Statutes — Retrospective operation — Retrospective effect given to Amending Act — Operation cannot extend to date of coming into force of main Act — See Administration of Orissa States Order (1948), Pr. 4 Orissa 43 (C N 19)

—Preamble — Interpretation of Statutes — See Civil Services Punjab Police Rules (1934), Vol. II, Chapter XVI, R. 16.2(1) Punj 81 C (C N 13)

—Preamble — Interpretation of Statutes — General rules of construction —

Civil P. C. (contd.)

Legislative intention in use of superlative degree — Grammatical construction explained Punj 81 E (C N 13)

—Preamble — Interpretation of Statutes — Relevant canons of construction Punj 81 F (C N 13)

—Pre. — Maxims — Principles, Actio personalis moritur cum persona — Applicability — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 39 Andh Pra 80 E (C N 10) (FB)

—Ss. 2 (2), 47, 104 and 115, O. 21, R. 90 and O. 43, R. 1 (j) — Order on objections by judgment-debtor under O. 21, R. 90 — No second appeal lies against order — Appeal can be treated as a revision under S. 115 if no injustice results Delhi 56 A (C N 10)

—S. 9 — Bar by Criminal P. C. — See Criminal P. C. (1898), S. 488 All 185 A (C N 25)

—S. 9 — Purpose or ground for issue of temporary permit — Must be set out in order authorising issue of permit — Exercise of jurisdiction under S. 62 — Conditions precedent must be satisfied — See Motor Vehicles Act (1939), S. 62 Cal 104 B (C N 14)

—Ss. 9 and 16 — Scope — Suit for accounts of dissolved partnership — Defendant resident within jurisdiction of Indian Court — Partnership having assets in form of immovable property in foreign country — Court in India has jurisdiction to entertain suit and, if necessary, to appoint receiver to realise assets of partnership situate in foreign country Mad 119 A (C N 34)

—S. 11 — Judgment or decree of court not competent is not effective — But this has no application where court takes territorial jurisdiction — Word may in S. 39 — Cannot be construed as shall or must — Court passing decree may itself execute it in cases falling within cls. (a) to (e) of S. 39(1) — See Civil P. C. (1908), S. 38 Raj 53 (C N 9)

—S. 15 — See Suits Valuation Act (1887), S. 8 Bom 109 A (C N 17)

—S. 16 — Scope — Suit for accounts of dissolved partnership — Defendant resident within jurisdiction of Indian Court — Partnership having assets in form of immovable property in foreign country — Court in India has jurisdiction to entertain suit and if necessary to appoint receiver to realise assets of partnership situate in foreign country — See Civil P. C. (1908), S. 9 Mad 119 A (C N 34)

—S. 16 — Judgment or decree of court not competent is not effective — But this has no application where court takes territorial jurisdiction — Word may in S. 39 cannot be construed as shall or must — Court passing decree may itself execute it in cases falling within cls. (a) to

Civil P. C. (contd.)

(e) of S. 39(1) — See Civil P. C. (1908), S. 38 Raj 53 (C N 9)

—S. 20 — Order for maintenance by Court of A State — Enforcement of order in B State — Civil suit to set it aside on ground of fraud or concealment — Part of cause of action held arose in B State — Civil Court in B State therefore, had jurisdiction to entertain civil suit — (Criminal P. C. (1898), S. 488)

All 185 B (C N 25)
—S. 20 — Suit on contract — Defendant at Gorakhpur — Plaintiff at Forbesganj — Defendant to send goods by rail to Forbesganj — Delivery of goods to common carrier is delivery to buyer at Gorakhpur — No part of cause of action arises at Forbesganj

Pat 91 A (C N 11)
—S. 20 — Contract — Communication of breach or cancellation of — Place where it is received is a place where part of cause of action arises

Pat 91 B (C N 11)
—S. 20—Contract—Suit on — Place of acceptance of the offer — See Contract Act (1872), S. 2

Pat 91 D (C N 11)
—S. 21 — Objection as to jurisdiction taken at the earliest stage — No prejudice caused to the defendant — Plea, held, could not succeed at second appellate stage

Pat 91 C (C N 11)
—Ss. 38, 39, 11, 16 — Judgment or decree of court not competent is not effective — But this has no application where court lacks territorial jurisdiction— Word "may" in S. 39 — Cannot be construed as "shall" or "must" — Court passing decree may itself execute it in cases falling within cls. (a) to (e) of S. 39 (1) — AIR 1947 Mad 347 (FB), Dissented from — (Words and Phrases — Word "may".)

Raj 53 (C N 9)
—S. 39 — Judgment or decree of court not competent is not effective — But this has no application where court lacks territorial jurisdiction— Word 'may' in S. 39 — Cannot be construed as 'shall' or 'must' — Court passing decree may itself execute it in cases falling within cls. (a) to (e) of S. 39 (1) — See Civil P. C. (1908), S. 38

Raj 53 (C N 9)
—Ss. 40 and 42 — Transfer of decree for execution in another State — Powers of transferee court — It cannot regulate substantive rights and liabilities of parties — Money decree passed by Calcutta High Court in Original side — Decree transferred to court in Orissa for execution — Judgment-debtor praying for instalments under S. 13 of Orissa Money Lenders Act — Orissa Court held could not grant instalments — For the application of the Orissa Act money lending must have been transacted in State of Orissa — (Debt Laws — Orissa Money

Civil P. C. (contd.)

Lenders Act (3 of 1939), S. 13)

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—S. 42 — Transfer of decree for execution in another State — Powers of transferee court are in relation to procedure to be followed and not in relation to substantive law applicable in execution of decree — See Civil P. C. (1908), S. 40

Orissa 36 (C N 15)
—S. 47 — Order on objections by judgment-debtor under O. 21, R. 90 — No second appeal lies against order — Appeal can be treated as a revision under S. 115 if no injustice results — See Civil P. C. (1908), S. 2 (2)

Delhi 56 A (C N 10)
—Ss. 100-101 — Constitution of India Article 133 (1) — Ascertainment of damages under Fatal Accidents Act — Second appeal — Appellate Court should be slow in disturbing findings reached by lower Courts if they have taken all relevant facts into consideration — (Fatal Accidents Act (1855), Sections 1A, 2)

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—S. 104 — Order on objections by judgment-debtor under O. 21, R. 90 — No second appeal lies against order — Appeal can be treated as a revision under S. 115 if no injustice results — See Civil P. C. (1908), S. 2 (2)

Delhi 56 A (C N 10)
—S. 110(1), (2) — Certificate to file appeal — When can be granted under Cl. (b) — Distinction between Cls. (a) and (b) — See Constitution of India, Art. 133 (1) (a), (b)

All 180 A (C N 23) (FB)
—S. 110(1) (2) — Certificate to file appeal under Cl. (a) or (b) — Certain property forming subject-matter of litigation — Valuation of constructions added to it during pendency of litigation cannot be taken into consideration — See Constitution of India, Art. 133 (1) (a), (b)

All 180 B (C N 23) (FB)
—S. 115 — Words of S. 20 of Kerala Act 2 of 1965 are much wider than those in S. 115 Civil P. C. — Revision not limited to a mere question of jurisdiction — District Judge is empowered to consider whether on evidence the finding of subordinate judge was proper — See Houses and Rents — Kerala Buildings (Lease and Rent Control) Act (2 of 1965), S. 20

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—S. 115 — Powers of High Court under — Limitations

Assam 35 A (C N 6)
—S. 115 — Arbitration Act (1940), S. 20 — High Court in revision cannot examine correctness of finding that certain claims were outside purview and scope of agreement — It is enough for the High Court to say that the lower Court had jurisdiction to decide the matter and that the appellate Court upheld the decision

Assam 35 D (C N 6)
—S. 115 — Case in which no appeal lies 'thereto' — Includes interlocutory

Civil P. C. (contd.)

order — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 110

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—S. 115 — Order on objections by judgment-debtor under O. 21, R. 90 — No second appeal lies against order — Appeal can be treated as a revision under S. 115 if no injustice results — See Civil P. C. (1908), S. 2 (2)

Delhi 56 A (C N 10)

—S. 141 — Questions of law — Question whether the provisions of O. 47, R. 7 C.P.C. can be invoked respecting on order made under Art. 226 with the aid of S. 141 of the Code and whether the Procedural Provisions of the Code such as those enacted in Orders 1 and 2 can be availed of in connection with writ cases — Conflict of judicial opinion between various High Courts on the points — Authoritative pronouncement by Supreme Court on the questions necessary — Leave to appeal to Supreme Court granted — See Constitution of India, Art. 133 (1) (c)

Manipur 26 D (C N 8)

—S. 148 — See Civil P. C. (1908), O. 37, R. 3(4) (Bom)

Bom 101 (C N 15)

—S. 148 — Extension of time — Suit for pre-emption decreed — Direction to deposit amount decreed within time fixed as condition — Suit to stand dismissed in default — Court becomes functus officio and has no jurisdiction thereafter to extend time

J and K 33 A (C N 33)

—S. 151 — Orders made under article — Inherent power of High Court to review — See Constitution of India, Art. 226

Manipur 26 B (C N 8)

—S. 152, O. 20, Rr. 3, 6, 7 — Inherent power of Court to amend decrees or orders — Exercise of — Limitations — AIR 1924 Cal. 895 and AIR 1933 Cal. 627, Dissented from

Ker 57 (C N 13)

—O. 1, R. 10 (2) — Person claiming to be tenure-holder — Absence of his name in revenue records — Statement under S. 10(1) not issued to him — He can still file objection to that statement — See Tenancy Laws — U. P. Imposition of Ceiling on Landholdings Act (1 of 1961), S. 10

All 130 A (C N 15) (FB)

—O. 3, R. 1 — Reference of dispute to arbitrator — Notifications by Government authorising Executive Engineers to act for Government in judicial proceedings — Proceedings in court under Arbitration Act are proceedings under the Civil P. C. — Held, that the Executive Engineer became a recognised agent within O. 27, R. 2 and could make appearance under O. 3, R. 1 — See Civil P. C. (1908), O. 27, R. 2

Assam 35 B (C N 6)

—O. 18, R. 17 — O. 18, R. 17 applies to trial of election cases under Orissa Gram

Civil P. C. (contd.)

Panchayat Act — Procedure applicable under Civil P. C., to trial of suit applies to trial of election petitions by virtue of S. 35(1) of Gram Panchayat Act — Subs. (2) to (9) of S. 35 do not exclude applicability of O. 18, R. 17 — O. 18, R. 17 is a procedure applicable to trial of suits — See Panchayats. — Orissa Gram Panchayat Act (1 of 1965), S. 35

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—Order 18, Rule 17 — Recall of plaintiffs' witness as a witness of defendant with leave of Court — No prohibition if cogent reasons exist

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—O. 20, R. 3 — Inherent power of court to amend decrees or orders — Exercise of limitation — See Civil P. C. (1908), S. 152

Ker 57 (C N 13)

—O. 20, R. 6 — See Civil P. C. (1908), S. 152

Ker 57 (C N 13)

—O. 20, R. 7 — See Civil P. C. (1908), S. 152

Ker 57 (C N 13)

—O. 20, R. 14 — Extension of time — Suit for pre-emption — Trial Court directing to deposit amount decreed within certain time as condition — In default suit to stand dismissed — Appeal by plaintiff — Along with appeal, appellant presenting application for extension of time for depositing purchase money determined by trial Court — Determination of purchase money made a specific ground of appeal — Held, appellate Court's decision in dismissing appeal on sole ground that deposit was not made within time limit fixed by trial Court was not correct

J & K 33 B (C N 9)

—O. 21, R. 35 — Limitation — Delivery under warrant issued under O. 21, R. 35 resisted — Fresh warrant obtained — Same resister objecting to delivery again — Application under O. 21, R. 97 made — More than 30 days after first resistance but within thirty days after the second resistance — Application not barred under Art. 129, Limitation Act, 1963 — See Civil P. C. (1908), O. 21, R. 97

Guj 49 (C N 3)

—O. 21, R. 46 — Prejudgment garnishee proceedings — Procedural due process — Attachment of wages due to debtor — No hearing given to debtor — Attachment violates due process requirements of 14th Amendment of Constitution of America — See Constitution of India, Art. 226

USSC 25 (C N 5)

—O. 21, R. 46 — Compensation determined — A debt can be attached in execution — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 8

Delhi 58 (C N 11)

Civil P. C. (contd.)

—O. 21, R. 54 (Punjab Amendment) — Failure to take possible objections before sale — Fatal to the relief under O. 21, R. 90 — See Civil P. C. (1908), O. 21, R. 90 (Punjab Amendment)

Delhi 56 C (C N 10)

—O. 21, R. 66 (Punjab Amendment) — Failure to take possible objections before sale — Fatal to the relief under O. 21, R. 90 — See Civil P. C. (1908), O. 21, R. 90 (Punjab Amendment)

Delhi 56 C (C N 10)

—O. 21, R. 67 (Punjab Amendment) — Failure to take possible objections before sale — Fatal to the relief under O. 21, R. 90 — See Civil P. C. (1908), O. 21, R. 90 (Punjab Amendment)

Delhi 56 C (C N 10)

—O. 21, R. 68 (Punjab Amendment) — Failure to take possible objections before sale — Fatal to the relief under O. 21, R. 90 — See Civil P. C. (1908), O. 21, R. 90 (Punjab Amendment)

Delhi 56 C (C N 10)

—O. 21, R. 89 — Sale held during judgment-debtor's lifetime — Confirmed after death of judgment-debtor — Omission to bring legal representatives on record — Sale is not vitiated—See Civil P. C. (1908), O. 21, R. 92

Bom 67 (C N 9)

—O. 21, R. 90 — See Civil P. C. (1908), O. 21, R. 92

Bom 67 (C N 9)

—O. 21, R. 90 — Order on objections by judgment-debtor under O. 21, R. 90 — No second appeal lies against order — Appeal can be treated as a revision under S. 115 if no injustice results — See Civil P. C. (1908), S. 2 (2)

Delhi 56 A (C N 10)

—O. 21, R. 90 — Sale is not to be set aside unless irregularity or fraud is shown to have resulted in substantial injury to judgment-debtor — Normally mere inadequacy of price, no ground to set aside sale

Delhi 56 B (C N 10)

—O. 21, Rr. 90, 66, 67, 54 and 68 (Punjab Amendment) — Failure to take possible objections before sale — Fatal to the relief under O. 21, R. 90

Delhi 56 C (C N 10)

—O. 21, Rr. 92, 89 and 90 — Sale held during judgment-debtor's lifetime — Confirmed after death of judgment-debtor — Omission to bring legal representatives on record — Sale is not vitiated. AIR 1952 Mad. 871, Diss.

Bom 67 (C N 9)

—O. 21, Rr. 97, 35 and 103 — Limitation — Delivery under warrant issued under O. 21, R. 35 resisted — Fresh warrant obtained — Same resister objecting to delivery again — Application under O. 21, R. 97 made, more than 30 days after first resistance but within 30 days after the second resistance — Application not barred under Art. 129, Limitation Act, 1963

Guj 49 (C N 8)

Civil P. C. (contd.)

—O. 21, R. 103 — Limitation — Delivery under warrant issued under O. 21, R. 35, resisted — Fresh warrant obtained — Same resister objecting to delivery again — Application under O. 21, R. 97 made — More than 30 days after first resistance but within thirty days after the second resistance—Application not barred under Art. 129 Limitation Act 1963 — See Civil P. C. (1908), O. 21, R. 97

Guj 49 (C N 8)

—O. 22, Rr. 1, 3 and 9 — Joint decree — Appeal against by defendants — Death of one plaintiff before hearing of appeal — Appeal dismissed and joint decree passed in ignorance of death — Decree abates — High Court neither can affirm decree of trial Court nor can set aside abatement — Proper way is to set aside decree and to remand case — (1947) 51 Cal WN 654, **Overruled**

Cal 99 (C N 13)

—O. 22, R. 3 — Joint decree — Appeal against by defendants — Death of one plaintiff before hearing of appeal — Appeal dismissed and joint decree passed in ignorance of death — Decree abates — High Court neither can affirm decree of trial Court nor can set aside abatement— Proper way is to set aside decree and to remand case — See Civil P. C. (1908), O. 22, R. 1

Cal 99 (C N 13)

—O. 22, R. 9 — Joint decree — Appeal against by defendants — Death of one plaintiff before hearing of appeal— Appeal dismissed and joint decree passed in ignorance of death — Decree abates — High Court neither can affirm decree of trial Court nor can set aside abatement— Proper way is to set aside decree and to remand case — See Civil P. C. (1908), O. 22, R. 1

Cal 99 (C N 13)

—O. 27, R. 2 and O. 3, R. 1 — Arbitration Act (1940), Section 14 — Reference of dispute to arbitrator — Notifications by Government authorising Executive Engineers to act for Government in judicial proceedings — Proceedings in Court under Arbitration Act are proceedings under the Civil P. C. — **Held**, that the Executive Engineer became a "recognised agent" within O. 27, R. 2 and could make appearance under O. 3, R. 1

Assam 35 B (C N 6)

—O. 37, R. 3(4) (Bom), S. 148 — Bombay City Civil Court Rules (1948), R. 123 — Summons for judgment taken under O. 37 — Leave to defend granted on certain conditions — Default — Application for extension of time by defendant — Court has jurisdiction to grant it

Bom 101 (C N 15)

—O. 38, R. 5 — Prejudgment garnishee proceedings — Procedural due process — Attachment of wages due to debtor — No hearing given to debtor — Attachment violates due process requirements of 14th Amendment of Constitu-

Civil P. C. (contd.)

tion of America — See Constitution of India, Art. 226

USSC 25 (C N 5)

—O. 43, R. 1 (j) — Order on objections by judgment-debtor under O. 21, R. 90 — No second appeal lies against order — Appeal can be treated as a revision under S. 115 if no injustice results — See Civil P. C. (1908), S. 2 (2)

Delhi 56 A (C N 10)

—O. 47, R. 1 — Orders made under article — Inherent power of High Court to review — See Constitution of India, Art. 226

Manipur 26 B (C N 8)

—O. 47, R. 1 — Questions of law — Question whether the provisions of O. 47 R. 7, C.P.C. can be invoked respecting an order made under Art. 226 with the aid of S. 141 of the Code and whether the Procedural Provisions of the Code, such as those enacted in Orders 1 and 2 can be availed of in connection with writ cases — Conflict of judicial opinion between various High Courts on the points — Authoritative pronouncement by Supreme Court on the questions necessary — Leave to appeal to Supreme Court granted — See Constitution of India, Art. 133 (1) (c)

Manipur 26 D (C N 8)

—O. 47, R. 8 — Review application — Rehearing of parent proceedings should start only after application is allowed

Manipur 26 A (C N 8)**CIVIL SERVICES****—All India Services Act (61 of 1951)**

—S. 3 — Indian Forest Service (Cadre) Rules (1966), Rr. 3 and 4 — Indian Forest Service (Fixation of Cadre Strength) Regulations (1966), Schedule — Establishment of Forest Service Cadre for State of Kerala — Fixation of strength at 19 senior posts under State Government and 2 senior posts under Central Government — State Government has no power to create ex-cadre post of Conservator of Forests — Intention of Legislature in fixing 19 cadre posts was to bring about more efficient service — There was no intention to confer power on State Government to create ex-cadre post of Conservator of Forests as that would create parallel services of State cadre and All India Cadre having same functions — Fact that at the time of the constitution of IFS there were four Conservators of Forests in Kerala of which three alone were included in the cadre cannot be a reason for holding that the State can create more posts of Conservators ex-cadre

Ker 54 (C N 12)**—Bihar Superior Judicial Service Rules**

—Rules 5, 16 (b), 16 (d) — High Court has no power to fix gradation of judicial officers — Seniority, how fixed — Constitution of India, Articles 309, 233 and 234

SC 370 A (C N 80)**Civil Services — Bihar Superior Judicial Service Rules (contd.)**

—R. 16 (b) & (d) — High Court has no power to fix gradation of judicial officers — Seniority, how fixed — See Civil Services — Bihar Superior Judicial Service Rules, R. 5

SC 370 A (C N 80)**—Indian Forest Service (Cadre) Rules (1966)**

—R. 3 — Establishment of Forest Service Cadre for State of Kerala — Fixation of strength at 19 senior posts under State Government and 2 senior posts under Central Government — State Government has no power to create ex-cadre post of Conservator of Forests — See Civil Services — All India Services Act (1951), S. 3

Ker 54 (C N 12)

—R. 4 — Establishment of Forest Service Cadre for State of Kerala — Fixation of strength at 19 senior posts under State Government and 2 senior posts under Central Government — State Government has no power to create ex-cadre post of Conservator of Forests — See Civil Services — All India Services Act (1951), S. 3

Ker 54 (C N 12)**—Indian Forest Service (Fixation of Cadre Strength) Regulations (1966)**

—Schedule — Establishment of Forest Service Cadre for State of Kerala — Fixation of strength at 19 senior posts under State Government and 2 senior posts under Central Government — Intention of Legislature in fixing 19 cadre posts was to bring about more efficient service — See Civil Services — All India Services Act (1951), S. 3

Ker 54 (C N 12)**—Punjab Civil Medical Services Class I (Recruitment and Conditions of Service) Rules (1940)**

—R. 9.2 — Scheduled post — Post of Additional Director, Health Services; though not mentioned in Schedule is a Scheduled post — Since it was super time scale post it is not to go on the basis of seniority but on the basis of merit — Seniority would be considered only where merits are equal — Method of selection indicated — Held, that in the instant case method adopted was proper — See Constitution of India, Art. 309

Punj 112 B (C N 19) (FB)**—Punjab Civil Services (Punishment and Appeal) Rules (1952)**

—R. 3.26(d) — Word "communicate" — Meaning of — Order of suspension passed against Government servant — Takes effect from date of communication and not from date of actual receipt. (1963) 65 Pun LR 975, Reversed

SC 214 A (C N 46)

—Rule 3.26 (d) — Government servant on verge of retirement — Disciplinary action against him — Procedure

SC 214 B (C N 46)

Civil Services — Punjab Civil Services

(Punishment and Appeal) Rules (contd.)

—R. 4 (vi) — See Civil Services Punjab Police Rules (1934), Vol. II, Chap. XVI, R. 16.2 (1) Punj 81 B (C N 13)

—Punjab Police Rules (1934)

—Vol. II, Chap. XVI, R. 16.2(1)— Punishments under — Lacuna indicated — Punjab Civil Services (Punishment and Appeal) Rules (1952), R. 4 (vi) not applicable Punj 81 B (C N 13)

—Vol. II, Chapter XVI, R. 16.2(1) — Word 'acts' — Interpretation of — Does not exclude single act — (Civil P. C. (1908), Preamble — Interpretation of Statutes) — (General Clauses Act (1897), S. 13(2)) Punj 81 C (C N 13)

—Vol. II, Chap. XVI, R. 16.2 (1) — Words "gravest acts of misconduct" — Interpretation of — Intention of Legislature — Meaning of 'misconduct' and 'grave' — Use of superlative degree — Significance of, explained — (Words and Phrases — 'Misconduct') — (Words and Phrases — 'Grave and gravest') Punj 81 D (C N 13)

—Vol. II, Chap. XVI, R. 16.2(1) — See Constitution of India, Art. 226 Punj 81 G (C N 13)

—Punjab Services (Appointment by Promotion) Rules (1962)

—Cl. 2 — Scheduled post — Post of Additional Director, Health Services, though not mentioned in Schedule is a Scheduled post — Since it was super time scale post it is not to go on the basis of seniority but on the basis of merit — Seniority would be considered only where merits are equal — Method of selection indicated — Held that in the instant case method adopted was proper — See Constitution of India, Art. 309 Punj 112 B (C N 19) (FB)

—Railway Establishment Code

—Vol. II, R. 2046 — Posts of Senior Accountants and Inspectors of Station Accounts are not similar — Different age of retirement prescribed for two posts — No violation of Article — See Constitution of India, Art. 16(1) Delhi 71 A (C N 14)

—Vol. II, R. 2046 (2) (a) and (b) — Expression "Ministerial servant" — Meaning — Inspector of Station Accounts is not one — Declaration by Railway Board — Effect — Subsequent cancellation — No violation of Art. 311 (2) — (Constitution of India, Art. 311 (2)) Delhi 71 B (C N 14)

Cochin Christian Succession Act (6 of 1097)

—S. 2 (2) — See Hindu Law — Mitakshara School SC 223 (C N 48)

Companies Act (1 of 1956)

—S. 36 — Articles of association have no force of law — See Co-operative So-

Companies Act (1956) (contd.)

cieties — Andhra Pradesh Co-operative Societies Act (7 of 1964):

SC 245 C (C N 51)

—S. 159 — Prosecution for default under Ss. 159 to 162, 166 and 210 — Holding of meeting is not pre-requisite — (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and (1962) 32 Com. Cas. 1143 (Cal) and 39 CWN 1152 and AIR 1948 Cal 42 and (1967) II Com. L.J. 92, **Dissented from**; AIR 1963 AP 389, **Overruled** — See Companies Act (1956), S. 220 Andh Pra 70 (C N 9) (FB)

—S. 160 — Prosecution for default under Ss. 159 to 162, 166 and 210 — Holding of meeting is not pre-requisite — (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and (1962) 32 Com. Cas. 1143 (Cal) and 39 CWN 1152 and AIR 1948 Cal 42 and (1967) II Com. L.J. 92, **Dissented from**; AIR 1963 AP 389, **Overruled** — See Companies Act (1956), S. 220 Andh Pra 70 (C N 9) (FB)

—S. 161 — Prosecution for default under Ss. 159 to 162, 166 and 210 — Holding of meeting is not pre-requisite — (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and (1962) 32 Com. Cas. 1143 (Cal) and 39 CWN 1152 and AIR 1948 Cal 42 and (1967) II Comp. L. J. 92, **Dissented from**; AIR 1963 AP 389, **Overruled** — See Companies Act (1956), S. 220 Andh Pra 70 (C N 9) (FB)

—S. 162 — Prosecution for default under Ss. 159 to 162, 166 and 210 — Holding of meeting is not pre-requisite — (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and (1962) 32 Com. Cas. 1143 (Cal) and 39 CWN 1152 and AIR 1948 Cal 42 and (1967) II Comp. L. J. 92, **Dissented from**; AIR 1963 AP 389, **Overruled** — See Companies Act (1956), S. 220 Andh Pra 70 (C N 9) (FB)

—S. 166 — Prosecution for default under Ss. 159 to 162, 166 and 210 — Holding of meeting is not pre-requisite — (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and (1962) 32 Com. Cas. 1143 (Cal) and 39 CWN 1152 and AIR 1948 Cal 42 and (1967) II Comp. L. J. 92, **Dissented from**; AIR 1963 AP 389, **Overruled** — See Companies Act (1956), S. 220 Andh Pra 70 (C N 9) (FB)

—S. 210 — Prosecution for default under Ss. 159 to 162, 166 and 210 — Holding of meeting is not pre-requisite — (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and (1962) 32 Com. Cas. 1143 (Cal) and 39 CWN 1152 and AIR 1948 Cal 42 and (1967) II Comp. L. J. 92, **Dissented from**; AIR 1963 AP 389, **Overruled** — See Companies Act (1956), S. 220 Andh Pra 70 (C N 9) (FB)

—Ss. 220, 166, 159 to 162 and 210 — Prosecution under — Pre-requisites for — Holding of Annual General Meeting and laying before it of Balance Sheet and

Companies Act (1956) (contd.)

Profit and Loss Account is essential for prosecution under S. 220 (3) — Holding of meeting however, not necessary for prosecution for default under Ss. 159 to 162, 166 and 210 — (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and 1963 (1) Cri LJ 521 (Cal) and 39 CWN 1152 and AIR 1948 Cal 42 and (1967) 2 Comp LJ 92 (All), Dissented from; AIR 1963 Andh Pra 389, Overruled

Andh Pra 70 (C N 9) (FB)

—Ss. 391 (1), 394-A (as inserted by Act 31 of 1965), 396, 643 (1) and (2), 643 (1) (b) (iii) — Companies (Court) Rules (1959), Rr. 9, 11, 11(a) (10), 11(b), 67, 69 — Application under S. 391 (1) — Both Central Government and shareholders of Company are entitled to notice. (1967) 37 Com Cas 195 (Cal) & (1968) 38 Com Cas 197 (Mad), Dissented from

All 165 B (C N 21)

—S. 394-A (as inserted by Act 31 of 1965) — See Companies Act (1956), S. 391 (1) (as inserted by Act 31 of 1965)

All 165 B (C N 21)

—S. 396 — See Companies Act (1956), S. 391 (1) (as inserted by Act 31 of 1965)

All 165 B (C N 21)

—S. 643 (1) & (2) — Rules framed under — Companies (Court) Rules (1959), R. 32 — Mode of service — All that the rule requires is service of summons and not of other material — This rule is subject to any order of Court which may suitably modify or adopt mode of service to the requirements of a case.

All 165 C (C N 21)

—S. 643 (1) (b) (iii) & (2) — See Companies Act (1956), S. 391 (1) (as inserted by Act 31 of 1965)

All 165 B (C N 21)

Companies (Court) Rules (1959)

—R. 9 — See Companies Act (1956), S. 391 (1) (as inserted by Act 31 of 1965)

All 165 B (C N 21)

—R. 11 — See Companies Act (1956), S. 391 (1) (as inserted by Act 31 of 1965)

All 165 B (C N 21)

—R. 11 (a) (10) — See Companies Act (1956), S. 391 (1) (as inserted by Act 31 of 1965)

All 165 B (C N 21)

—R. 11(b) — See Companies Act (1956), S. 391 (1) (as inserted by Act 31 of 1965)

All 165 B (C N 21)

—R. 32 — See Companies Act (1956), S. 643 (1) and (2)

All 165 C (C N 21)

—R. 67 — See Companies Act (1956), S. 391 (1) (as inserted by Act 31 of 1965)

All 165 B (C N 21)

—R. 69 — See Companies Act (1956), S. 391 (1) (as inserted by Act 31 of 1965)

All 165 B (C N 21)

Conduct of Election Rules (1961)

—R. 93 — Inspection of ballot boxes — Requirements to be satisfied before Tribunal can permit inspection — See Repre-

Conduct of Election Rules (contd.)

sentation of the People Act (1951), S. 92 SC 276 (C N 58)

Constitution of America

—Fifth Amendment — Damage to building after it was occupied by troops to defend the same against rioters — Building already under attack by rioters before army occupation — Owners are not entitled to compensation — There is no 'taking' within meaning of 5th Amendment — See Constitution of India, Art. 31 USSC 18 (C N 4)

—Fourteenth Amendment — Prejudgment garnishee proceedings — Procedural due process — Attachment of wages due to debtor — No hearing given to debtor — Due process requirement of 14th Amendment of American Constitution is violated — See Constitution of India, Art. 226

USSC 25 (C N 5)

—Fourteenth Amendment — Constitution of India, Arts. 226 and 21 — Case from America — Administrative enquiry under State Statute — Investigation of criminal violations in field of labour management relation under statute — Inquiry Commission to make public the finding — Observance of due process essential — Opportunity to give evidence — Procedural safeguards — See Constitution of India, Art. 226

USSC 32 (C N 6)

Constitution of India

—Art. 13 — 'Law' — Bye-laws of Co-operative society framed in pursuance of A. P. Co-operative Societies Act have no force of law — See Co-operative Societies — A. P. Co-operative Societies Act (7 of 1964) SC 245 C (C N 51)

—Art. 14 — Classification of dependant of assessee into his or her spouse and or minor child and other persons wholly and mainly dependent upon him — Classification is reasonable and not arbitrary and does not violate Art. 14 — See Expenditure Tax Act (1957), as amended by Finance Act (1959), S. 2 (9) (ii)

Andh Pra 86 E (C N 11) (FB)

—Art. 14 — Different provision regarding expenditure incurred by dependant of assessee as individual and dependant of Hindu undivided family — Does not offend Art. 14 — Expenditure Tax Act (1957), as amended by Finance Act (1959), S. 4 (ii)

Andh Pra 86 F (C N 11) (FB)

—Art. 14 — Scope — Essential Commodities Act (1955), S. 3 — Gur (Regulation of Use) Order (1968) does not violate Art. 14

Goa 35 E (C N 7)

—Arts. 14, 15 (4), 29 (2) — Scope — Reservation of seats in Government Medical College for children of army personnel — Reservation is valid and reasonable

J and K 45 B (C N 12)

—Arts. 14, 15 and 29 — Admissions to Government Medical College by Government of Jammu and Kashmir — Government making reservation for candidates from Ladakh district, declared as socially and educationally backward and for scheduled caste candidates — It cannot be struck down

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as being violative of Arts. 14, 15 or 29

J and K 45 C (C N 12)

—Art. 14 — Validity — Does not contravene Art. 14 or Art. 301 of Constitution — Not repugnant to provisions of S. 15 (a) of Central Sales Tax Act — See Sales Tax — Mysore Sales Tax Act (25 of 1957), S. 5 (4)

Mys 52 (C N 12)

—Art. 15 — Admissions to Government Medical College by Government of Jammu and Kashmir — Government making reservation for candidates from Ladakh district, declared as socially and educationally backward and for scheduled caste candidates — It cannot be struck down as being violative of Arts. 14, 15 or 29 — See Constitution of India, Art. 14

J and K 45 C (C N 12)

—Arts. 15, 16 — Scope and applicability — Temporary appointment to special post — Appointment of person already in service — Rule of seniority not observed — No rules for appointment framed — Post not advertised — Article 16 held not contravened

Punj 112 D (C N 19) (FB)

—Art. 15 (4) — Scope — Reservation of seats in Government medical college for children of army personnel — Reservation is valid and reasonable — See Constitution of India, Art. 14

J and K 45 B (C N 12)

—Art. 16 — Scope and applicability — Temporary appointment to special post — Appointment of person already in service — Rule of seniority not observed — No rules for appointment framed — Post not advertised — Art. 16 held not contravened — See Constitution of India, Art. 15

Punj 112 D (C N 19) (FB)

—Art. 16 — Scope — Right of Government in matter of appointment and promotion of officers, extent of indicated — See Constitution of India, Art. 162

Punj 112 E (C N 19) (FB)

—Article 16 (1) — Railway Establishment Code, Vol. II, R. 2046 — Posts of Senior Accountants and Inspectors of Station Accounts are not similar — Different age of retirement prescribed for two posts — No violation of this Article

Delhi 71 A (C N 14)

—Art. 19 (1) (g) — Essential Commodities Act (1955), S. 3 — Gur (Regulation of Use) Order (1968) — Reasonableness of the restriction imposed by the order is to be adjudged in the context of the scheme of the Act and not territorially — Act specifies authorised purposes for which order can be passed under S. 3 — Use of consumption of gur as food is more important than its use for preparation of alcoholic liquor — Order comes within clause (6) of Art. 19 and thus Art. 19 (1) (g) is not violated

Goa 35 D (C N 7)

—Art. 21 — Case from America — Administrative enquiry under State Statute — Investigation of criminal violations in field

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of labour management relation under statute — Inquiry Commission to make public the finding — Observance of due process essential — Opportunity to give evidence — Procedural safeguards — See Constitution of India, Art. 226

USSC 32 (C N 6)

—Art. 22 — Customs Act (1962), S. 104 (2) — Without unreasonable delay — Persons detained by Customs authorities for interrogation and produced before the Magistrate within 24 hours of their arrest — Provisions of section are not violated — See Customs Act (1962), S. 104 (2)

Bom 79 A (C N 11)

—Art. 29 — Unlike Art. 29, citizenship is not a necessary qualification for claiming protection under Art. 30 — See Constitution of India, Art. 30

SC 259 C (C N 53)

—Art. 29 — Admissions to Government Medical College by Government of Jammu and Kashmir — Government making reservation for candidates from Ladakh district, declared as socially and educationally backward and for scheduled caste candidates — It cannot be struck down as being violative of Arts. 14, 15 or 29 — See Constitution of India, Art. 14

J and K 45 C (C N 12)

—Art. 29 (2) — Scope — Reservation of seats in Government medical college for children of army personnel — Reservation is valid and reasonable — See Constitution of India, Art. 14

J and K 45 B (C N 12)

—Articles 30 and 29 — Unlike Article 29, citizenship is not a necessary qualification for claiming protection under Article 30 — AIR 1969 Pat 394, Reversed

SC 259 C (C N 53)

—Art. 30 (1) — Protection of Article 30 (1) extends both to pre-constitution as well as post-constitution educational institutions provided they are intended to be administered by minorities either based on religion or language

SC 259 A (C N 53)

—Article 30 (1) — Minority — Right to set up educational institution of their choice — Persons must be residents in India and must form well-defined religious or linguistic minority — Right cannot be claimed by non-resident foreigners

SC 259 B (C N 53)

—Article 30 (1) — Primary school established in 1854 by Christian missionaries and local Christian residents of Bhagalpur with aid of funds partly contributed by them and partly by Christian Missionary Society of London — School subsequently converted into Christian Missionary Society Higher Secondary School managed by the National Christian Council of India — Held that the school was entitled to protection of Art. 30 (1) and that the order interfering with its management was invalid — AIR 1969 Pat 394, Reversed

SC 259 D (C N 53)

Constitution of India (contd.)

—Art. 31 — Search and seizure of documents under Sec. 132, Income-tax Act — Search bona fide and not irregular — Rights of assessee not infringed — See Income-tax Act (1961), S. 132

SC 292 A (C N 62)

—Art. 31 — Case from America — Damage caused to buildings by rioters after buildings had been occupied by troops to defend buildings against the rioters — Buildings already under attack by rioters before army occupation — Owners of buildings are not entitled to compensation — There is no 'taking' within the meaning of the Fifth Amendment of the American Constitution — (Constitution of America, Fifth Amendment)

USSC 18 (C N 4)

—Art. 31 — Prejudgment garnishee proceeding — Procedural due process — Attachment of wages due to debtor — No hearing given to debtor — Due process requirement of 14th Amendment of American Constitution is violated — See Constitution of India, Art. 226

USSC 25 (C N 5)

—Art. 31 — Provision under, treating spouse as dependant and taxing expenditure incurred by her — Is not confiscatory — See Expenditure Tax Act (1957), as amended by Finance Act (1959), S. 2 (g) (i)

Andh Pra 86 G (C N 11) (FB)

—Art. 31-A Proviso 2 — Provisions regarding ceiling and disposal of excess land in Ch. IV inserted by Amending Act — Are not unconstitutional — See Tenancy Laws — Orissa Land Reforms Act (1960), S. 1

SC 398 (C N 87)

—Art. 31-B — Provisions regarding ceiling and disposal of excess land in Ch. IV inserted by Amending Act — Are not unconstitutional — See Tenancy Laws — Orissa Land Reforms Act (1960), S. 1

SC 398 (C N 87)

—Art. 51 — International Law — Reception and residence of alien is discretionary with State

SC 329 C (C N 70)

—Art. 133 (1) — Ascertainment of damages under Fatal Accidents Act — Second appeal — Appellate Court should be slow in disturbing findings reached by lower Courts, if they have taken all relevant facts into consideration — See Civil P. C. (1908), Ss. 100-101

SC 376 B (C N 81)

—Art. 133 (1) (a), (b) — Certificate to file appeal — When can be granted under clause (b) — Distinction between clauses (a) and (b) — Civil P. C. (1908), S. 110 (1), (2)

All 180 A (C N 23) (FB)

—Art. 133 (1) (a), (b) — Certificate to file appeal under clause (a) or (b) — Certain property forming subject-matter of litigation — Valuation of constructions added to it during pendency of litigation cannot be taken into consideration — Civil P. C. (1908), S. 110 (1), (2) — (Point conceded)

All 180 B (C N 23) (FB)

Constitution of India (contd.)

—Art. 133 (1) (c) — Questions of law — Question whether the provisions of Order 47, Rule 1 Civil P. C. can be invoked respecting an order made under Article 226 with the aid of Section 141 of the Code and whether the procedural provisions of the Code, such as those enacted in Orders 1 and 2 can be availed of in connection with writ cases — Conflict of judicial opinion between various High Courts on the points — Authoritative pronouncement by Supreme Court on the questions necessary — Leave to appeal to Supreme Court granted

Manipur 26 D (C N 8)

—Art. 133 (1) (c) — Certificate of fitness — Substantial question of law — Finding that unruly conduct of applicants in meeting of Municipal Committee amounted to flagrant abuse of their position as municipal commissioners — Decision is on a matter of fact and no question of law is involved — (Punjab Municipal Act (3 of 1911), S. 16)

Punj 110 A (C N 18) (FB)

—Art. 133 (1) (c) — Applications under — Removal of applicants from membership of municipality — Question whether State Government has given reason for its order — High Court looking into executive file of the case to find what exactly was the order and as a fact finding it to be correct that it was supported by reasons — It is a conclusion of fact — No question of law is involved — Applications dismissed — (Punjab Municipal Act (3 of 1911), S. 16)

Punj 110 B (C N 18) (FB)

—Article 136 — Proceedings under Prevention of Food Adulteration Act — Food Inspector's authority to file complaint on behalf of Municipal Board neither challenged before trial court nor before High Court in appeal — Accused cannot be permitted to take up contention for first time before the Supreme Court after disposal of appeal by the High Court

SC 318 C (C N 67)

—Article 136 — Finding of Subordinate Judge in Rent Control proceedings confirmed by High Court in revision under Sec. 115, Civil P. C. — Held, it was not necessary to examine the question as to whether revision was properly heard and disposed of by District Court

SC 337 C (C N 71)

—Art. 136 — Concurrent finding of fact — Proceedings for eviction of tenant under Rent Control Act, on ground of sub-letting — District Court and High Court both accepting the evidence as conclusive of sub-letting — No interference

SC 337 D (C N 71)

—Article 136 — Plea that jurisdiction of Civil Court was barred by provisions of M. B. Land Revenue and Tenancy Act, decided against respondent by first two courts — Decision not challenged before High Court in second appeal — Plea cannot be raised in appeal to Supreme Court

SC 343 D (C N 73)

Constitution of India (contd.)

—Article 136 — Appellate Court allowing amendment of charge—Supreme Court will not interfere with the judicial exercise of discretion — See Criminal P. C. (1898), S. 423 (1) (d) SC 359 A (C N 77)

—Article 136 — No ground taken in special leave petition — Cannot be allowed to be raised in argument SC 359 B (C N 77)

—Article 136 — Plea that certain share of dividend taxable as income other than dividend — Plea not raised before High Court or Tribunal — Not entertained in Supreme Court SC 388 B (C N 84)

—Article 136 — Industrial Disputes Act (1947), Sch. III, Entries 2 and 5 — Finding of Tribunal as to financial position of a Company — Jurisdiction of Supreme Court to interfere SC 390 A (C N 85)

—Articles 162, 311, 16 — Scope — Right of Government in matter of appointment and promotion of officers, extent of, indicated Punj 112 E (C N 19) (FB)

—Article 226 — Income-tax Act (1961), S. 132 — Petition under Article 226 challenging order under Section 132 — Serious allegations made — High Court must take evidence viva voce and must not base its conclusion in affidavits — AIR 1965 All 487, Reversed SC 292 B (C N 62)

—Articles 226 and 311 — Order of reversion of civil servant from officiating post to substantive post — Petition challenging validity of order filed nearly after seven years — Refusal to entertain held justifiable SC 364 B (C N 78)

—Arts. 226 and 31 — Case from America — Prejudgment garnishee proceedings — Procedural due process — Attachment of wages due to debtor — Hearing to debtor not given — Attachment violates due process requirement of 14th Amendment of American Constitution — (Constitution of America, Fourteenth Amendment) — Civil P. C. (1908), O. 38, R. 5, O. 21, R. 46) USSC 25 (C N 5)

—Arts. 226 and 21 — Case from America — Administrative enquiry under State Statute — Investigation of criminal violations in field of labour management relation under statute — Inquiry Commission to make public the finding — Observance of due process essential — Opportunity to give evidence — Procedural safeguards — (Constitution of America, Fourteenth Amendment) USSC 32 (C N 6)

—Art. 226 — Natural justice — See Telegraph Act (1885), S. 7

—Art. 226 — Telegraph Act (1885), S. 7-B (1) — Dispute relating to actual reading of meter involving questions as to whether meter had been correctly and honestly read and the readings had been correctly and honestly noted down — Is clearly outside purview of S. 7-B (1) — Filing of writ petition is not barred by S. 7-B (1) — Held,

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however, that on basis of affidavit and materials placed on record, it was not possible to record any finding which could be made basis for grant of relief — Proper forum All 143 B (C N 16)

—Arts. 226 and 227 — Finding of fact — Re-appreciation of evidence — Grounds. Bom 104 A (C N 16)

—Art. 226 — Natural justice — Grant of temporary permit — Notice to existing operators on the route necessary — Opportunity to make representations should be given even when permit is granted a second time — See Motor Vehicles Act (1939), S. 62 Cal 104 A (C N 14)

—Art. 226 — Rules framed under Motor Vehicles Act are part of statute itself and hence an application for temporary permit made in accordance with the Rules cannot be assailed in petition under Art. 226, Constitution of India — But that bar does not apply where the question whether the application was in accordance with law is not in issue in the petition and the validity of the permit is assailed on other grounds — (Motor Vehicles Act (1939), S. 62) Cal 104 E (C N 14)

—Art. 226 — Temporary permit—Order granting it found invalid by Court in writ proceedings — Permit holder also restrained from placing the bus on road by the Court by an interim order of injunction — Court will not refrain from interfering on the ground that the permit will be expiring shortly and allow the permit holder to make any use of the permit or to take any advantage or benefit thereunder — (Motor Vehicles Act (1939), S. 62) Cal 104 G (C N 14)

—Art. 226 — Writ of quo warranto — Issue of — Not issued if respondent ceases to hold office except on resignation after rule nisi Cal 118 A (C N 16)

—Art. 226 — Quo warranto — Writ cannot be used to quash acts done by usurper or for refund of his salary. Cal 118 B (C N 16)

—Art. 226 — Petition for writ under — Reliefs other than those prayed for—When can be granted Cal 118 C (C N 16)

—Art. 226 — Error apparent on face of record — Errors in appreciation of documentary evidence or errors in drawing inferences cannot be said to be errors of law, and can be corrected only by a Court by sitting as a Court of appeal and not under Art. 226. Delhi 66 C (C N 13)

—Art. 226 — Indian citizen obtaining foreign passport — Government to enquire under S. 9(2) whenever the obtaining is said to be involuntary — Question cannot be gone into in writ proceedings — See Citizenship Act (1955), S. 9(1) Delhi 76 A (C N 15)

—Art. 226 — Subsequent events — Validity of order under S. 3 of Essential Commodities Act — Order amended even prior

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to filing of petition under Art. 226 — Validity of order as amended must be considered — Goa 35 B (C N 7)

— Art. 226 — Territorial jurisdiction to issue writs — See Constitution of Jammu and Kashmir, S. 103

J and K 45 A (C N 12)
— Art. 226 — Industrial Disputes Act (1947), Ss. 10-A and 10 — Arbitrator under S. 10-A — He is 'person' within Art. 226 — Writ can be issued against him.

Madh Pra 63 A (C N 16)
— Art. 226 — See Industrial Disputes Act (1947), S. 10-A

Madh Pra 63 B (C N 16)
— Art. 226 — Orders made under Article — Inherent power of High Court to review — (Civil P. C. (1908), S. 151, O. 47, R. 1) Manipur 26 B (C N 8)

— Art. 226 — Joint writ petition against certain separate orders — Objection to maintainability of petition should be taken at earliest opportunity

Manipur 26 C (C N 8)
— Art. 226 — Grounds of certiorari — Election petition admitted even when barred by limitation — Statutory provisions must be strictly applied — Writ petition lies — See Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), S. 13 Mys 73 (C N 17)

— Art. 226 — Principles of natural justice — Violation of, by Chairman of a Municipality — Order set aside by Government in appeal without hearing Chairman — High Court when will not interfere with appellate order, stated — Orissa 41 (C N 18)

— Art. 226 — Other remedy available — Election petition under Orissa Gram Panchayat Act — Interlocutory Order — Section 38 of Panchayat Act provides appeal only against final orders passed under subsecs. (1) and (2) — No appeal lies against interlocutory order — Hence only remedy is by application under Art. 226 — (Orissa Gram Panchayat Act, 1964 (1 of 1965), S. 38) Orissa 46 A (C N 20)

— Art. 226 — Patna University Act (25 of 1951), Section 9 (4) — Alternative remedy, under — Petitioner, a Principal of Medical College and Professor of Surgery — Letter received by the petitioner from Registrar of University under direction of Vice-Chancellor requiring him to hand over charge — Even after protest made by petitioner to Vice-Chancellor the latter insisted upon compliance of order — Held, there was no alternative remedy left to petitioner than to file writ application — Decision by the Vice-Chancellor might have taken longer time and meanwhile prejudice might have been caused to him

Pat 79 B (C N 9)
— Art. 226 — Petitioner, a Principal of Medical College and Professor of Surgery — Resolution of University Syndicate to re-employ him until age of 62 years on his superannuation from Health Service of State

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on attaining age of 58 years — University requiring him to hand over charge — Writ petition — Prayer for injunction refused — Fact that charge from the petitioner had been taken will not make petition infructuous — If order of Syndicate re-employing petitioner is held valid, order directing to hand over charge to petitioner can be passed by High Court

Pat 79 C (C N 9)
— Arts. 226, 311 — Disciplinary enquiry into misbehaviour of police constable — Copy of report of Reserve Inspector, not supplied — Petitioner having knowledge of contents — Held, no prejudice was caused Punj 81 A (C N 13)

— Arts. 226, 311 — Dismissal of police constable for misbehaviour — Writ petition against — No interference — When department has not used discretion wantonly or arbitrarily — (Civil Services — Punjab Police Rules (1934), Vol. II, Chap. XVI, Rule 16.2 (1)) Punj 81 G (C N 13)

— Arts. 226, 311 — Representation by the petitioner officer against appointment of respondent another officer to the post in preference to petitioner, addressed to Chief Minister, Punjab — President's Rule in Punjab when office notes were put up before Secretary of the Department — Representation ordered to be filed by Secretary — It cannot be said that Secretary had mala fide intention in withholding representation from the Chief Minister

Punj 112 C (C N 19) (FB)
— Art. 227 — See Constitution of India, Art. 226 Bom 104 A (C N 16)

— Art. 233 — Bihar Superior Judicial Service Rules, Rr. 5, 16 (b), 16 (d) — High Court has no power to fix gradation of judicial officers — Seniority, how fixed — See Civil Services — Bihar Superior Judicial Service Rules, R. 5 SC 370 A (C N 80)
— Art. 233 — Appointment of District Judge by Government without consultation of High Court is not valid

SC 370 B (C N 80)
— Arts. 233, 235 — Right of High Court to transfer District Judges

SC 370 C (C N 80)
— Art. 234 — Bihar Superior Judicial Service Rules, Rr. 5, 16 (b), 16 (d) — High Court has no power to fix gradation of judicial officers — Seniority, how fixed — See Civil Services — Bihar Superior Judicial Service Rules, R. 5 SC 370 A (C N 80)
— Art. 235 — Right of High Court to transfer District Judges — See Constitution of India, Art. 233

SC 370 C (C N 80)
— Art. 245 — Interpretation of Constitutional entries — Use of words of wide and general import in statute — They are subject to restrictions imposed by Constitution — See Municipalities — Calicut City Municipal Act (Kerala Act 30 of 1961), S. 126, proviso SC 264 A (C N 54)
— Art. 245 — Retrospective legislation by delegated authority — Principles — See

Constitution of India (contd.)

Income-tax Act (1961), S. 2(44) (ii) (as substituted by S. 4 of Finance Act, 1963)

SC 385 (C N 83)

—Art. 245 — See Telegraph Act (1885), S. 7. All 143 A (C N 16)

—Art. 245 — Delegation of power by authority — Power to issue temporary permits — R.T.A. cannot delegate the power — See Motor Vehicles Act (1939), S. 62

Cal 104 D (C N 14)

—Art. 245 — Parliament — Territorial extent of legislative power — See Administration of Orissa State Order (1948), Pr. 4

Orissa 43 (C N 19)

—Art. 246 — Parliament has exclusive power to make laws with respect to matters in List I of Schedule VII, notwithstanding concurrent power of Parliament and State Legislature or exclusive power of State Legislature in Lists III and II, respectively — See Constitution of India, Schedule VII, List I, Entry 3

SC 228 A (C N 49)

—Art. 246 — Interpretation of Constitutional entries — Use of words of wide and general import in statute — They are subject to restrictions imposed by Constitution — See Municipalities — Calicut City Municipal Act (Kerala Act 30 of 1961), S. 126, proviso

SC 264 (C N 54)

—Art. 246, Schedule VII, List I, Entry 97 — Expenditure Tax Act (1957), is not invalid for want of legislative competency

Andh Pra 86 B (C N 11) (FB)

—Art. 246 — Colourable legislation — Meaning of — Law pretended to be in exercise of undoubted power but which in fact is on a prohibited field, is colourable legislation

Assam 40 D (C N 8)

—Art. 248 — S. 2-A, Industrial Disputes Act, is not ultra vires — See Industrial Disputes Act (1947, as amended by Act 35 of 1965), S. 2

Delhi 60 C (C N 12)

—Art. 254(2) — S. 6-R(2) incorporated in U. P. Industrial Disputes Act by U. P. Act 1 of 1957 prevails over S. 25-J(2), Industrial Disputes Act, 1947, U. P. Act 1 of 1957 having received President's assent — See U. P. Industrial Disputes Act (28 of 1947), S. 6-R(2)

SC 237 A (C N 50)

—Art. 286(1)(a) — Exemption under — Assessee delivering goods outside State by way of direct sale — He can claim exemption — He need not prove that goods were actually consumed there. ILR (1967) Andh Pra 265, Reversed

SC 306 A (C N 64)

—Art. 301 — Validity — See Sales Tax — Mysore Sales Tax Act (1957), S. 5(4)

Mys 52 (C N 12)

—Art. 309 — Bihar Superior Judicial Service Rules, Rr. 5, 16(b), 16(d) — High Court has no power to fix gradation of Judicial officers — Seniority, how fixed — See Civil Services — Bihar Superior Judicial Service Rules, R. 5

SC 370 B (C N 80)

—Arts. 309, 310 — Financial sanction for the post up to certain date — Post stands abolished on that date — No sanction of

Constitution of India (contd.)

Council of Ministers is required for abolition

Punj 112 A (C N 19) (FB)

—Art. 309 — Punjab Services (Appointment by Promotion) Rules (1962), Cl. 2 — Scheduled post — Post of Additional Director, Health Services, though not mentioned in Schedule is a scheduled post — Since it was super-time scale post, it is not to go on the basis of seniority but on the basis of merit — Seniority would be considered only where merits are equal — Method of selection indicated — Held that in the instant case method adopted was proper — (Punjab Civil Medical Service Class I (Recruitment and Conditions of Service) Rules (1940), Rule 9.2)

Punj 112 B (C N 19) (FB)

—Art. 310 — Financial sanction for the post up to certain date — Post stands abolished on that date — No sanction of Council of Ministers is required for abolition — See Constitution of India, Art. 309

Punj 112 A (C N 19) (FB)

—Art. 311 — Sub-Treasury Officer officiating in post of Superintendent of Surveys — Suspension followed by dismissal of officer — Suspension and dismissal set aside by Judicial Commissioner — Reinstatement to post of Superintendent of Survey — Reversion to the post of Sub-Treasury Officer with retrospective effect by same order of reinstatement — Validity

SC 364 A (C N 78)

—Art. 311 — Order of reversion of civil servant from officiating post to substantive post — Petition challenging validity of order filed nearly after seven years — Refusal to entertain held justifiable — See Constitution of India, Art. 226

SC 364 B (C N 78)

—Art. 311 — Mala fides — Mere delay, though of a long period, between suspension and dismissal, is not sufficient to impute mala fides

Delhi 52 B (C N 9)

—Art. 311 — Disciplinary enquiry into misbehaviours of police constable — Copy of report of Reserve Inspector not supplied — Petitioner having knowledge of contents — Held, no prejudice was caused — See Constitution of India, Art. 226

Punj 81 A (C N 13)

—Art. 311 — Dismissal of police constable for misbehaviour — Writ petition against — No interference — When department has not used discretion wantonly or arbitrarily — See Constitution of India, Art. 226

Punj 81 G (C N 13)

—Art. 311 — Representation by the petitioner officer against appointment of respondent, another officer, to the post in preference to petitioner, addressed to Chief Minister, Punjab — President's rule in Punjab when office notes were put up before Secretary of the Department — Representation ordered to be filed by Secretary — It cannot be said that Secretary had mala fide intention in withholding representation from the Chief Minister — See Constitution of India, Art. 226

Punj 112 C (C N 19) (FB)

Constitution of India (contd.)

—Art. 311 — Scope — Right of Government in matter of appointment and promotion of officers, extent of, indicated — See Constitution of India, Art. 162.

Punj 112 E (C N 19) (FB)

—Art. 311 (1) — Temporary or quasi-permanent appointment earlier to appointment to substantive post — Latter appointment is to be taken into consideration for purpose of Cl. (1) of Art. 311

Delhi 52 A (C N 9)

—Art. 311 (2) — Documents material to defence of Government servant — Denial of such documents amounts to denial of reasonable opportunity Delhi 52 C (C N 9)

—Art. 311 (2) (as amended by the Constitution (15th Amendment) Act, 1963) — Amendment is not retrospective — Demand for recalling witnesses and their cross-examination made long before amendment — Cross-examination cannot be denied by resorting to amendment

Delhi 52 D (C N 9)

—Art. 311 (2) — Expression "Ministerial servant" — Meaning — Inspector of Station Accounts is not one — Declaration by Railway Board — Effect — Subsequent cancellation — No violation of Art. 311 (2) — See Civil Services — Railway Establishment Code, Vol. II, R. 2046 (2) (a) and (b)

Delhi 71 B (C N 14)

—Art. 372 — Regulation of price of sugarcane — Provision expressly contained in Bihar Sugar Factories Control Act (1937) and also in Sugarcane (Control) Order (1955), R. 3 (3) — Provision of Order prevails over the Act, the Act being a pre-Constitution Act — See Essential Commodities Act (1955), S. 3 SC 267 B (C N 55)

—Sch. VII, List I, Entry 3, Art. 246 — Scope and effect — Entry 3 is not restricted to houses acquired, requisitioned or allotted for military purposes and includes even private letting out of houses in cantonment areas — Expression 'regulation of house accommodation' includes regulation in all its aspects and is not confined to allotment only — Effect of Entry 3 is that Parliament alone can legislate and not State Legislatures notwithstanding the fact that similar power may be found in any entry in List II or List III. AIR 1954 Bom 204 and AIR 1954 Bom 254 and AIR 1956 Nag 268 and AIR 1961 Pat 207, Overruled

SC 228 A (C N 49)

—Sch. 7, List I, Entry 97 — Expenditure Tax Act (1957) is not invalid for want of legislative competency — See Constitution of India, Art. 246

Andh Pra 86 B (C N 11) (FB)

—Sch. VII, List I, Entry 97 — S. 2-A, Industrial Disputes Act, is not ultra vires — See Industrial Disputes Act (1947) (as amended by Act 35 of 1965), S. 2-A

Delhi 60 C (C N 12)

Constitution of India (contd.)

—Sch. VII, List II, Entry 18 — Government of India Act (1935), Sch. VII, List II, Entry 21 — Expression 'land tenures' — It would not appropriately cover tenancy of buildings or of house accommodation (Obiter) SC 228 B (C N 49)

—Sch. VII, List II, Entry 52 — S. 126 of Calicut City Municipal Act is not ultra vires of the entry — See Municipalities — Calicut City Municipal Act (Kerala Act 30 of 1961), S. 126, proviso

SC 264 (C N 54)

—Sch. VII, List III, Entry 22 — S. 2-A, Industrial Disputes Act, is not ultra vires — See Industrial Disputes Act (1947) (as amended by Act 35 of 1965), S. 2-A

Delhi 60 C (C N 12)

—Sch. VII, List III, Entry 33 — Law relating to control of sugarcane — Parliament is competent to enact law by virtue of Entry 33 of List III — Power conferred on Government under Sec. 3 of Essential Commodities Act and Sugarcane (Control) Order (1955), cannot be challenged as invalid SC 267 C (C N 55)

Constitution of Jammu and Kashmir

—S. 103 — Territorial jurisdiction of High Court to issue writs — Selection of candidates by Government for admission to Medical Colleges outside the State — Such colleges admitting candidates selected by Government — High Court exercising its powers under S. 103 cannot redress grievances in admission of candidates as it does not possess any territorial jurisdiction over college situated outside State

J and K 45 A (C N 12)

Contract Act (9 of 1872)

—S. 2 (a) — Place of acceptance of the offer — (Civil P. C. (1908), S. 20 — Contract — Suit on) Pat 91 D (C N 11)

—S. 2 (d) — Mitakshara School (Madras School) — Joint family property — Alienation of, by coparcener — Alienation in consideration of promise to marry — Validity of — Promise to marry is valuable consideration — Alienation, not being gift, is valid to the extent of his share in the property — See Hindu Law

Mad 113 (C N 32)

—S. 14 — Coercion in S. 72 not conterminous with the definition in S. 15 — It merely means payment under compulsion which the defendant has no right to claim — See Contract Act (1872), S. 72

Guj 59 (C N 10)

—S. 15 — Coercion in S. 72 not conterminous with the definition in S. 15 — It merely means payment under compulsion which the defendant has no right to claim — See Contract Act (1872), S. 72

Guj 59 (C N 10)

—Ss. 72, 15, 14 — 'Coercion' in S. 72 not conterminous with the definition in S. 15

Contract Act (contd.)

— It merely means payment under compulsion which the defendant has no right to claim
Guj 59 (C N 10)

—S. 73 — Performance of contract — Unilateral extension of time not possible — Other party should be shown to have expressly or impliedly agreed to it
Pat 91 E (C N 11)

—Ss. 151 and 152—Goods accepted for carriage—Nature of duty of the Railways—Proof of care taken by it—Mere fact that rain water entered the wagon and caused damage, held, would not fix liability on Railways — See Railways Act (1890), S. 72 (old)
Madh Pra 55 A (C N 15)

—S. 161 — Goods accepted for carriage — Nature of duty of the Railways—Proof of care taken by it — Mere fact that rain water entered the wagon and caused damage, held, would not fix liability on Railways — See Railways Act (1890), S. 72 (old)
Madh Pra 55 A (C N 15)

CO-OPERATIVE SOCIETIES

—Andhra Pradesh Co-operative Societies Act (7 of 1964)

—Bye-laws of co-operative society framed in pursuance of provisions of the Act — They cannot be held to have force of law— (Companies Act (1956), Section 36) — (Industrial Employment (Standing Orders) Act (1946), Sec. 2 (g))
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—S. 16 — See Co-operative Societies—Andhra Pradesh Co-operative Societies Act (1964), S. 61
SC 245 B (C N 51)

—S. 16 (5)—Amendments in bye-laws—They are not contemplated in interests of workmen or for purpose of resolving industrial disputes, but in the interest of the society or the co-operative movement
SC 245 E (C N 51)

—S. 61 — Dispute capable of being resolved by Registrar under Section 61 — Jurisdiction of Industrial Tribunal under Industrial Disputes Act, 1947 is barred
SC 245 A (C N 51)

—Ss. 61, 16 — 'Dispute touching business of society' — Dispute relating to alterations of conditions of service — It cannot be held to be dispute touching "business" of society — Such dispute is not contemplated to be dealt with under Section 62 and is, therefore, outside scope of Sec. 61; it could only be dealt with by Industrial Tribunal under Industrial Disputes Act, 1947 — Provisions of Section 16 (5) are irrelevant when considering scope of jurisdiction of Registrar under Section 61
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COURT-FEES AND SUITS VALUATIONS

—Court-fees Act (7 of 1870)

—S. 7 (9) (U. P.) — Suits Valuation Act (1887), Ss. 4, 8 (U. P.) — Mortgage in favour of two persons advancing equal amounts — Mortgagor acquiring interest of one mortgagee — Suit for redemption of remaining half — Amount advanced by mortgagee whose interest was not acquired would be principal amount as contemplated in S. 7 (9) — (Transfer of Property Act (1882), S. 60)
All 188 (C N 26)

—Madras Court-fees and Suits Valuation Act (14 of 1955)

—Ss. 33 (8) and 35 — Scope — Suit for redemption of mortgage and for accounts— Allegation in plaint that documents in question though executed as sale-deeds, operated only as mortgages — Held, there was no need of cancellation of sale-deeds and, therefore, payment of court-fees on that basis was not necessary. C.R.P. 1764 of 1961 (Mad.), Overruled
Mad 107 (C N 29)

—S. 35 — Scope — Suit for redemption of mortgage and for accounts — Allegation in plaint that documents in question, though executed as sale-deeds, operated only as mortgages — Held, there was no need of cancellation of sale-deeds and, therefore, payment of court-fees on that basis was not necessary — See Court-fees and Suits Valuations — Madras Court-Fees and Suits Valuation Act (14 of 1955), S. 33 (8)
Mad 107 (C N 29)

—Suits Valuation Act (7 of 1887)

—S. 4 (U. P.)—See Court-fees and Suits Valuations—Court-fees Act (1870), S. 7 (9) (U. P.)
All 188 (C N 26)

—S. 8 (U. P.) — See Court-fees and Suits Valuations—Court-fees Act (1870), S. 7 (9) (U. P.)
All 188 (C N 26)

—Ss. 8 and 9 — Suit to enforce registration of document under S. 77, Registration Act — Forum — Suit is not capable of valuation and is not governed by S. 8, Suits Valuation Act, and there being no rules framed under S. 9, plaintiff is entitled to put his own valuation for jurisdiction — Plaintiff valuing suit at value of property comprised in deed which was beyond pecuniary jurisdiction of Bombay City Civil Court — Suit is properly filed in High Court and S. 15, Civil P. C., is not violated — (Registration Act (1908), S. 77)—(Civil P. C. (1908), S. 15)
Bom 109 A (C N 17)

—S. 9 — See Suits Valuation Act (1887), S. 8
Bom 109 A (C N 17)

Criminal Law Amendment (Amending) Act (22 of 1966)

—S. 5 (1) (a) — Accused charged and tried with person not amenable to military, naval or air force law — Charge-sheet submitted and trial commenced long before 30-6-1966 — Proceedings can be continued by Special Judge even if charges had been

Court-fees Act (7 of 1870)

See under Court-fees and Suits Valuations.

Criminal Law Amendment (Amending) Act (contd.)

framed after 30-6-1966 — Word 'charged' in section means only the submission of a charge-sheet before that date and not the framing of a charge by the Court

Assam 43 A (C N 9)
—S. 5 (1) (a) — Applicability — Accused appearing in Court before 30-6-1966 in obedience to summons — Section applies to the case even though some of the documents referred to in S. 173, Criminal P. C., were not given to accused even long after 30-6-1966 — In view of the fact that 'trial' under S. 251-A (1), Criminal P. C., begins as soon as the accused appears or is brought before Court trial in the case must be taken to have commenced long before 30-6-1966 when the accused appeared in Court — Criminal P. C. (1898), S. 251-A (1)

Assam 43 B (C N 9)

Criminal Procedure Code (5 of 1898)

—Sec. 4 (1) (f) — Complaint regarding offence under Sec. 7 of Essential Commodities Act — Offence punishable with three years' imprisonment—Is cognizable offence within meaning of Sec. 4 (1) (f)

SC 267 D (C N 55)

—S. 4 (m) — Prosecution for conspiracy to commit offence under S. 5 (2), Prevention of Corruption Act and also for offence under that section — Sanction not obtained in respect of conspiracy — Prosecution must fail in respect of both offences—See Criminal P. C. (1898), S. 196-A (2)

Assam 43 C (C N 9)

—S. 39 — Expression "specially empowered" — Meaning of — State Government can specially empower not only particular individual Additional District Magistrate, but also entire class of such Magistrates, under the section — See Public Safety — Preventive Detention Act (1950), S. 3 (2) (b)

Ker 50 (C N 11)

—S. 46 — Applicability — Arrest and custody — Distinction — Person under surveillance making statement — Statement is not hit by S. 24, Evidence Act

Bom 79 B (C N 11)

—S. 60 — Customs Act (1962), S. 104 (2) — Without unreasonable delay detained by Customs authorities for interrogation and produced before the Magistrate within 24 hours of their arrest — Provisions of section are not violated — See Customs Act (1962), S. 104 (2)

Bom 79 A (C N 11)

—S. 61 — Customs Act (1962), S. 104 (2) — Without unreasonable delay detained by Customs authorities for interrogation and produced before the Magistrate within 24 hours of their arrest — Provisions of section are not violated — See Customs Act (1962), S. 104 (2)

Bom 79 A (C N 11)

—S. 103 — Search under S. 132, Income-tax Act, 1961 — Provisions of Criminal P. C. apply — See Income-tax Act (1961), S. 132

SC 292 A (C N 62)

Criminal P. C. (contd.)

—S. 145, sub-sections (4) and (9) — Power of Magistrate under sub-section (9) to summon any witness — Not subject to first proviso to sub-section (4) — Witness can be summoned to file affidavit. AIR 1959 All 763, Overruled; AIR 1961 Punj 187, Diss.

All 154 (C N 19)

—S. 162 — Statements made in an investigation of a case other than that which results in a trial in which those statements are sought to be used — Section does not apply

Pat 95 B (C N 12)

—S. 164 — See Evidence Act (1872), S. 24

SC 283 A (C N 60)

—S. 165 — Search under S. 132, Income-tax Act, 1961 — Provisions of Criminal P. C. to apply — See Income-tax Act (1961), S. 132

SC 292 A (C N 62)

—Ss. 177 to 199-B, Chap. XV, S. 177 — Scope — Offence under S. 406, I. P. C. — Where neither entrustment nor conversion has taken place within the territorial jurisdiction of the Court where complaint is lodged, the Court has no jurisdiction to proceed with complaint

Cal 110 A (C N 15)

—S. 177 — Objection to jurisdiction — Complaint case — Objection can be taken after framing of charge

Cal 110 B (C N 15)

—S. 190 (1) (a) — Complaint was held to be neither by the Corporation nor person authorised by 'local authority' — Complaint to Magistrate about an offence—Complaint to be signed by the Commissioner. — Rubber stamp impression of signature not enough — Complaint not properly authorised — Magistrate cannot take cognizance of — See Prevention of Food Adulteration Act (1954), S. 20 (1)

Cal 120 A (C N 17)

—Ss. 196-A (2), 4 (n) and 221 — Prosecution for conspiracy to commit offence under Section 5 (2), Prevention of Corruption Act and also for offence under that section — Sanction not obtained in respect of conspiracy — Prosecution must fail in respect of both offences — Prevention of Corruption Act (1947), S. 5 (2)

Assam 43 C (C N 9)

—S. 200 — Scope — Tenant surrendering land — Landlord entering into possession — Such possession can be availed of for purposes of S. 426 or 447, I. P. C.—See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), S. 119

Manipur 23 C (C N 7)

—S. 200 (a) — Complaint was held to be neither by the Corporation nor person authorised by 'local authority' — Complaint to Magistrate about an offence — Complaint to be signed by the Commissioner—Rubber stamp impression of signature not enough — Complaint not properly authorised — Magistrate cannot take cognizance of — See Prevention of Food Adulteration Act (1954), S. 20 (1)

Cal 120 A (C N 17)

—S. 221 — Prosecution for conspiracy to commit offence under S. 5 (2), Prevention

Criminal P. C. (contd.)

of Corruption Act and also for offence under that section — Sanction not obtained in respect of conspiracy — Prosecution must fail in respect of both offences — See Criminal P. C. (1898), S. 196-A (2)

Assam 43 C (C N 9)

—S. 231 — Charge amended at appellate stage — Case remanded to give opportunity to adduce evidence — See Criminal P. C. (1898), S. 423 (1) (d)

SC 359 A (C N 77)

—S. 239 — Accused charged of offences committed in course of same transaction — Case instituted against some of the accused upon complaint — Case clubbed under S. 239 along with case instituted against other accused upon police report — Acquittal of all accused — Appeal against acquittal of accused against whom cognizance is taken on police report, maintainable only at the instance of the State and not at the instance of complainant — Remedy of complainant is under S. 439 — See Criminal P. C. (1898), S. 417 (3)

SC 272 A (C N 57)

—S. 242 — Offence under S. 48 (3) (vi) — Summons case — Substance of accusation against accused explained to him—Accused denying charge — Failure to examine accused under S. 342 — No prejudice shown — S. 537 (a) can be relied upon, assuming S. 342 is attracted — See Criminal P. C. (1898), S. 537 (a)

Goa 47 A (C N 8)

—S. 257 — Prevention of Food Adulteration Act (1954), Ss. 13 (5), 13 (3) — Criminal P. C. (1898), S. 510 (2) — Report of Public Analyst — Accused has right to call Public Analyst to be examined and cross-examined — The fact that certificate of Director of Central Laboratory supersedes report of Public Analyst and is conclusive and final does not limit this right of accused — See Prevention of Food Adulteration Act (1954), S. 13

SC 366 (C N 79)

—S. 261-A (1) — Applicability — Accused appearing in Court before 30-6-1966 in obedience to summons — Section applies to the case even though some of the documents referred to in S. 173, Criminal P. C., were not given to accused even long after 30-6-1966 — In view of the fact that 'trial' under S. 251-A (1), Criminal P. C., begins as soon as the accused appears or is brought before Court, trial in the case must be taken to have commenced long before 30-6-1966 when the accused appeared in Court — See Criminal Law Amendment Act (1966), S. 5 (1) (a)

Assam 43 B (C N 9)

—S. 342 — Offence under S. 48 (3) (vi) — Summons case — Substance of accusation against accused explained to him—Accused denying charge — Failure to examine accused under S. 342 — No prejudice shown — S. 537 (a) can be relied upon, assuming S. 342 is attracted — See Crimi-

Criminal P. C. (contd.)

nal P. C. (1898), S. 537 (a)

Goa 47 A (C N 8)

—S. 342 — Whether applies to summons case — (Quaere) — Conflicting Case law referred — Goa 47 C (C N 8)

—S. 350 — Judgment written by predecessor — Succeeding Magistrate cannot sign and deliver judgment

Pat 89 B (C N 10)

—S. 367 — Appreciation of evidence — Criminal trial — Material on record justifying finding in favour of accused — Court, held, could act on it though accused had not taken it as a specific ground of defence, 'Matar dal' — Analyst testing it only for 'pulse' — Court also treating it as 'food grain' — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held immaterial — See Evidence Act (1872), S. 3

Cal 120 C (C N 17)

—Ss. 417 (3), 417 (1), 239, 439 — Accused charged of offences committed in the course of same transaction — Case instituted against some of the accused upon complaint — Case clubbed under Sec. 239 along with case instituted against other accused upon police report — Acquittal of all accused — Appeal against acquittal of accused against whom cognizance is taken on police report, maintainable only at the instance of the State and not at the instance of complainant — Remedy of complainant is under Section 439. AIR 1968 Orissa 26, Reversed.

SC 272 A (C N 57)

—S. 417 (3) — Prevention of Food Adulteration Act (1954), Section 20 — Complaint for offence under the Act purported to have been filed by Municipal Board but signed by its Food Inspector — Acquittal—Municipal Board held competent to file appeal against acquittal — Municipal Board was competent to file complaint or to authorise its Food Inspector on its behalf

SC 318 A (C N 67)

—S. 423 — Appreciation of evidence by appellate Court — Evidence of prosecution witness — Truth and falsehood not separable — Entire evidence has to be rejected — Decision of Guj. H. C., Reversed.

SC 219 A (C N 47)

—Ss. 423 (1) (d), 535, 231 — Charge can be altered at appellate stage — Charge altered and case remanded for fresh argument — Accused given opportunity to adduce evidence — No new trial — No prejudice — Constitution of India, Art. 136 — Supreme Court will not interfere with judicial exercise of discretion

SC 359 A (C N 77)

—Ss. 435, 439 — Revision petition should be filed in the Court of Sessions Judge in first instance, rather than directly in High Court — Revision petition admitted and pending in High Court for 20 months — Arguments on merits heard — Petition should not be thrown out on this technical

Criminal P. C. (contd.)

objection — (Advantages of the practice shown) Manipur 23 A (C N 7)

—S. 439 — Accused charged of offences committed in the course of same transaction — Case instituted against some of the accused upon complaint — Case clubbed under S. 239 along with case instituted against other accused upon police report — Acquittal of all accused — Appeal against acquittal of accused against whom cognizance is taken on police report, maintainable only at the instance of State and not at the instance of complainant — Remedy of complainant is under S. 439 — See Criminal P. C. (1898), S. 417 (3)

SC 272 A (C N 57)

—S. 439 — Acquittal of accused — Revision at the instance of private complainant — Revisional jurisdiction of High Court — High Court cannot re-appraise the evidence and upset the findings of the Magistrate

SC 272 B (C N 57)

—S. 439 — Revision petition should be filed in the Court of Sessions Judge in first instance, rather than directly in High Court — Revision petition admitted and pending in High Court for 20 months — Arguments on merits heard — Petition should not be thrown out on this technical objection — (Advantages of the practice shown) — See Criminal P. C. (1898), S. 435

Manipur 23 A (C N 7)

—S. 488 — Order for maintenance under Section 488 — Civil suit to set aside order made after contest — Suit barred — Order challenged on ground of fraud or concealment — Suit not barred — (Civil P. C. (1908), S. 9 — Barred by Criminal P. C.)

All 185 A (C N 25)

—S. 488 — See Civil P. C. (1908), S. 20

All 185 B (C N 25)

—S. 510 (2) — Prevention of Food Adulteration Act (1954), Ss. 13 (5), 13 (3) — Report of Public Analyst — Accused has right to call Public Analyst to be examined and cross-examined — The fact that certificate of Director of Central Laboratory supersedes report of public Analyst and is conclusive and final does not limit this right of accused — See Prevention of Food Adulteration Act (1954), S. 13

SC 366 (C N 79)

—S. 535 — Charge can be amended at the appellate stage — See Criminal P. C. (1898), S. 423 (1) (d)

SC 359 A (C N 77)

—Ss. 537 (a), 342 and 242 — Motor Vehicles Act (1939), S. 48 (3) (vi) — Offence under S. 48 (3) (vi) — Summons case — Substance of accusation against accused explained to him — Accused denying charge — Failure to examine accused under S. 342 — No prejudice shown — S. 537 (a) can be relied upon, assuming S. 342 is attracted

Goa 47 A (C N 8)

Customs Act (52 of 1962)

—S. 104 — Applicability — Arrest and custody — Distinction — Person under sur-

Customs Act (contd.)

veillance making statement—Statement is not hit by S. 24, Evidence Act — See Criminal P. C. (1898), S. 46

Bom 79 B (C N 11)

—S. 104 (2) — Without unreasonable delay — Persons detained by Customs authorities for interrogation and produced before the Magistrate within 24 hours of their arrest — Provisions of section are not violated

Bom 79 A (C N 11)

DEBT LAWS**—Orissa Money Lenders Act (3 of 1939)**

—S. 13 — Money decree passed by Calcutta High Court in Original side — Decree transferred to court in Orissa for execution — Judgment-debtor praying for instalments — Orissa Court held could not grant instalments — See Civil P. C. (1908), S. 40

Orissa 36 (C N 15)

Displaced Persons (Compensation and Rehabilitation) Act (44 of 1954)

—S. 8 — Compensation determined — A debt can be attached in execution — (Civil P. C. (1908), O. 21, R. 46). AIR 1958 Punj 436, Dissented from

Delhi 58 (C N 11)

Divorce Act (4 of 1869)

—Ss. 10 and 17 — Wife's petition for dissolution of marriage on ground of cruelty — Evidence — Adultery coupled with cruelty must be proved — Adultery, what is — Nature of proof of adultery required — Words and Phrases — 'Adultery' — (Hindu Marriage Act (1955), Section 13)

Mad 104 (C N 27) (SB)

—S. 17 — Wife's petition for dissolution of marriage on ground of cruelty — Evidence — Cruelty coupled with adultery must be proved — Adultery, what is — Nature of proof of adultery required — See Divorce Act (1869), S. 10

Mad 104 (C N 27) (SB)

—Ss. 18 and 19 (1) — Impotency — Evidence — Wife deliberately refusing to give reason for not consummating marriage — Also refusing to submit to medical examination — Subsequent offer by her to consummate marriage found not genuine — Inference of impotency held could be drawn — (Evidence Act (1872), S. 114)

Mad 103 (C N 26) (SB)

—S. 19(1) — Petition under S. 18 of Divorce Act by husband on ground of wife's impotency — Wife deliberately refusing to give reason for not consummating marriage — Also refusing to submit to medical examination — Subsequent offer by her to consummate marriage found not genuine — Inference of impotency held could be drawn — See Divorce Act (1869), S. 18

Mad 103 (C N 26) (SB)

Easements Act (5 of 1882)

—S. 33, Explanations II and III — Easementary right to light and air — Suit for permanent injunction restraining interference with — Right not infringed unless interference amounts to nuisance — Issue as to the existence of such interference necessary — Mys 76 (C N 18)

East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948)

See under Tenancy Laws

EDUCATION

—Patna University Act (25 of 1951)

—S. 9(4) — See Constitution of India, Art. 226 — Pat 79 B (C N 9)

—S. 10(12) — Resolution of the syndicate of University — Vice-Chancellor has power to write to Government for concurrence, if in his opinion resolution is not in accordance with provision of Act — Pat 79 A (C N 9)

—S. 50 — 'Head of University Department' and 'University Professor' meaning of — Distinction — Petitioner appointed as Principal of Medical College and Professor of Clinical Surgery and Head of University Department — Expression 'Head of department' does not mean also 'University Professor' — Head of Department need not be a University Professor — Held on facts and circumstances that the resolution of syndicate of University re-employing petitioner as Professor of Surgery and Principal of Medical College until age of 62 years on his superannuation from Health Service of Government on attaining age of 58 years without concurrence of State Government was invalid — Since it was not established that he was appointed as a University Professor provisions of Section 52 were attracted—Government's approval for his re-employment was necessary — Language used in Section 52 of 1962 Act and Section 50 of 1951 Act are more or less identical—See Education — Patna University Act (1961) Bihar Act (3 of 1962), S. 52 — Pat 79 D (C N 9)

—Patna University Act, 1961 (Bihar Act 3 of 1962)

—S. 2 (g) (4) — Head of University Department' and 'University Professor' meaning of — Distinction — Petitioner appointed as Principal of Medical College and Professor of Clinical Surgery and Head of University Department — Expression 'Head of Department' does not mean also 'University Professor' — Head of Department need not be a University Professor — Held on facts and circumstances that the resolution of syndicate of University re-employing petitioner as Professor of Surgery and Principal of Medical College until age of 62 years on his superannuation from Health service of Government on attaining age of 58 years without concurrence of State Government was invalid

Education — Patna University Act (contd.)

— Since it was not established that he was appointed as a University Professor, provisions of Section 52 were attracted — Government's approval for his re-employment was necessary — Language used in Section 52 of 1962 Act and S. 50 of 1951 Act are more or less identical — See Patna University Act (1961) (Bihar Act 3 of 1962), S. 52 — Pat 79 D (C N 9)

—Ss. 52, 2 (g) and (4) — Patna University Act (25 of 1951), Section 50 — Head of 'University Department' and 'University Professor' meaning of — Distinction — Petitioner appointed as Principal of Medical College and Professor of Clinical Surgery and Head of University Department — Expression 'Head of Department' does not mean also 'University Professor' — Head of Department need not be a University Professor — Held, on facts, and circumstances that the resolution of syndicate of University re-employing petitioner as Professor of Surgery and Principal of Medical College until age of 62 years on his superannuation from Health service of Government on attaining age of 58 years without concurrence of State Government was invalid — Since it was not established that he was appointed as a University Professor, provisions of S. 52 were attracted — Government's approval for his re-employment was necessary — Language used in Section 52 of 1962 Act and S. 50 of 1951 are more or less identical — Pat 79 D (C N 9)

Electricity Act (9 of 1910)

—Ss. 6, 7 — Purchase of undertaking by Board — Liability to pay retrenchment compensation arising on transfer — It attaches to purchase money payable to company in substitution for the undertaking and is not enforceable against the Board — Sections 57 and 57-A of Electricity (Supply) Act, 1948 would make no difference — Under Cl. V, sub-clause (2), Proviso, compensation payable to employees of company would be charged upon Contingencies Reserve of the Company and balance alone would be handed over to Board — (Electricity (Supply) Act (1948), Ss. 57, 57-A, Sixth Schedule, Cl. V (2), Proviso) — SC 237 D (C N 50)

—S. 7 — Purchase of undertaking by Board — Liability to pay retrenchment compensation arising on transfer — It attaches to purchase money and is not enforceable against the Board — Sections 57 and 57-A of Electricity (Supply) Act, 1948 would make no difference — See Electricity Act (1910), S. 6 — SC 237 D (C N 50)

Electricity (Supply) Act (54 of 1948)

—S. 57 — Purchase of undertaking by Board — Liability to pay retrenchment Compensation arising out of transfer — It is not enforceable against the Board —

Electricity (Supply) Act (1948) (contd.)

See Electricity Act (1910), S. 6

SC 237 D (C N 50)

—S. 57-A — Purchase of undertaking by Board — Liability to pay retrenchment compensation arising out of transfer — It is not enforceable against the Board — See Electricity Act (1910), S. 6

SC 237 D (C N 50)

—Sch. VI, Cl. V (2) Proviso — Retrenchment compensation payable to employees of undertaking purchased over by Board — It would be charged upon Contingencies Reserve and balance alone would be handed over to Board — See Electricity Act (1910), S. 6

SC 237 D (C N 50)

—Sch. VI, Cl. V (2) Proviso — Contingencies Reserve out of which retrenchment compensation is payable to employees of company handed over to Board — Charge for payment of compensation amount may attach to that amount

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Essential Commodities Act (10 of 1955)

—Ss. 2 (b) and (c), 3 — Scheme of Cls. (b) and (c) of Section 2 and S. 3 — Scheme intended to bring under control cultivation and sale of food crops — Sugar cane does come within ambit of Act and cultivation and sale of sugar-cane can be regulated under Section 3 — Sugar-cane (Control) Order (1955), R. 3 (3) is valid. AIR 1956 SC 676, Rel. on

SC 267 A (C N 55)

—S. 3 — Scheme of Cls. (b) and (c) of S. 2 and S. 3 — Scheme intended to bring under control cultivation and sale of food crops — Sugarcane does come within ambit of Act — See Essential Commodities Act (1955), S. 2 (b) and (c)

SC 267 A (C N 55)

—S. 3 — Order under Sugarcane (Control) Order (1955), R. 3 (3) — Regulation of price of sugarcane — Provision expressly contained in Bihar Sugar Factories Control Act (1937) and also in Sugarcane (Control) Order (1955), R. 3 (3) — Provision of Order prevails over the Act, the Act being a pre-Constitution Act.

SC 267 B (C N 55)

—S. 3 — Law relating to control of sugarcane — Parliament is competent to enact law by virtue of Entry 33 of List 3 — Power conferred on Government under S. 3 of Essential Commodities Act cannot be challenged as invalid — See Constitution of India Sch. 7, List 3, Entry 33

SC 267 C (C N 55)

—S. 3 — Assam Foodgrains (Licensing and Control) Order, 1961, Cl. 3 — Violation of Requirements — Cri. Rev. No. 4 of 1967 (Assam) held not good law

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—S. 3 — See Constitution of India, Art. 226

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—S. 3 — See Constitution of India, Art. 19 (1) (g)

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Essential Commodities Act (contd.)

—S. 3 — Construction of sub-section — "Regulation" — Meaning of — Gur (Regulation of Use) Order (1968) — Order is valid and not beyond powers of Central Government under S. 3 — (Civil P. C. (1908) Pre. — Interpretation of Statutes — Construction of sub-section) — (Words and Phrases — "Regulation")

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—S. 3 — See Constitution of India, Art. 14

Goa 35 E (C N 7)

—S. 3 (1) — Gur (Regulation of Use) Order (1968) — Order is not invalid for being silent as to formation of opinion for purpose specified in S. 3 (1) — It is not an indispensable requirement of law that formation of such opinion should be stated in the Order — Circumstances as to satisfaction can be established in any other way e.g., in counter affidavit

Goa 35 A (C N 7)

—S. 7 — Complaint regarding offence under S. 7 of Essential Commodities Act — Offence punishable with three years imprisonment — Is cognizable offence within meaning of S. 4 (1) (f), Criminal P. C. — See Criminal P. C. (1898), Section 4 (1) (f)

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Estate Duty Act (34 of 1953)

—S. 10 — Three Fixed Deposit receipts in name of P — P intimating bank to renew two receipts in joint names of P and S payable to either or survivor and also executing a gift in favour of S — Renewals of receipts by P on several occasions even after gift — Third receipt which was also renewed in joint names of P and S encashed and the amount invested in name of S alone — Death of P within two years of encashment — Other two receipts encashed by S — Whole amount under three receipts held liable to Estate Duty

SC 322 (C N 68)

—S. 10 — Scope — Absolute gift of a house — Donor under a separate contract retaining possession and enjoyment of the gifted houses on Rs. 15,000 as annual rent — On donor's death only the interest retained by him in the gifted house will pass and will be chargeable — S. 10 attracted

Mad 117 A (C N 33)

—S. 10 — Scope — Does not cover entire range of the subject-matter of gift — The expression 'to the extent' — Effect

Mad 117 B (C N 33)

Evidence Act (1 of 1872)

—S. 3 — Appreciation of evidence by appellate Court — Evidence of prosecution witness — Truth and falsehood not separable — Entire evidence has to be rejected — See Criminal P. C. (1898), S. 423

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—Ss. 3, 5 and 101 — Appreciation of evidence — Criminal trial — Material on record justifying finding in favour of ac-

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cused — Court, held, could act on it though accused had not taken it as a specific ground of defence — (Criminal P. C. (1898), Section 367) — (Prevention of Food Adulteration Act (1954), S. 16 (1) and (7) — 'Matar dal' — Analyst testing it only for 'pulse' — Court also treating it as foodgrain' — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held, immaterial Cal 120 C (C N 17)

—S. 3 — "Proved" — Assessment proceeding under Income-tax Act — Assessee's failure to establish that certain credits in name of others did not constitute concealed income — Penalty proceeding against assessee for concealment of income — Failure of assessee to establish his claim in assessment proceeding does not mean that department on which onus lies in penalty proceeding has established the concealment — See Income-tax Act (1922), S. 28 Orissa 38 (C N 17)

—S. 5 — Appreciation of evidence — Criminal trial — Material on record justifying finding in favour of accused — Court, held, could act on it though accused had not taken it as a specific ground of defence, 'Matar dal' — Analyst testing it only for 'pulse' — Court also treating it as 'foodgrain' — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held immaterial — See Evidence Act (1872), Section 3 Cal 120 C (C N 17)

—S. 5 — Appreciation of evidence — Interested witnesses — Testimony not final Punj 85 B (C N 14)

—S. 13 — Complaint under Ss. 426, 447 and 506, I. P. C.—Rent-note executed by tenant of complainant in respect of land in question and copy of judgment of Nyaya Panchayat in rent recovery case filed by complainant — Documents are not irrelevant, but are admissible to prove the offences Manipur 23 B (C N 7)

—Ss. 24 and 26 — Accused kept in remand for fifteen days — Then after being kept in jail custody for three days produced before executive Magistrate for recording confession — After preliminary questioning and a warning accused sent back to jail — Confession recorded on next day, held, was voluntary — Accused had spent four days in judicial custody and he was not under influence of investigating agency for at least four days — (Criminal P. C. (1898), S. 164) SC 283 A (C N 60)

—S. 24 — Applicability — Arrest and custody — Distinction—Person under surveillance making statement — Statement is not hit by Section 24, Evidence Act — See Criminal P. C. (1898), S. 46 Bom 79 B (C N 11)

—S. 26 — Accused kept in remand for fifteen days — Then, after keeping in jail custody for three days, produced before Magistrate for recording confession —

Evidence Act (contd.)

After preliminary questioning and a warning accused sent back to jail — Confession recorded on next day, held, was voluntary — Accused had spent four days in judicial custody and he was not under influence of investigating agency for at least four days — See Evidence Act (1872), Section 24 SC 283 A (C N 60)

—S. 32 — Dying declaration — Reliability — To pass the test of reliability dying declaration has to be subjected to very close scrutiny — Once the Court has come to conclusion that it was true, there is no question of further corroboration

Raj 60 A (C N 11)
—S. 35 — Death entry in chowkidar's hath chitha — Who made entry and whether it was made in discharge of official duty not proved — Hath chitha not admissible in evidence — See Penal Code (1860), S. 302 SC 326 (C N 69)

—S. 45 — Dog tracking evidence — Admissibility SC 283 B (C N 60)

—Ss. 101 to 104 — Business with regular accounts — Determination of net value of assets — Whether written down value is true value — Onus is on assessee to prove — See Wealth Tax Act (1957), S. 7 (2) (a) SC 352 A (C N 75)

—S. 101 — Appreciation of evidence — Criminal Trial — Material on record justifying finding in favour of accused—Court, held, could act on it though accused had not taken it as a specific ground of defence, 'Matar dal' — Analyst testing it only for 'pulse' — Court also treating it as 'foodgrain' — Absence of additional tests could result in acquittal—Fact that accused had not pleaded it in defence, held immaterial — See Evidence Act (1872), S. 3

Cal 120 C (C N 17)
—Ss. 101-104 — Goods accepted for carriage — Nature of duty of the Railways — Proof of care taken by it — Mere fact that rain water entered the wagon and caused damage, held would not fix liability on railways — See Railways Act (1890), S. 72 (old)

Madh Pra 55 A (C N 15)

—Ss. 101-104 — Penalty proceeding under Income-tax Act for concealment of income — Onus lies on the department to prove such concealment — See Income-tax Act (1922), S. 28 Orissa 38 (C N 17)
—Ss. 101-104 — Intention — Proof of — No presumption — Burden to prove intention — Extent of — See Penal Code (1860), S. 300 Raj 60 C (C N 11)

—S. 114 — Goods accepted for carriage — Nature of duty of the Railways — Proof of care taken by it — Mere fact that rain water entered the wagon and caused damage, held would not fix liability on railways — See Railways Act (1890), Section 72 (old)

Madh Pra 55 A (C N 15)
—S. 114 — Petition under Divorce Act (1869), S. 18 by husband on ground of

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wife's impotency — Wife deliberately refusing to give reason for not consummating marriage—Also refusing to submit to medical examination — Subsequent offer by her to consummate marriage found not genuine — Inference of impotency held could be drawn — See Divorce Act (1869), S. 18

Mad 103 (C N 26) (SB)
—S. 114 — Service by post — Presumption under Section 27, Mysore General Clauses Act (3 of 1899) — Presumption is rebuttable — Contrary that has to be proved for rebuttal has no reference to actual service — See Mysore General Clauses Act (3 of 1899), S. 27

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—S. 114 — Notice of termination of tenancy — Notice sent under Certificate of posting — Presumption arises that the notice has been duly delivered to addressee — (Transfer of Property Act (1882), Section 106) — (Mysore General Clauses Act (3 of 1899), Section 27)

Mys 77 C (C N 19)
—S. 114 — Intention — Proof of — No presumption — Burden to prove intention — Extent of — See Penal Code (1860), S. 300

Raj 60 C (C N 11)
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Madh Pra 63 B (C N 16)
—Ss. 145, 155 — Statement of a witness made in previous case — Use of it in subsequent case to contradict him or impeach his character — Before so using it, the party should be allowed to draw the witness's attention to his previous statements

Pat 95 A (C N 12)
—S. 155 — Witness's attention should be drawn to his previous statement before using it — See Evidence Act (1872), Section 145

Pat 95 A (C N 12)

Expenditure Tax Act (29 of 1957)

—S. 2 (g) (i) (as amended by Finance Act, 1959) — Word "dependent" in relation to assessee as individual — Means his or her spouse irrespective of fact of their dependency and persons wholly and mainly dependent on assessee for their support and maintenance — (Words of Phrases — 'Dependent')

Andh Pra 86 C (C N 11) (FB)
—S. 2 (g) (i) (as amended by Finance Act 1959) — Classification of dependant of assessee into his or her spouse and/or minor child and other persons wholly and mainly dependant upon him — Classification is reasonable and not arbitrary and does not violate Art. 14 — (Constitution of India, Art. 14)

Andh Pra 86 E (C N 11) (FB)
—S. 2 (g) (i) (as amended by Finance Act, 1959) — Provision under treating spouse as dependant and taxing expenditure incurred by her — Is not confiscatory

Andh Pra 86 G (C N 11) (FB)
—S. 4 (ii) (as amended by Finance Act, 1959) — Distinction between assessee as

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"individual" and as "Hindu undivided family" stated

Andh Pra 86 D (C N 11) (FB)
—S. 4 (ii) (as amended by Finance Act, 1959) — Different provisions regarding expenditure incurred by dependant of assessee as individual and dependant of Hindu undivided family — Does not offend Art. 14 — (Constitution of India, Art. 14) Andh Pra 86 F (C N 11) (FB)

—S. 16 — Notice for reopening assessment — When can be issued — Failure of assessee to disclose in returns his relationship with dependant and expenditure incurred by her — Notice issued by Expenditure Tax Officer is valid

Andh Pra 86 A (C N 11) (FB)

Fatal Accidents Act (13 of 1855)

—Ss. 1-A and 2 — Damages under — Assessment of — Principles stated — (Tort — Accidents — Damages)

SC 376 A (C N 81)
—S. 1-A — Ascertainment of damages — Second appeal — Appellate Court should be slow in disturbing findings reached by lower Courts, if they have taken all relevant facts into consideration — See Civil P. C. (1908), Ss. 100-101

SC 376 B (C N 81)
—S. 2 — Damages under — Assessment of — Principles stated — See Fatal Accidents Act (1855), S. 1-A

SC 376 A (C N 81)
—S. 2 — Ascertainment of damages — Second appeal — Appellate Court should be slow in disturbing findings reached by lower Courts if they have taken all relevant facts into consideration — See Civil P. C. (1908), Ss. 100-101

SC 376 B (C N 81)

General Clauses Act (10 of 1897)

—S. 13 (2) — See also Civil Services Punjab Police Rules (1934), Vol. II, Chapter XVI, R. 16.2 (1)

Punj 81 C (C N 13)
—S. 21 — See Municipalities — Gujarat Municipalities Act (34 of 1964), S. 99

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—S. 27 — See Mysore General Clauses Act (1899), S. 27

Geneva Conventions Act (6 of 1960)

—Preamble — Act does not give special remedy but gives indirect protection by providing for breaches of conventions

SC 329 B (C N 70)
—Sch. IV, Arts. 6 and 47 — "Occupation" — Meaning — In the case of annexation of Goa, the occupation was true annexation by subjugation and as such had ceased in the sense contemplated by Article 47 — Terms "Annexation", and "subjugation" — Meaning

SC 329 A (C N 70)
—Sch. IV, Art. 47 — "Occupation" — Meaning — In the case of annexation of Goa, the occupation was true annexation

Geneva Conventions Act (contd.)

by subjugation and as such had ceased in the sense contemplated by Art. 47 — Terms Annexation, subjugation — Meaning — See Geneva Conventions Act (1960), Sch. IV, Art. 6 SC 329 A (C N 70)

Gift Tax Act (18 of 1958)

—S. 4 — Transfer — Unequal partition between father and son — No transfer involved Mad 111 B (C N 31)
 —S. 5 (1) — Exemption under — Share in foreign firm owning immovable property — Not "immoveable property situated outside India" Mad 111 A (C N 31)
 —S. 18 (1) (as it stood before amendment)—Ten per cent credit given does not constitute gift tax — See Wealth Tax Act (1957), S. 50-A Orissa 37 (C N 16)

Government of India Act (1935) (26 Geo.

V-1 Edw, 8 (3))

—Sch. VII, List II, Entry 21 — See Constitution of India, Sch. VII, List II, Entry 18

Gujarat Municipalities Act (34 of 1964)

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Gur (Regulation of Use) Order (1968)

—See also (1) Constitution of India, Art. 19 (1) (g) Goa 35 D (C N 7)
 (2) Essential Commodities Act (1955), S. 3 (1) Goa 35 A (C N 7)

Hindu Adoptions and Maintenance Act (78 of 1956)

—S. 11 (vi) — Adoption — Effect — Ties of adopted child of his family of birth are severed and replaced by those of adoptive family — See Hindu Adoptions and Maintenance Act (1956), S. 12 SC 343 B (C N 73)

—Ss. 12, 11 (vi) and 14 (4) — Adoption — Effect — Ties of adopted child with his family of birth are severed and replaced by those of adoptive family — Hindu undivided family consisting of two brothers — On death of one brother his widow begetting illegitimate son from surviving brother — Adoption of male child by her, thereafter — Adopted son becomes coparcener — He is entitled to joint property in preference to illegitimate child. S. A. No. 275 of 1962, D/-7-9-1965 (MP), **Reversed** SC 343 B (C N 73)

—S. 14 (4) — Adoption — Effect — Ties of adopted child of his family of birth are severed and replaced by those of adoptive family — See Hindu Adoptions and Maintenance Act (1956), S. 12 SC 343 B (C N 73)

—S. 18 (2). (d) — Desertion — What constitutes — Refusal by wife to live with husband who has another wife living — She is not deserter. — See Hindu Marriage Act (1955), S. 9 Mys 59 A (C N 13)

Hindu Law

—Hindu undivided family — Temporary reduction of coparcenary unit to single individual — Character of joint family property does not change. S. A. No. 275

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of 1962, D/-7-9-1965 (MP), **Reversed** SC 343 A (C N 73)

—Joint Family — Unequal partition between father and son — No transfer of property involved — See Gift Tax Act (1958), S. 4 Mad 111 B (C N 31)

—Mitakshara School — Inheritance and succession — Vannia Tamil Christians of Chittur Taluk, Kerala — Law as to inheritance and succession — Community is governed by Mitakshara School of Hindu Law—Son's liability to discharge father's debt — Doctrine of pious obligation — Nature — Doctrine applies to Vannia Tamil Christians SC 223 (C N 48)

—Mitakshara School (Madras School) — Joint family property — Alienation of by coparcener — Alienation in consideration of promise to marry — Validity of — Promise to marry is valuable consideration — Alienation, not being gift, is valid to the extent of his share in the property — (Transfer of Property Act (1882), Section 122) — (Contract Act (1872), S. 2 (d)) Mad 113 (C N 32)

—Undivided family — Inheritance — Hindu undivided family consisting of two brothers — On death of one brother, surviving brother becomes sole coparcener — Adoption of male child by widow of deceased brother — Adopted son becomes coparcener — He is entitled to joint family property—Surviving brother cannot will away the property — See Hindu Adoptions and Maintenance Act (1956), S. 12 SC 343 B (C N 73)

Hindu Law of Inheritance (Amendment) Act (2 of 1929)

—Ex-State area of Gangpur (now forming part of Orissa State)—Not applicable before merger — See Administration of Orissa States Order (1948), Pr. 4 Orissa 43 (C N 19)

Hindu Marriage Act (25 of 1955)

—Ss. 9 and 10 and 13 (2) — Hindu Adoptions and Maintenance Act (1956), Section 18 (2) (d) — Desertion — What constitutes — Refusal by wife to live with husband who has another wife living — She is not deserter Mys 59 (C N 13)

—S. 10 — Desertion — What constitutes — Refusal by wife to live with husband who has another wife living — She is not deserter — See Hindu Marriage Act (1955), S. 9 Mys 59 A (C N 13)

—S. 13—Wife's petition for dissolution of marriage on ground of cruelty — Evidence — Cruelty coupled with adultery must be proved — Adultery, what is — Nature of proof of adultery required — See Divorce Act (1869), S. 10 Mad 104 (C N 27) (SB)

—S. 13 (2) — Desertion — What constitutes — Refusal by wife to live with husband who has another wife living — She is not deserter—See Hindu Marriage Act (1955), S. 9 Mys 59 A (C N 13)

Hindu Women's Rights to Property Act (18 of 1937)

—Ex-State area of Gangpur (now forming part of Orissa State) — Not applicable before merger — See Administration of Orissa States Order (1948), Pr. 4

Orissa 43 (C N 19)

HOUSES AND RENTS**—Kerala Buildings (Lease and Rent Control) Act (16 of 1959)**

—S. 11 (4) (i)—Petition for eviction of tenant on ground of subletting filed after coming into force of Act 2 of 1965 — Petition, held maintainable in view of proviso to Section 34 (1) of Act 2 of 1965 — See Houses and Rents — Kerala Buildings (Lease and Rent Control Act (2 of 1965), S. 34 (1) Proviso SC 337 A (C N 71)

—Kerala Buildings (Lease and Rent Control) Act (2 of 1965)

—S. 11 (4) (i) — Petition for eviction of tenant on ground of subletting filed after coming into force of Act 2 of 1965 — Petition, held maintainable in view of proviso to Section 34 (1) of Act 2 of 1965 — See Houses and Rents — Kerala Buildings (Lease and Rent Control) Act (2 of 1965), S. 34 (1) Proviso

SC 337 A (C N 71)

—S. 20 — Words of Section 20 are much wider than those in Section 115, Civil P. C. — Revision not limited to a mere question of jurisdiction — District Judge is empowered to consider whether on evidence the finding of Subordinate Judge was proper — (Civil P. C. (1908), S. 115)

SC 337 B (C N 71)

—Ss. 34 (1) Proviso and 11 (4) (i) — Kerala Buildings (Lease and Rent Control) Act (16 of 1959), Section 11 (4) (i) — Petition for eviction of tenant on ground of sub-letting filed after coming into force of Act 2 of 1965 — Petition, held maintainable in view of proviso to Section 34 (1) of Act of 1965 — Section 4 of Kerala Act 7 of 1125 held applicable — Words "corresponding provision" in proviso to Section 34 (1) meaning of — (Kerala Interpretation and General Clauses Act (7 of 1125), S. 4) — Reasoning in O. P. No. 2653 of 1967, D/- 4-10-1967 (Ker.) as reported in 1968 Ker LT (SN) P. 4, Overruled

SC 337 A (C N 71)

Howrah Municipal Act (17 of 1965)

See under Municipalities.

Income-tax Act (11 of 1922)

—S. 2 (6-A) Proviso to Explanation (as it stood before amendment by Finance Act 3 of 1956) and Section 12 — "Dividend" — Meaning of — Proportionate share of capital gains arising to Company on or after 1-4-1948 — Its distribution to share-holders — Not liable to tax as dividend

SC 388 A (C N 84)

Income-tax Act (1922) (contd.)

—S. 2 (14-A) (incorporated by Adaptation of Laws Order, 1950) — State of Benaras after merger on 1-12-1949 forming part of "taxable territories" as defined under section — See Income-tax Act (1922), S. 14 (2) (c)

SC 281 (C N 59)

—S. 10 (2) (xv) — Capital expenditure or Revenue expenditure — Money paid in consideration or acquisition of a source of profit of income is capital expenditure — Such amount held, could not be apportioned between capital and income, ILR (1964) Andh Pra 616, Reversed

SC 300 B (C N 63)

—S. 12 — Proportionate share of capital gains arising to Company on or after 1-4-1948 — Its distribution to share-holders — Not liable to tax as dividend — See Income-tax Act (1922), S. 2 (6-A) and Proviso to Explanation

SC 388 A (C N 84)

—Ss. 14 (2) (c), 16 (2) and 2 (14A) (incorporated by Adaptation of Laws Order, 1950 with effect from 1-4-1950) — Dividend declared on 25-7-1949 — Assessee Bank having its registered office in State of Benaras encashing dividend warrants on 31-12-'49 — Merger of State of Benaras with Dominion of India on 1-12-1949 — Effect — Dividend held was received by Bank in taxable territories on 31-12-1949 and was not exempt from liability to payment of tax even if right thereto had accrued to Bank in an Indian State

SC 281 (C N 59)

—S. 16(2) — Expression "paid" does not contemplate actual receipt of dividend by member in general — Dividend may be said to be paid when Company discharges its liability and makes amount of dividend unconditionally available to member entitled thereto — See Income-tax Act (1922), S. 14(2)(c)

SC 281 (C N 59)

—S. 16(3)(b) — Applies to transfers by way of trust — it cannot be contended that a trustee receives income on behalf of the beneficiary and not on his own account. Hence Section 16 (3) (b) does apply to cases of transfers by way of trust

Cal 124 A (C N 18)

—S. 16(3)(b) — Income arising to wife or child indirectly by transfer effected by husband — Clause (b) does not apply — Income-tax Act (1961), Section 64

Cal 124 B (C N 18)

—S. 28 — Imposition of penalty for concealment of income — No evidence recorded in penalty proceedings — Order based on decision in assessment proceedings — Penalty is not validly imposed. (1961) 42 ITR 129 (Pat) and (1963) 48 ITR 324 (All) Dissented from— (Evidence Act (1872), Ss. 3 and 101-104)

Orissa 38 (C N 17)

—S. 34 — Word "information" in Section 34(1)(b) would cover information as

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to relevant judicial decisions — Once valid proceedings are started under Section 34(1)(b) the whole assessment proceedings start afresh and the Income Tax Officer can levy tax on entire income escaped assessment during relevant year
SC 300 A (C N 63)

—S. 66 — Plea that certain share of dividend taxable as income other than dividend — Plea not raised before High Court or Tribunal — Not entertained in Supreme Court — See Constitution of India, Art. 136
SC 388 B (C N 84)

—S. 66(1) — Appellate Tribunal not accepting certain findings of Income-tax Officer and Appellate Authority though coming to the same conclusions in favour of the department — Question referred to High Court, framed in light of final conclusions of Tribunal, couched in general terms and not limited to or circumscribed by reasons given by Tribunal against the assessee — The findings of facts of Tribunal in favour of assessee can be reversed by High Court even though not challenged by department by following proceedings for reference of a question challenging those findings
SC 394 (C N 86)

Income-tax Act (43 of 1961)

—S. 2 (44) (ii) (as substituted by Section 4 of Finance Act, 1963) — Notification under — State Government authorising Tahsildar with powers of Tax Recovery Officer — Authorisation cannot be made retrospectively — Retrospective legislation by delegated authority — Principle — Legal fiction created by Section 4 of Finance Act (1963) — Construction of
SC 385 (C N 83)

—S. 64 — Income arising to wife or child indirectly by transfer effected by husband clause (b) does not apply — See Income-tax Act (1922), S. 16 (3) (b)
Cal 124 B (C N 18)

—S. 132 (as amended in 1965) — R. 112 framed under Sec. 295 (1) — Exercise of power under Section 132 — Should be bona fide: AIR 1965 All 487, Reversed — (Criminal P. C. (1898), Ss. 103, 165) — Constitution of India, Art. 31
SC 292 A (C N 62)

—S. 132 — See Constitution of India, Art. 226
SC 292 B (C N 62)

—S. 295(1) — Rules under — Rule 112 — Search and seizure under S. 132 of the Act — Powers of I. T. Officer — See Income-tax Act (1961), S. 132
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Indian Forest Service (Cadre) Rules (1966)

See under Civil Services

Indian Forest Service (Fixation of Cadre Strength) Regulations (1966)

See under Civil Services

Industrial Disputes Act (14 of 1947)

—S. 2-A (as amended by Act 35 of 1965) — Relevant provisions in the Act referring to "workmen" would have to be construed as including "workman" so that S. 2-A is harmonised with rest of provisions of the Act — Section 2-A cannot be said to be repealed by any older provision in the Act — It is also not ultra vires the Parliament — Parliament had power to enact it either under Entry 22 of Concurrent List or under Entry 97 of Union List read with Art. 248 of Constitution
Delhi 60 C (C N 12)

—S. 2(k) — Demand by workmen must be raised first on Management and rejected by them before industrial dispute can be said to arise and exist — Making of such demand to Conciliation Officer and its communication by him to Management who reject the same is not sufficient to constitute industrial dispute — See Industrial Disputes Act (1947), S. 10
Delhi 60 B (C N 12)

—S. 2 (k) — Word "non-employment" — It would include retrenchment as well as refusal to reinstate
Delhi 60 E (C N 12)

—S. 7 — Notification appointing person as Presiding Officer of Labour Court during leave of its Presiding Officer — Held since notification did not constitute new Labour Court appointment could not be considered as one under S. 7 — See Industrial Disputes Act (1947), S. 8
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—R. 342(2) — Right to claim compensation under S. 110-A taken away —

Mysore Motor Vehicles Rules (contd.)
Rule is invalid as being beyond rule-making power of State — See Motor Vehicles Act (1939), S. 111-A

Mys 67 C (C N 15)

Mysore Municipalities Act (22 of 1964)
See under Municipalities.

Mysore Sales Tax Act (25 of 1957)
See under Sales Tax.

Mysore Village Panchayats and Local Boards Act (10 of 1959)
See under Panchayats.

Orissa Gram Panchayat Act (1 of 1965)
See under Panchayats.

Orissa Land Reforms Act (16 of 1960)
See under Tenancy Laws.

Orissa Money Lenders Act (3 of 1939)
See under Debt Laws.

Orissa Sales Tax Act (14 of 1947)
See under Sales Tax.

PANCHAYATS

—**Bombay Village Panchayats Act (3 of 1959)**

—Ss. 13 and 13-A — There is no prohibition for a person whose name has been recorded in the voters' list of more than one ward from voting in more than one ward — Where such a person votes in both the wards, the votes cannot be excluded unless such person is disqualified under S. 13(1) — Provisions of Representation of the People Act cannot be read into the Bombay Village Panchayats Act Bom 96 (C N 14)

—S. 13-A — There is no prohibition for a person whose name has been recorded in the voters' list of more than one ward from voting in more than one ward — Where such a person votes in both the wards, the votes cannot be excluded unless such person is disqualified under S. 13(1) — Provisions of Representation of the People Act cannot be read into the Bombay Village Panchayats Act — See Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 13 Bom 96 (C N 14)

—**Bombay Village Panchayats Election Rules (1959)**

—Practice of modifying election rules from time to time deprecated. — Observed further that it was desirable that a provision similar to the one in the Representation of the People Act, 1950 and in the Zilla Parishad Act which prevents election being set aside on technical grounds should be added even to the Village Panchayats Act and the Municipal Act where it does not exist Bom 93 C (C N 13)

—Rr. 3(5) and 7(1) — Non-observance of R. 3(5) — Election is not vitiated Bom 104 B (C N 16)

Panchayats — Bombay Village Panchayats Election Rules (contd.)

—R. 7(1) — See Panchayats — Bombay Village Panchayats Election Rules, 1959, R. 3(5) Bom 104 B (C N 16)

—R. 7 (1) — Fixation of date for filing of nomination paper by candidates and date of scrutiny — Date for scrutiny must be the date immediately following the date for nomination of candidates — Next date of filing nominations a public holiday — Mamlatdar is not justified in postponing the scrutiny by one day — No prejudice caused by such postponement — Election held was not vitiated Bom 104 C (C N 16)

—R. 13 — Rule 13 is ambiguous and unworkable — Fixation of specific date by Tahsildar for withdrawal of nomination — Names of candidates withdrawing by specified date not shown by Returning Officer as candidates to election — Election held not invalid Bom 93 A (C N 13)

—R. 29 — There is no prohibition for a person whose name has been recorded in the voters' list of more than one ward from voting in more than one ward — Where such a person votes in both the wards, the votes cannot be excluded unless such person is disqualified under S. 13(1) — Provisions of Representation of the People Act cannot be read into the Bombay Village Panchayats Act — See Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 13 Bom 96 (C N 14)

—**Mysore Village Panchayats and Local Boards Act (10 of 1959)**

—S. 13 — Application under Sec. 13 is not appeal against or petition to revise declared result of election — Such declaration is not order or judgment for purpose of Sec. 12(2) Limitation Act — Time-barred election petition under S. 13 must be dismissed under S. 3 Limitation Act even if plea of limitation is not raised in defence — Such time-barred petition allowed ex parte on narrow difference showed after recount — Writ petition against that decision filed more than two months later — In dealing with elections, statutory provisions must be strictly interpreted and applied. — High Court must necessarily interfere in such a case — (Limitation Act (1963), Ss. 3 and 12(2)) — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Strict construction) — (Constitution of India, Art. 226 — Grounds of Certiorari) Mys 73 (C N 17)

—**Orissa Gram Panchayats Act, 1964 (1 of 1965)**

—Ss. 35, 37 — Civil P. C. (1908), O. 18, R. 17 — O. 18, R. 17 applies to trial of election cases — Procedure applicable,

Panchayats — Orissa Gram Panchayats Act (contd.)

under Civil P. C., to trial of suit applies to trial of election petitions by virtue of S. 35 (1) of Panchayat Act — Sub-ss. (2) to (9) of Section 35 do not exclude applicability of O. 18, R. 17 — O. 18, R. 17 is a procedure applicable to trial of suits — Examining witnesses on oath comes under O. 18, R. 17 and also within purview of S. 37 (d) Orissa 46 B (C N 20)

—S. 37 — Procedure applicable, under Civil P. C., to trial of suit applies to trial of election petitions by virtue of S. 35(1) of Panchayat Act — Examining witnesses on oath comes under O. 18, R. 17 and also within purview of S. 37(d) — See Panchayats — Orissa Gram Panchayat Act (1 of 1965), S. 35 Orissa 46 B (C N 20)

—S. 38 — Election petition — Interlocutory Order — S. 38 provides appeal only against final orders passed under sub-sections (1) and (2) — No appeal lies against interlocutory order — See Constitution of India, Art. 226

Orissa 46 A (C N 20)

Partition Act (4 of 1893)

—Ss. 2, 3 — Application under Section 3(1) filed on basis of request made under Section 2 — Subsequent withdrawal of request would be inconsequential to continued maintainability of application under Section 3 (1)

Mad 106 (C N 28)

—S. 3 — Application under S. 3 (1) filed on basis of request made under Section 2 — Subsequent withdrawal of request would be inconsequential to continued maintainability of application under S. 3(1) — See Partition Act (1893), S. 2

Mad 106 (C N 28)

Patna University Act (25 of 1951)

See under Education.

Patna University Act 1961 (3 of 1962)

See under Education.

Penal Code (45 of 1860)

—S. 34 — Free fight between two groups of persons — Injuries sustained by persons of both groups in course of such fight — Death of two — Only persons found to have inflicted injuries can be convicted for the injuries caused by them — See Penal Code (1860), S. 149

SC 219 B (C N 47)

—Ss. 34 and 304, Part I — Bona fide assertion of right of way through uncultivated portion of private land by villagers — Does not amount to common intention to commit a criminal act — Conviction under S. 304, Part I/34, held, illegal — Decision of Guj. High Court Reversed

SC 219 C (C N 47)

—Ss. 97, 99 — Right of private defence — Persons constructing permanent water

Penal Code (contd.)

course on land of another without his consent — They commit criminal trespass and mischief — Occupier of land has right of private defence of property — He need not resort to public authorities

Punj 85 A (C N 14)

—S. 99 — Right of private defence — Persons constructing permanent water course on land of another without his consent — They commit criminal trespass and mischief — Occupier of land has right of private defence of property — He need not resort to public authorities — See Penal Code (1860), S. 97

Punj 85 A (C N 14)

—S. 103 — Complainant's party armed with deadly weapons entering upon land occupied by accused and constructing permanent water course on it without any right — Party of accused resisting them — Fight between the parties resulting in death of two persons on complainant's side and injuries to persons on both sides — Held that accused had right of private defence of property and had not exceeded it — Being protected by the right there was no offence committed by them

Punj 85 C (C N 14)

—S. 109 — Conspiracy and abetment — Offences are distinct — See Penal Code (1860), S. 120-B

Cal 110 C (C N 15)

—Ss. 120-B and 109 — Conspiracy and abetment — Offences are distinct

Cal 110 C (C N 15)

—Ss. 149 and 34 and 323 and 304 — Free fight between two groups of persons — Injuries sustained by persons of both groups in course of such fight — Death of two persons — Only persons found to have inflicted injuries can be convicted for the injuries caused by them

SC 219 B (C N 47)

—S. 161 — Secretary of Gram Panchayat who was also Talati charged for offence of taking bribe — Plea of accused that he took money for purchasing small saving certificate for complainant and not for substitution of his name in revenue records — Conviction under S. 5(1) (d) of Prevention of Corruption Act and S. 161 Penal Code held proper in view of circumstances found against him — See Prevention of Corruption Act (1947), S. 5(1) (d)

SC 356 (C N 76)

—Ss. 299, 300 and 304 Part 2 — Intention — Absence of — Defence of accident under intoxication of liquor — Plea not raised specifically — Court can still take into consideration circumstances of case

Raj 60 D (C N 11)

—S. 300 — Intention and knowledge — Difference between — Knowledge is awareness of consequences — Intention requires something more than mere

Penal Code (contd.)

awareness of consequences

Raj 60 B (C N 11)

—S. 300 — Intention — Proof of — No presumption — Burden to prove intention — Extent of, stated — (Evidence Act (1872), Ss. 101-104 and 114)

Raj 60 C (C N 11)

—S. 300 — Intention — Absence of — Defence of accident under intoxication of liquor — Plea not raised specifically — Court can take into consideration circumstances of case — See Penal Code (1860), S. 299

Raj 60 D (C N 11)

—Ss. 302, 304 — Accused charged under Section 302 for having shot down deceased with gun — Sessions Judge rejecting prosecution story on basis of entries in chawkidar's hath chitha which showed that deceased was dead prior to date of occurrence — Who made entry and whether it was made in discharge of official duty not proved — Hath Chitha is not admissible — Conviction by High Court on basis of other evidence and F. I. R., held, justified — Evidence Act (1872), Section 35

SC 326 (C N 69)

—S. 304 — Free fight between two groups of persons — Injuries sustained by persons of both group in course of such fight — Death of two persons — Only persons found to have inflicted injuries can be convicted for the offences individually committed by them — See Penal Code (1860), S. 149

SC 219 B (C N 47)

—S. 304 — Accused charged under S. 302 for having shot down deceased with gun — Sessions Judge rejecting prosecution story on basis of entries in Chawkidar's hath chitha which showed that deceased was dead prior to date of occurrence — Who made entry and whether it was made in discharge of official duty not proved — Hath Chitha is not admissible — Conviction by High Court on basis of other evidence and F. I. R., held, justified — See Penal Code (1860), S. 302

SC 326 (C N 69)

—S. 304 Part I — Bona fide assertion of right of way through uncultivated portion of private land — Common intention to commit criminal act within S. 34 if can be inferred — Conviction under S. 304 Part I/34, held, illegal — See Penal Code (1860), S. 34

SC 219 C (C N 47)

—S. 304 Part 2 — Intention — Absence of — Defence of accident under intoxication of liquor — Plea not raised specifically — Court can take into consideration circumstances of case — See Penal Code (1860), S. 299

Raj 60 D (C N 11)

—S. 323 — Free fight between two groups of persons — Injuries sustained by persons of both group in course of such fight — Death of two — Only persons found to have inflicted injuries can

Penal Code (contd.)

be convicted for the injuries caused by them — See Penal Code (1860), S. 149

SC 219 B (C N 47)

—S. 406 — Scope — Offence under S. 406 I.P.C. — Where neither entrustment nor conversion has taken place within the territorial jurisdiction of the court where complaint is lodged, the court has no jurisdiction to proceed with complaint — See Criminal P. C. (1898), Ch. XV

Cal 110 (C N 15)

—S. 426 — Scope — Tenant surrendering land — Landlord entering into possession — Such possession can be availed of for purposes of Ss. 426 or 447 I.P.C. — See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), S. 119

Manipur 23 C (C N 7)

—Ss. 441, 447 — Intent to annoy etc., must be the aim of entry — Natural consequence of entry and knowledge of such consequence not sufficient — Dominant intention to assert possession — Assertion resulting in annoyance to complainant — Entry could not be said to be criminal trespass

Orissa 47 (C N 21)

—S. 447 — Scope — Tenant surrendering land — Landlord entering into possession — Such possession can be availed of for purposes of Ss. 426 or 447 I.P.C. — See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), S. 119

Manipur 23 C (C N 7)

—S. 447 — Intent to annoy etc., must be the aim of entry — Natural consequence of entry and knowledge of such consequence not sufficient — Dominant intention to assert possession — Assertion resulting in annoyance to complainant — Entry could not be said to be criminal trespass — See Penal Code (1860), S. 441

Orissa 47 (C N 21)

—S. 506 — Charge under — Intention which weighs with accused in entering upon land in possession of another has no relevancy to charge under S. 506 — Complaint under S. 506 cannot be thrown out on ground that dominant intention of accused in entering upon land was in his capacity as its owner

Manipur 23 D (C N 7)

Prevention of Corruption Act (2 of 1947)

—S. 5 (1) (d) — Penal Code (1860), S. 161 — Secretary of Gram Panchayat who was also Talati charged for offence of taking bribe — Plea of accused that he took money for purchasing small saving certificates for complainant and not for substituting his name in revenue records — Conviction under Section 5 (1) (d) and Section 161 held proper in view of circumstances found against him

SC 356 (C N 76)

—S. 5 (2) — Prosecution for conspiracy to commit offence under S. 5 (2) Prevention of Corruption Act and also for offence under that section — Sanction not

Prevention of Corruption Act (contd.)

obtained in respect of conspiracy — Prosecution must fail in respect of both offences — See Criminal P. C. (1898), S. 196-A (2) Assam 43 C (C N 9)

Prevention of Food Adulteration Act (37 of 1954)

—Ss. 2, 13 and 23 — 'Matar Dal' — Analyst treating it as a pulse and reporting the sample to be adulterated — Court taking it also to be 'food grain' — Accused acquitted for non-performance of additional tests under A. 18.06(i) and (ii) — Decision, held, could not be assailed — Absence of evidence about it being 'food grain', held, immaterial

Cal 120 B (C N 17)

—S. 13 — Report of public analyst — Need not contain mode or particulars of analysis nor the test applied — But should contain result of analysis namely, data from which it can be inferred whether the article of food was or was not adulterated — Relevant data given in report — Accused can be convicted on basis of such report

SC 318 B (C N 67)

—S. 13 — Criminal P. C. (1898), Sections 510 (2), 257 — Report of public analyst — Accused has right to call Public Analyst to be examined and cross-examined — The fact that certificate of Director of Central Laboratory supersedes report of Public Analyst and is conclusive and final does not limit this right of accused

SC 366 (C N 79)

—S. 13 — 'Matar dal' — Analyst treating it as a pulse and reporting the sample to be adulterated — Court taking it also to be 'food grain' — Accused acquitted for non-performance of additional tests under A. 18.06 (i) and (ii) — Decision, held, could not be assailed — Absence of evidence about it being 'food grain', held immaterial — See Prevention of Food Adulteration Act (1954), S. 2

Cal 120 B (C N 17)

—S. 16 (1) and (7) — Appreciation of evidence — Criminal Trial — Material on record justifying finding in favour of accused — Court, held, could act on it though accused had not taken it as a specific ground of defence — 'Matar dal' — Analyst testing it only for 'pulse' — Court also treating it as 'food grain' — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held immaterial. — See Evidence Act (1872), S. 3

Cal 120 C (C N 17)

—S. 20 — Complaint for offence under the Act purported to have been filed by Municipal Board but signed by its Food Inspector — Acquittal — Municipal Board held competent to file appeal against acquittal — Municipal Board was competent to file complaint or to authorise its Food

Prevention of Food Adulteration Act (contd.)

Inspector on its behalf — See Criminal P. C. (1898), S. 417 (3)

SC 318 A (C N 67)

—S. 20 — Permission under — No question of applying one's mind to the facts of case before institution of complaint arises — Authority under section can be conferred long before a particular offence takes place

SC 318 D (C N 67)

—S. 20 (1) — Complaint was held to be neither by the Corporation nor person authorised by 'local authority' — (Municipalities — Calcutta Municipal Act (33 of 1951), Sections 585 and 30 — Complaint to Magistrate about an offence — Complaint to be signed by the Commissioner — Rubber stamp impression of signature not enough — (Criminal P. C. (1898), Ss. 190 (1) (a) and 200 (a) — Complaint not properly authorised — Magistrate cannot take cognizance of).

Cal 120 A (C N 17)

—S. 23 — 'Matar dal' — Analyst treating it as a pulse and reporting the sample to be adulterated — Court taking it also to be 'food grain' — Accused acquitted for non-performance of additional tests under A. 18.06(i) and (ii) — Decision, held, could not be assailed — Absence of evidence about it being 'food grain', held immaterial — See Prevention of Food Adulteration Act (1954), S. 2

Cal 120 B (C N 17)

Preventive Detention Act (4 of 1950)

See under Public Safety.

PUBLIC SAFETY

—Preventive Detention Act (4 of 1950)

—S. 3 — Grounds for detention must have relevance to maintenance of public order — Grounds held had such relevance — Fact that alleged acts were also an offence under Penal Code is irrelevant — See Public Safety — Preventive Detention Act (1950), S. 7

SC 269 B (C N 56)

—S. 3 (2) (b) — Expression "specially empowered" under — Meaning of — State Government can specially empower not only particular individual Additional District Magistrate but also entire class of such Magistrates, under the section — Criminal P. C. (1898), S. 39 — Madras General Clauses Act (1 of 1891), S. 15. AIR 1951 Mad 1159 & AIR 1956 Sau 73, Dissented from

Ker 50 (C N 11)

—Ss. 7, 10, 11 — Advisory Board already dealing with matter — Governor confirming detention — Representation subsequently by detenu and prayer to produce him before Board — Prayers held could not be acceded to — Government however, asked to deal with representations

SC 269 A (C N 56)

—Ss. 7 and 3 — Grounds for detention must have relevance to maintenance of

Public Safety—Preventive Detention Act (contd.)

public order — Grounds held had such relevance — Fact that acts alleged were also an offence under Penal Code is irrelevant

SC 269 B (C N 56)

—S. 10 — Advisory Board already dealing with matter — Governor confirming detention — Representation subsequently by detenu and prayer to produce him before Board — Prayers held could not be acceded to—Government however, asked to deal with representations—See Public Safety — Preventive Detention Act (1950), Section 7

SC 269 A (C N 56)

—S. 11 — Advisory Board already dealing with matter — Governor confirming detention — Representation subsequently by detenu and prayer to produce him before Board — Prayers held could not be acceded to—Government however, asked to deal with representations — See Public Safety — Preventive Detention Act (1950), Section 7

SC 269 A (C N 56)

Punjab Civil Medical Services Class I (Recruitment and Conditions of Service) Rules (1940)

See under Civil Services.

Punjab Civil Services (Punishment and Appeal) Rules (1952)

See under Civil Services.

Punjab General Sales Tax Act (46 of 1948)

See under Sales Tax.

Punjab Land Revenue Act (17 of 1887)

—S. 117 — Even if a party suffers a decision by the Consolidation Officers about the non-existence of any question of title to the property sought to be partitioned during consolidation proceedings and a partition is completed on that basis, the party can still go before a Civil Court and obtain a decision on the question of title as claimed by him. He would be doing so under Section 117 of Punjab Land Revenue Act, which is an exception kept alive by Section 16-A, of East Punjab Act 50 of 1948, and the operation of sub-section (2) of S. 16-A of East Punjab Act 50 of 1948 will be subject to the decision of the Civil Court — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A (1)

Punj 93 B (C N 15) (FB)

—S. 117—Question of title to property sought to be partitioned in consolidation proceedings — Controversy over existence of, not allowed to be raised in writ proceedings — It is a matter to be agitated according to Section 117 of Land Revenue Act — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A

Punj 93 C (C N 15) (FB)

—S. 117 (1) — Consolidation proceedings — Question of title arising in — Question cannot be decided by officer under the Act

Punjab Land Revenue Act (contd.)

— Parties to be referred to a Civil Court under S. 117 (1) of Land Revenue Act — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A

Punj 93 A (C N 15) (FB)

Punjab Municipal Act (3 of 1911)

See under Municipalities.

Punjab Police Rules (1934)

See under Civil Services.

Punjab Pre-emption Act (1 of 1913)

—S. 15 (2) (b), (as amended by Act 13 of 1964) — First Paragraph — Sale of property, received by widow from her husband — Her step-daughter can exercise right of pre-emption — Amendment Act 13 of 1964 should be given retrospective effect

SC 349 A (C N 74)

—S. 31 (as inserted by Amending Act 10 of 1960) — Scope — Appellate Court — Power of — Can give retrospective effect to substantive provisions of Amending Act 10 of 1960 only

SC 349 B (C N 74)

Punjab Services (Appointment by Promotion) Rules (1962)

See under Civil Services.

Railway Establishment Code

See under Civil Services.

Railways Act (9 of 1890)

—Ss. 55 and 56 — Railway's right to sell goods consigned — Prior demand for payment of a fixed sum necessary

Madh Pra 55 F (C N 15)

—S. 56 — Damages — Railway cannot insist on party's accepting its assessment of damages — Non-delivery for non-acceptance of Railway's terms, held amounted to misconduct — Goods not unclaimed property — See Railways Act (1890), Section 72

Madh Pra 55 E (C N 15)

—S. 56 — Railways right to sell goods consigned — Prior demand for payment of a fixed sum necessary — See Railways Act (1890), S. 55

Madh Pra 55 F (C N 15)

—S. 72 (old) — Goods accepted for carriage — Nature of duty of the Railways — Proof of care taken by it — Mere fact that rain water entered the wagon and caused damage, held, would not fix liability on Railways — (Contract Act (1872), Ss. 151, 152 and 161) — (Evidence Act (1872), Ss. 114, 101-104)

Madh Pra 55 A (C N 15)

—S. 72 (old) — Negligence — Wagon certified as 'watertight' by visual test — Wagon found leaking after a long journey — 'Shower room' test not performed — Absence of 'shower room' test, held, did not prove negligence — 'Visual test' was also a proper one — Word 'water-tight', a mere descriptive term — It did not mean that wagon was actually water tight — (Words and Phrases — 'Water tight')

Madh Pra 55 B (C N 15)

Railways Act (contd.)

—S. 72 — Care to be taken by Railways — Goods sent by sealed wagon — Railway not bound to inspect during transit

Madh Pra 55 C (C N 15)

—S. 72 (old) and Rr. 31 (2) and 47 of the General Rules for Acceptance, Carriage and Delivery of Goods Rules — Damages — Railway not bound to give open delivery — Remedy of consignee stated

Madh Pra 55 D (C N 15)

—Ss. 72 and 56 — Damages — Railway cannot insist on party's accepting its assessment of damage — Non-delivery for non-acceptance of Railway's terms, held, amounted to misconduct — Goods, not unclaimed property

Madh Pra 55 E (C N 15)

—Rules under R. 47 — The general rules for acceptance, Carriage and Delivery of Goods Rules — Damages — Railway not bound to give open delivery — Remedy of consignee stated—See Railways Act (1890), S. 72 (old)

Madh Pra 55 D (C N 15)

—Rules under R. 31 (2) — The general rules for acceptance, Carriage and Delivery of Goods Rules — Damages — Railway not bound to give open delivery — Remedy of consignee stated — See Railways Act (1890), S. 72 (old)

Madh Pra 55 D (C N 15)

Registration Act (16 of 1908)

—Pre. and S. 2 — Stamp Act and Registration Act though not strictly in pari materia may be read together — Definitions in Stamp Act apply to Registration Act—There being no definition of 'Release' under Registration Act, definition in Article 55 of Stamp Act is useful

Bom 109 E (C N 17)

—Ss. 1 and 17 — Scope and applicability — Act does not apply to immoveable property situate outside India

Mad 119 C (C N 34)

—S. 2 — See Registration Act (1908), Pre.

Bom 109 E (C N 17)

—S. 17 — Scope and applicability — Act does not apply to immoveable property situate outside India — See Registration Act (1908), S. 1

Mad 119 C (C N 34)

—S. 17 (1) (b) — Scope — Document not creating or declaring any interest in immoveable property but merely reciting the pre-existing rights of parties in immoveable properties — Document does not require registration

Mad 119 B (C N 34)

—S. 77 — See Court-fees and Suits Valuations — Suits Valuation Act (1887), S. 8

Bom 109 A (C N 17)

—S. 77 — See Bombay City Civil Court Act (40 of 1948), S. 3 (c)

Bom 109 B (C N 17)

—S. 78 — Registration fees — Art. 1 (3) of Table of Fees of Maharashtra Government — Deed of release — Absence of definition in Act — Words used must be given meaning they bear in law of con-

Registration Act (contd.)

veyancing — Deed — Construction — On construction document held to be a deed of release and not a receipt — Registration fee payable as such under Art. 1 (3) — (T. P. Act (1882), S. 8—Interpretation of deeds)

Bom 109 C (C N 17)

Representation of the People Act (43 of 1950)

—S. 23 (1), (2) and (3) (as amended by Act 47 of 1966) — Scope — Power to correct entries in electoral roll or to include new names — Cannot be exercised after last date for making nomination and before completion of election

SC 314 A (C N 66)

—Ss. 23 (2) and (3) (as amended by Act 47 of 1966) and 27 (2) — There is no conflict between Sections 23 (2) and 27 (2) — Inclusion of names of electors after last date for making nomination — Objection to—Entertainability: SC 314 B (C N 66)

—S. 23 (3) (as amended by Act 47 of 1966) — Electoral Roll referred to in Section 62 (1) is that which is in force on last day for making nomination — See Representation of the People Act (1951), Section 62 (1)

SC 314 C (C N 66)

—S. 23 (3) — Inclusion of names of electors in electoral roll in contravention of Section 23 (3) — Is sufficient ground for invalidating election under S. 100 (1) (d) of Act of 1951 — See Representation of the People Act (1951), S. 100 (1) (d)

SC 314 D (C N 66)

—S. 23 (3) — Inclusion of any name in electoral roll after prescribed date is prohibited whether application for inclusion was made before or after that date

SC 340 A (C N 72)

—S. 23 (3) — Person's name included in electoral roll as on last date of making nomination paper — He is entitled to vote unless prohibited by any provision — See Representation of the People Act (1951), S. 62

SC 340 B (C N 72)

—S. 27 (2) — There is no conflict between Sections 23 (2) and 27 (2) — Inclusion of names of electors after last date for making nomination — Objection to — Entertainability — See Representation of the People Act (1950), S. 23 (2) & (3)

SC 314 B (C N 66)

—S. 30 — Finality of electoral roll cannot be challenged in a proceeding challenging validity of election — Right to vote being purely a statutory right, validity of any vote is to be examined on basis of provisions of the Act — Entries in electoral roll are final and are not open to challenge either before Civil Court or before a tribunal considering validity of any election

SC 340 C (C N 72)

Representation of the People Act (43 of 1951)

—S. 62 — Representation of the People Act (1950), S. 23 (3) — Person's name in-

Representation of the People Act (contd.)
 cluded in electoral roll as on last date of making nomination paper — He is entitled to vote unless prohibited by any provision

SC 340 B (C N 72)

—S. 62 (1) — Representation of the People Act (1950), S. 23 (3) (as amended by Act 47 of 1966) — Electoral roll referred to in Section 62 (1) is that which is in force on last day for making nomination

SC 314 C (C N 66)

—S. 62 (3) — There is no prohibition for a person whose name has been recorded in the voters' list of more than one ward from voting in more than one ward — Where such a person votes in both the wards, the votes cannot be excluded unless such person is disqualified under Section 13 (1) — Provisions of Representation of the People Act cannot be read into the Bombay Village Panchayats Act — See Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 13 Bom 96 (C N 14)

—S. 92 — Inspection of ballot boxes — Requirements to be satisfied before Tribunal can permit inspection — Scrutiny of ballot papers sought on basis of assertions neither accompanied by statement of material facts nor supported by any evidence — Scrutiny should not be ordered — Conduct of Election Rules (1961), R. 93 — Civil Misc. Appln. Nos. 41 (E) and 42 (E) of 1968 in Election Petition No. 7 of 1967, D/- 21-5-1968 (All — Lucknow Bench), **Reversed**

SC 276 (C N 58)

—S. 100 (1) (d) — Grounds for declaring election void — Inclusion of names of electors in electoral roll in contravention of Sec. 23 (3) of Representation of the People Act (1950) (as amended by Act 47 of 1966) — Reception of such votes materially affecting election of returned candidate — **Held**, it was sufficient ground for invalidating election under S. 100 (1) — (Representation of the People Act (1950), Section 23 (3) (as amended by Act 47 of 1966))

SC 314 D (C N 66)

—S. 123 — See Municipalities — U. P. Town Areas Act (1914), S. 39

All 146 B (C N 17) (FB)

—S. 123 (1) (A) — Long standing agitation by agriculturists and class 3 and class 4 employees for better conditions — Strike by employees threatened — Chief Minister belonging to Congress Party announcing at election meeting of party nominee steps taken in the very recent past by Government to ameliorate the conditions of agriculturists and Class 3 and 4 employees by granting certain exemptions in the former case and by increasing dearness allowance in the latter case — **Held** that Chief Minister or the State Government was not an agent of the returned Congress candidate and that the candidate did not commit corrupt practice

SC 211 A (C N 45)

Representation of the People Act (contd.)

—S. 123 (4) — Candidate or his agent distributing dummy ballot papers with candidate's name and his election symbol and also the name of other contesting candidate without his election symbol — Such dummy ballot papers, held, were in contravention of instructions issued by Election Commission of India — But it could not be said that the dummy ballot papers conveyed to voters the impression that the other candidate had withdrawn his candidature

SC 211 B (C N 45)

Requisitioning and Acquisition of Immoveable Property Act (30 of 1952)

—S. 3 (1) and Cl. (a) of first proviso to sub-section (2) — Property used by owner for commercial purpose is not excepted under the proviso — Premises used by owner for commercial purpose — Order, requisitioning premises for accommodating Government servant cannot be quashed

Delhi 66 A (C N 13)

—S. 3 — Notice of requisition — Claim by owners that they were bona fide using premises as residence for themselves and their families on date on which notice was served — Burden is on owners to prove requirements of Cl. (a) of 1st proviso to sub-section (2) of S. 3 — Mere fact that rations were drawn on the card issued in favour of the owner does not necessarily establish by itself that the owners were actually residing in the premises at the material time.

Delhi 66 B (C N 13)

SALES TAX

—Andhra Pradesh General Sales Tax Act (6 of 1957)

—S. 5 — Rules framed under S. 39 — S. 23 (1) — Scope of — Is not limited to tax or penalty leviable under sections referred to in the rule — Rule equally applies to penalty leviable under S. 14 — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 14

Andhra Pra 80 D (C N 10) (FB)

—S. 5A — Rules framed under S. 39 — S. 23 (1) — Scope of — Is not limited to tax or penalty leviable under sections referred to in the rule — Rule equally applies to penalty leviable under S. 14 — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 14

Andh Pra 80 D (C N 10) (FB)

—S. 9 (1) — Rules framed under S. 39 — S. 23 (1) — Scope of — Is not limited to tax or penalty leviable under sections referred to in the rule — Rule equally applies to penalty leviable under S. 14 — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 14

Andhra Pra 80 D (C N 10) (FB)

—Ss. 11, 14, 15, 17, 18, 21 (4) (a) (i) and (ii) and 30 (1). (a) — Word 'tax' as used in

Sales Tax — A. P. General Sales Tax Act (contd.)

Act does not include penalty

Andh Pra 80 A (C N 10) (FB)

—S. 11 — Rules framed under S. 39 — S. 23 (1) — Scope of — Is not limited to tax or penalty leviable under sections referred to in the rule — Rule equally applies to penalty leviable under S. 14 — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 14

Andh Pra 80 D (C N 10) (FB)

—S. 14 — Word 'tax' as used in Act does not include penalty — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 11

Andh Pra 80 A (C N 10) (FB)

—Ss. 14, 39, 5, 5-A, 9 (1) and 11 — Rules framed under S. 39, Rule 23 (1) — Scope of — Is not limited to tax or penalty leviable under sections referred to in the rule — Rule equally applies to penalty leviable under S. 14

Andh Pra 80 D (C N 10) (FB)

—S. 15 — Word 'tax' as used in Act does not include penalty — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 11

Andh Pra 80 A (C N 10) (FB)

—S. 17 — Word 'tax' as used in Act does not include penalty — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 11

Andh Pra 80 A (C N 10) (FB)

—S. 18 — Word 'tax' as used in Act does not include penalty — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 11

Andh Pra 80 A (C N 10) (FB)

—S. 21 (4) (a) (i) and (ii) — Word 'tax' as used in Act does not include penalty — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 11

Andh Pra 80 A (C N 10) (FB)

—S. 30 (1) (a) — Word 'tax' as used in Act does not include penalty — See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 11

Andh Pra 80 A (C N 10) (FB)

—S. 39 — Rules under Rule 23 (1) — Return relating to business done by deceased dealer submitted by his legal representative — Defects in return — Return based on accounts maintained by deceased dealer — Legal representative cannot be held personally responsible for defects in the return in absence of any manipulation — Tax and penalty are recoverable from estate of deceased dealer under R. 23 (1) — Legal representative cannot be held personally liable for penalty or tax

Andh Pra 80 B (C N 10) (FB)

—S. 39 — Rules framed under S. 39 — S. 23 (1) — Scope of — Is not limited to tax or penalty leviable under sections referred to in the rule — Rule equally applies to penalty leviable under S. 14 — See Sales

Sales Tax — A. P. General Sales Tax Act (contd.)

Tax Andhra Pradesh General Sales Tax Act (6 of 1957), S. 14

Andh Pra 80 D (C N 10) (FB)

—S. 39 — Rules under Rule 23 (1) — Provision under, for survival of liability of deceased dealer to pay tax and penalty — Liability does not disappear with his death

Andh Pra 80 E (C N 10) (FB)

—S. 39 (1) and (2) (o) — Rules framed under Rule 23 (1) — Validity of — Rule is within rule-making power under S. 39 (1)

Andh Pra 80 C (C N 10) (FB)

—Central Sales Tax Act (74 of 1956)

—S. 15 — Validity — Does not contravene Art. 14 or Art. 301 of Constitution — Not repugnant to Provisions of S. 15 (a) of Central Sales Tax Act — See Sales Tax — Mysore Sales Tax Act (25 of 1957), S. 5 (4) Mys 52 (C N 12)

—Madras General Sales Tax Act (9 of 1939)

—S. 2 (h) — Assessee selling goods outside state and inside state — Single assessment order for period prior to Constitution and subsequent — Assessment on sale outside state illegal after constitution by virtue of Article 286 (1) (a) — Held, that the order of assessment as a whole was not illegal as the assessment could be split up and dissected and the items of sale separated and taxed for different periods — Case law discussed SC 306 B (C N 64)

—Mysore Sales Tax Act (25 of 1957)

—S. 5 (4) — Validity — Does not contravene Article 14 or Article 301 of Constitution — Not repugnant to provisions of Section 15 (a) of Central Sales Tax Act Mys 52 (C N 12)

—Orissa Sales Tax Act (14 of 1947)

—S. 2 (c) (as stood prior to amendment of 1959) — 'Dealer' — Person to be a dealer must carry on business of selling or supplying goods in Orissa — "Business", meaning of — (Words and Phrases — "Business") — (1964) 6 OJD 345, Reversed SC 253 C (C N 52)

—S. 2 (g) (as it stood prior to amendment of 1959) — 'Sale' — Supply of building materials by company at agreed rates to contractors working for the Company — Held, amounted to 'sale' SC 253 A (C N 52)

—Ss. 9 (1), 12 (5) and 25 (1) (a) — Failure to register as a dealer — Imposition of penalty — Considerations — Persons in charge of affairs of a Company failing to register it as a dealer in honest and genuine belief that it was not a dealer — Imposition of penalties, held, not justified — (1964) 6 OJD 345, Reversed SC 253 B (C N 52)

—S. 12 (5) — Failure to register as a dealer — Imposition of penalty — Considerations — Persons in charge of affairs of a

Sales Tax — Orissa Sales Tax Act (contd.)

Company failing to register it as a dealer in honest and genuine belief that it was not a dealer — Imposition of penalties, held, not justified — See Sales Tax — Orissa Sales Tax Act (14 of 1947), S. 9 (1)

SC 253 B (C N 52)

—S. 25 (1) (a) — Failure to register as a dealer — Imposition of penalty — Considerations — Persons in charge of affairs of a Company failing to register it as a dealer in honest and genuine belief that it was not a dealer — Imposition of penalties, held, not justified — See Sales Tax — Orissa Sales Tax Act (14 of 1947), S. 9 (1)

SC 253 B (C N 52)

—Punjab General Sales Tax Act (46 of 1948)

—S. 11 (4) — Expression "Proceed to assess" in S. 11 (4) and word "determine" in Rule 33 (1) of Trav-Co. General Sales Tax Rules, 1950 do not lead to different results— See Sales Tax — Travancore-Cochin General Sales Tax Rules (1950), R. 33

SC 311 (C N 65)

—Travancore-Cochin General Sales Tax Rules (1950)

—Rule 33 — "Determine", meaning of — Notice for reopening of original assessment on ground of certain turnover escaping assessment, issued within time limit of three years — Owing to writ petition and stay orders, assessment could not be completed before expiry of time limit — Assessment proceedings held were within time — W. P. No. 46 of 1967, D/- 18-6-1968 (Ker), Reversed

SC 311 (C N 65)

—U. P. Sales Tax Act (15 of 1948)

—S. 3-A (1) — Notification under dated 31-3-1956, Entry 7 — Expression 'chemicals of all kinds' — Interpretation of — Sodium silicate is a chemical within the meaning of the entry

All 191 (C N 27) (FB)

Succession Act (39 of 1925)

—Ss. 222 and 255 — Application for probate of will — Must be of entire estate — Probate in respect of portion of property may be granted in special circumstances

Andh Pra 109 (C N 12)

—S. 255 — Only in exceptional cases probate will be granted in respect of part of estate — See Succession Act (1925), S. 222

Andh Pra 109 (C N 12)

—S. 307 — Voidable sale, setting aside — Person other than a reversioner at whose instance sale is voidable must sue to set aside the sale — See Limitation Act (1908), S. 91

Bom 73 A (C N 10)

—S. 307 (2) — Word restriction includes and covers a total prohibition

Bom 73 B (C N 10)

Sugar Cane Control Order (1955)

—R. 3 — Validity of power conferred on Government under S. 3 of Essential Com-

Sugar-cane Control Order (contd.)

modities Act and Sugar Cane Control Order cannot be challenged — See Constitution of India, Sch. VII, List III

SC 267 C (C N 55)

—R. 3 (3) — Rule is valid— See Essential Commodities Act (1955), S. 2 (b) and (c)

SC 267 A (C N 55)

—R. 3 (3) — Provision of Order prevails over Bihar Sugar Factories Control Act (1937), the Act being a pre-Constitution Act — See Essential Commodities Act (1955), S. 3

SC 267 B (C N 55)

Suits Valuation Act (7 of 1887)

See under Court-fees and Suits Valuations

Telegraph Act (13 of 1885)

—S. 7 — Rules made thereunder, R. 443

— Rule is not ultra vires rule making powers — No notice to show cause before disconnecting telephone is required — (Constitution of India, Art. 245)

All 143 A (C N 16)

—S. 7-B (1) — See Constitution of India, Art. 226

All 143 B (C N 16)

TENANCY LAWS**—Bombay Khoti Abolition Act (6 of 1950)**

—S. 10 (as amended by Maharashtra Act 43 of 1963) — Payment of compensation for loss of share in forest revenue — Khoti is not entitled to, unless Government has expressly granted proprietary rights over the soil — See Tenancy Laws — Bombay Khoti Abolition Act (6 of 1950), S. 12

SC 381 (C N 82)

—S. 12 (as amended by Maharashtra Act 43 of 1963) — Payment of compensation for loss of share in forest revenue — Khoti is not entitled to, unless Government has expressly granted proprietary rights over the soil — Bombay Land Revenue Code (5 of 1879), Section 41

SC 381 (C N 82)

—Bombay Tenancy and Agricultural Lands Act (67 of 1948)

—S. 76 (A) — As inserted by Bombay Act 38 of 1957 — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 110

Bom 86 A (C N 12)

—Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958)

—S. 110 — Scope of revisional jurisdiction of Collector — Limitations — Order is revisable irrespective of whether it is appealable or not under S. 107 or interlocutory — Revisional jurisdiction is excluded only in cases where an appeal filed within limitation is pending before him — "Where no appeal has been filed within the period provided" — Interpretation of — Spl. Civil Appns. Nos. 1189 of 1965 and 394 of 1966, D/- 20-12-1966 (Bom), Overruled

Bom 86 A (C N 12)

Tenancy Laws (contd.)

—East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948)

—S. 2 (a) (h) — Consolidation proceedings — Question of title arising in — Question cannot be decided by officer under the Act — Parties to be referred to a civil court under S. 117 (1) of Land Revenue Act — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A

Punj 93 A (C N 15) (FB)

—S. 14 (1) — Consolidation proceedings — Question of title arising in — Question cannot be decided by officer under the Act — Parties to be referred to a civil court under S. 117 (1) of Land Revenue Act — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A

Punj 93 A (C N 15) (FB)

—Ss. 16-A, 2 (a), (h), 36, 42 and 14 (1) — Consolidation proceedings — Question of title arising in — Question cannot be decided by officer under the Act — Parties to be referred to a civil court under S. 117 (1) of Land Revenue Act

Punj 93 A (C N 15) (FB)

—S. 16-A — Punjab Land Revenue Act (17 of 1887), Section 17 — Question of title to property sought to be partitioned in consolidation proceedings — Controversy over existence of, not allowed to be raised in writ proceedings — It is a matter to be agitated according to Section 117 of Land Revenue Act — (Punjab Land Revenue Act (17 of 1887), S. 117)

Punj 93 C (C N 15) (FB)

—Ss. 16-A, 36 and 42 — Order of Settlement Officer under S. 36 — Interference by Director of Consolidation under Section 42 — Interference possible only on the two grounds mentioned in Section 42 — AIR 1942 Mad 622 (FB), Diss. — (Limitation Act (1963), Arts. 63, 64—Co-sharers — Adverse possession — Claim by transferee of a co-sharer — Principles) — (T. P. Act (1882), S. 47)

Punj 93 D (C N 15) (FB)

—S. 16-A (1) and (2) — Dispute as to title — (Punjab Land Revenue Act (17 of 1887), S. 117) Punj 93 B (C N 15) (FB)

—S. 36 — Consolidation proceedings — Question of title arising in — Question cannot be decided by officer under the Act — Parties to be referred to a civil court under S. 117 (1) of Land Revenue Act — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A

Punj 93 A (C N 15) (FB)

—S. 36 — Order of Settlement Officer under S. 36 — Interference by Director of Consolidation under S. 42 — Interference possible only on the two grounds mentioned in S. 42 — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A

Punjab 93 D (C N 15) (FB)

Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (contd.)

—S. 42 — Consolidation proceedings — Question of title arising in — Question cannot be decided by officer under the Act — Parties to be referred to a civil court under S. 117 (1) of Land Revenue Act — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A

Punj 93 A (C N 15) (FB)

—S. 42 — Order of Settlement Officer under S. 36 — Interference by Director of Consolidation under S. 42 — Interference possible only on the two grounds mentioned in S. 42 — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A

Punj 93 D (C N 15) (FB)

—Madhya Bharat Land Revenue and Tenancy Act (66 of 1950)

—Ss. 86, 87, 89 — Rights of ordinary tenant are heritable SC 343 C (C N 73)

—S. 87 — Rights of ordinary tenant are heritable — See Tenancy Laws — Madhya Bharat Land Revenue and Tenancy Act (66 of 1950), S. 86 SC 343 C (C N 73)

—S. 89 — Rights of ordinary tenant are heritable — See Tenancy Laws — Madhya Bharat Land Revenue and Tenancy Act (66 of 1950), S. 86 SC 343 C (C N 73)

—Manipur Land Revenue and Land Reforms Act (33 of 1960)

—Ss. 119, 126 — Scope — Tenant surrendering land — Landlord entering into possession — Such possession can be availed of, for purposes of S. 426 or 447, I.P.C. — (Penal Code (1860), Ss. 426, 447) — (Criminal P. C. (1898), S. 200)

Manipur 23 C (C N 7)

—S. 126 — Scope — Tenant surrendering land — Landlord entering into possession — Such possession can be availed of for purposes of S. 426 or 447, I.P.C.—See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), S. 119

Manipur 23 C (C N 7)

—Orissa Land Reforms Act (16 of 1960)

—Secs. 1 (3), 45, 47 (as amended by Act 15 of 1965) — Provisions regarding ceiling and disposal of excess land in Chap. IV inserted by Amending Act — Are not unconstitutional, ILR (1967) Cut 333, Reversed SC 398 (C N 87)

—S. 45 (as amended by Act 15 of 1965) — Provisions regarding ceiling and disposal of excess land in Chap. IV inserted by Amending Act — Are not unconstitutional — See Tenancy Laws — Orissa Land Reforms Act (16 of 1960) (as amended by Act 15 of 1965), S. 1 (3)

SC 398 (C N 87)

—S. 47 (as amended by Act 15 of 1965) — Provisions regarding ceiling and disposal of excess land in Chap. IV inserted by Amending Act — Are not unconstitutional — See Tenancy Laws — Orissa Land Reforms Act (16 of 1960) (as

Tenancy Laws—Orissa Land Reforms Act (contd.)

amended by Act 15 of 1965), S. 1 (3)
SC 398 (C N 87)

—U. P. Imposition of Ceiling on Landholdings Act (1 of 1961)

—S. 3 (1) — Tenure-holder — Definition of — Entry in Revenue records — Not relevant for deciding as to who is tenure-holder
All 130 B (C N 15) (FB)

—Ss. 10, 11 and 37 — Person claiming to be tenure-holder — Absence of his name in revenue records — Statement under S. 10 (1) not issued to him — He can still file objection to that statement. 1965 All LJ 756 and 1967 All LJ 551, **Overruled**—Civil P. C. (1908), O. 1, R. 10 (2)

All 130 A (C N 15) (FB)
—S. 11 — Person claiming to be tenure-holder — Absence of his name in revenue records — Statement under S. 10 (1) not issued — He can still file objection to that statement — See Tenancy Laws — U. P. Imposition of Ceiling on Landholdings Act (1 of 1961), S. 10

All 130 A (C N 15) (FB)
—S. 37 — Person claiming to be tenure-holder — Absence of his name in revenue records — Statement under S. 10 (1) not issued — He can still file objection to that statement — See Tenancy Laws — U. P. Imposition of Ceiling on Landholdings Act (1 of 1961), S. 10

All 130 A (C N 15) (FB)
—U. P. Urban Areas Zamindari Abolition and Land Reforms Act (9 of 1957)

—Preamble — Object of the Statute
All 159 C (C N 20)

—S. 2 (1) (d)—Construction — Area held on lease duly executed before 1-7-1955 for purpose of erecting building thereon can be included within the meaning of "agricultural area" in S. 2 (1), if being used for cultivation
All 159 A (C N 20)

—S. 2 (1) (d) — See Civil P. C. (1908), Preamble
All 159 B (C N 20)

Tort

—Accidents — Damages — Assessments of — Principles — See Fatal Accidents Act (1855), S. 1-A
SC 376 A (C N 81)

Transfer of Property Act (4 of 1882)

—S. 5 — Transfer of property — Unequal partition between father and son — No transfer involved — See Gift Tax Act (1958), S. 4
Mad 111 B (C N 31)

—S. 8 — Interpretation of deeds — See Registration Act (1908), S. 78

Bom 109 C (C N 17)

—S. 47 — Order of Settlement Officer under S. 36 — Interference by Director of Consolidation under S. 42 — Interference possible only on the two grounds mentioned in S. 42 — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A
Punj 93 D (C N 15) (FB)

T. P. Act (contd.)

—S. 52 — *Lis pendens* — Applicability — Jammu and Kashmir Right of Prior Purchase Act (2 of 1993), S. 29 — Pre-emption. — Suit for — Suit property cannot be sold by vendee after period of limitation to one having equal right as plaintiff — Persons having no right of prior purchase joined in sale by subsequent vendee — Plaintiff's right of pre-emption not affected

J and K 37 (C N 10) (FB)
—S. 60 — See Court-fees and Suits. Valuation Act (1870), S. 7 (9) (U. P.)

All 188 (C N 26)
—Ss. 60 and 111 — Mortgage of shop — Suit for redemption of — Tenant of mortgagee cannot resist — Tenant ceases to be tenant of property on redemption — Rule that mortgagee's tenant continues to be tenant of mortgagor on redemption relates to agricultural leases only

Punj 109 (C N 17) (FB)
—S. 76 (a) and (c) — Tenant of mortgagor, unless his tenancy is determined at the time of mortgage, necessarily attorns to mortgagee — After redemption he is again relegated as tenant of the mortgagor

Punj 104 (C N 16) (FB)
—S. 106 — Service of notice by affixing it to a conspicuous part of premises — Discrepancies in the evidence of witnesses in regard to nomenclature of place where the notice has been fixed — Effect — In the absence of any material to show that the witnesses are interested in the landlord, it does not mean that notice has not been affixed to a conspicuous part of the premises
Mys 77 A (C N 19)

—S. 106 — Notice of termination of tenancy — Notice sent under certificate of posting — Notice is deemed to have been duly delivered to addressee — See also Evidence Act (1872), S. 114

Mys 77 C (C N 19)
—S. 106 — Affixture of notice to conspicuous part of premises — Procedure of — If the tender or delivery to the party is shown as impracticable, it is open to the landlord to adopt the procedure — It is not necessary that attempt must be made to serve personally on all classes of persons referred to in the section, i.e., the party or to one of his family members or his servants of his residence, before landlord can take advantage of the procedure of affixture

Mys 77 D (C N 19)

—S. 111 — Mortgage of shop — Suit for redemption of — Tenant of mortgagee cannot resist — Tenant ceases to be tenant of property on redemption — Rule that mortgagee's tenant continues to be tenant of mortgagor on redemption relates to agricultural leases only — See Transfer of Property Act (1882), S. 60

Punj 109 (C N 17) (FB)
—S. 122 — Mitakshara School (Madras School) — Joint family property — Alienation of, by coparcener — Alienation in con-

T. P. Act (contd.)

sideration of promise to marry — Validity of — Promise to marry is valuable consideration — Alienation, not being gift, is valid to the extent of his share in the property — See Hindu Law — Mitakshara School (Madras School)

Mad 113 (C N 32)

Travancore-Cochin General Sales Tax Rules (1950)

See under Sales Tax.

U. P. Imposition of Ceiling on Landholdings Act (1 of 1961)

See under Tenancy Laws.

U. P. Industrial Disputes Act (28 of 1947)

—S. 6-H(1) and (2) — Powers of Labour Court — Question whether there has been retrenchment cannot be decided by Labour Court — Labour Court can only compute compensation claimed to be payable to workmen when retrenchment is conceded — (Industrial Disputes Act (1947), Ss. 33-C(1) and 33-C(2))

SC 237 B (C N 50)

—Ss. 6-H(2) and 6-O — Earned leave not availed of, by workmen before closure or transfer of undertaking — Compensation is not payable in absence of any provision in statute governing right to such compensation — (Industrial Disputes Act (1947), Ss. 25-FF and 33-C(2))

SC 237 F (C N 50)

—S. 6-O — Scope — Order awarding retrenchment compensation cannot be made without recording finding that there was retrenchment and compensation was payable — Labour Court cannot award compensation without determining whether conditions of proviso to S. 6-O have been fulfilled

SC 237 C (C N 50)

—S. 6-O — Earned leave not availed of by workmen before closure or transfer of undertaking — Compensation is not payable in absence of any provision in statute governing right to such compensation — See U. P. Industrial Disputes Act (28 of 1947), S. 6-H(2)

SC 237 F (C N 50)

—S. 6-R(2) (incorporated by U. P. Act 1 of 1957) — U. P. Act 1 of 1957 having received assent of President, Sec. 6-R(2) would prevail over Sec. 25-J(2) of Industrial Disputes Act, 1947, by virtue of Art. 254(2) of Constitution

SC 237 A (C N 50)

U. P. Municipalities Act (2 of 1916)

See under Municipalities.

U. P. Sales Tax Act (15 of 1948)

See under Sales Tax

U. P. Town Areas Act (2 of 1914)

See under Municipalities.

U. P. Town Areas Election Rules (1948)

See under Municipalities.

U. P. Urban Areas Abolition and Land Reforms Act (9 of 1957)

See under Tenancy Laws.

Wealth Tax Act (27 of 1957)

—S. 7(2)(a) — Business with regular accounts — Determination of net value of fixed assets — Whether written-down value is true value — Onus is on assessee to prove — Failure to show that written-down value is true value — Adoption of value shown in balance sheet is proper. (1965) 1 ITJ 769 (Cal), Reversed.

SC 352 A (C N 75)

—S. 27(6) — Reference by Appellate Tribunal on question of law — Nature of duty of Tribunal to dispose of case after judgment given in reference, pointed out

SC 352 B (C N 75)

—S. 50-A — Relief in respect of gift tax paid — Assessee is entitled to relief in respect of the amount paid as tax under S. 18(1), Gift Tax Act, 1958 (as it stood before amendment) and the ten per cent credit given to him under that section cannot be deducted therefrom — Assessee cannot be penalised in respect of the ten per cent credit given to him for making a voluntary payment of tax and which can in no circumstance constitute gift tax — Gift Tax Act (1958) (before amendment), S. 18(1)

Orissa 37 (C N 16)

Words and Phrases

—“Adultery” — What is — See Divorce Act (1869), S. 10

Mad 104 (C N 27) (SB)

—“Annexation”, meaning — See Geneva Conventions Act (1960), Sch. IV, Art. 6

SC 329 A (C N 70)

—“Business” — See Sales Tax — Orissa Sales Tax Act (14 of 1947), S. 2(c) (as stood prior to amendment of 1959)

SC 253 C (C N 52)

—“Canvassing” — See Municipalities — U. P. Town Areas Act (2 of 1914), S. 8-A(2)

All 146 A (C N 17) (FB)

—Expression “chemicals of all kinds” — Meaning of — See Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 3-A(1)

All 191 (C N 27) (FB)

—Word “communicate” — Meaning — See Civil Services — Punjab Civil Services (Punishment and Appeal) Rules (1952), R. 3.26(d)

SC 214 A (C N 46)

—“Dependant” — See Expenditure Tax Act (1957) (as amended by Finance Act (1959)), S. 2(g)(i)

Andh Pra 86 C (C N 11) (FB)

—“Determine” — See Sales Tax — Travancore-Cochin General Sales Tax Rules (1950), R. 33

SC 311 (C N 65)

—“Discharge” and “Release” — Distinction between, pointed out

Bom 109 D (C N 17)

—“Grave” and “gravest” — See Civil Services Punjab Police Rules (1934), Vol. II, Chap. XVI, R. 16.2(1)

Punj 81 D (C N 13)

—“Hindu law” — Means uncodified Hindu law and not amendments made to it

50 SUBJECTWISE LIST OF CASES OVERRULED, ETC., IN AIR 1970 MARCH

Criminal P. C. (contd.)

—Ss. 417 (3) and 417 (1) — AIR 1968 Orissa 26 — Revers. AIR 1970 SC 272 A (C N 57).

—S. 439 — AIR 1968 Orissa 26 — Revers. AIR 1970 SC 272 A (C N 57).

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—S. 8 — AIR 1958 Punj 436 — Diss. AIR 1970 Delhi 58 (C N 11)

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—S. 11 (vi) — S. A. No. 275 of 1962, D/- 7-9-1965 (MP) — Revers. AIR 1970 SC 343 B (C N 73).

—S. 12 — S. A. No. 275 of 1962, D/- 7-9-1965 (MP) — Revers. AIR 1970 SC 343 B (C N 73).

—S. 14 (4) — S. A. No. 275 of 1962, D/- 7-9-1965 (MP) — Revers. AIR 1970 SC 343 B (C N 73).

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—S. 11 (4) (i) — 1968 Ker LT (SN) P. 4 — Over. AIR 1970 SC 337 A (C N 71).

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—S. 10 (2) (xv) — ILR (1964) Andh Pra 616 — Revers. AIR 1970 SC 300 B (C N 63).

—S. 28 — (1963) 48 ITR 324 (All) — Diss. AIR 1970 Orissa 38 (C N 17).

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—S. 132 — AIR 1965 All 487 — Revers. AIR 1970 SC 292 A (C N 62).

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—S. 33-C (2) — (1968) 70 Bom LR 104 (FB) — Held Overruled in view of AIR 1969 SC 1335 as interpreted AIR 1970 SC 209 A (C N 44).

—S. 33-C (2) — Appln. No. LCB 28 of 1965, D/- 16-4-1968 (Bom) — Revers. AIR 1970 SC 209 A (C N 44).

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—S. 48 (3) — AIR 1961 Ker 53 — Diss. AIR 1970 Mys 60 A (C N 14).

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—S. 64 (f) — AIR 1957 Raj 312 (FB) — Diss. AIR 1970 All 182 A (C N 24).

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— Calicut City Municipal Act (Kerala Act 30 of 1961)

—S. 126, Proviso — ILR (1965) 2 Ker 639 — Revers. AIR 1970 SC 264 B (C N 54).

— U. P. Town Areas Act (2 of 1914)

—S. 8-A (2) — Civil Misc. W. No. 1137 of 1966, D/- 5-9-1966 (All) — Over. AIR 1970 All 146 A (C N 17) (FB).

—S. 39 — ILR 1960 (2) All 822 — Partly Overruled. AIR 1970 All 146 C (C N 17) (FB).

—S. 39 — C. Misc. W. No. 1137 of 1966, D/- 5-9-1966 (All) — Over. AIR 1970 All 146 A (C N 17) (FB).

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—S. 3 (2) (b) — AIR 1956 Sau 73 — Diss. AIR 1970 Ker 50 (C N 11).

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—S. 92 — Ele. Petn. No. 7 of 1967, D/- 21-5-1968 (All-LB) — Revers. AIR 1970 SC 276 (C N 58).

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- S. 2 (c) — (1964) 6 OJD 345 — Revers. AIR 1970 SC 253 C (C N 52).
- S. 9 (1) — (1964) 6 OJD 345 — Revers. AIR 1970 SC 253 B (C N 52).
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- Bombay Tenancy and Agricultural Lands (Vidharbha Region) Act (99 of 1958)
- S. 110 — Spl. Civil Applns. Nos. 1189 of 1965 and 394 of 1966, D/- 20-12-1966 (Bom) — Over. AIR 1970 Bom 86A (C N 12).
- East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948)
- S. 16A — AIR 1942 Mad 622 (FB) — Diss. AIR 1970 Punj 93 D (C N 15) (FB).
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- S. 7 (2) (a) — (1965) 1 ITJ 769 (Cal) — Revers. AIR 1970 SC 352 A (C N 75).

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- (1896) ILR 18 All 233 = 1896 All WN 84, Narain Das v. Hazarilal — Held obiter as interpreted AIR 1970 Guj 49 (C N 8).
- AIR 1959 All 763 = 1959 Cri LJ 1384, Bhagwat Singh v. State—Over. AIR 1970 All 154 (C N 19).
- (1960) ILR 1960 (2) All 822 — Partly Overruled. AIR 1970 All 146 C (C N 17) (FB).
- (1963) 48 ITR 324 (All), Lal Chand Gopal Das v. Commissioner of Income-tax, U. P. and V. P. — Diss. AIR 1970 Orissa 38 (C N 17).
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- AIR 1965 All 487, Seth Brothers v. Commissioner of Income-tax, U. P., Lucknow — Revers. AIR 1970 SC 292 A, B (C N 62).

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- 1965 All LJ 756, Bageshwari Devi v. S. B. Pandey — Over. AIR 1970 All 130 A (C N 15) (FB).
- (1966) C. Misc. W. No. 1137 of 1966 dated 5-9-1966 (All) — Over. AIR 1970 All 146 A (C N 17) (FB).
- 1967 All LJ 551 = 1967 All WR (HC) 186, Kesar Sugar Works Ltd., Baheri v. State of U. P. — Over. AIR 1970 All 130 (C N 15) (FB).
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- (1968) Election Petition No. 7 of 1967, D/- 21-5-1968=Civ. Misc. Applns. Nos. 41 (E) and 42 (E) of 1968 (All LB) — Revers. AIR 1970 SC 276 (C N 58).

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- AIR 1963 Andh Pra 389 = 1963 (2) Cri LJ 368, Public Prosecutor v. H. R. Basava Raj — Over. AIR 1970 Andh Pra 70 (C N 9) (FB).

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- (1964) ILR (1964) Andh Pra 616, V. Bapaiah Chowdary v. Commissioner of Income-tax, Excess Profit Tax, Andhra Pradesh — Revers. AIR 1970 SC 300 B (C N 63).
- (1967) ILR (1967) Andh Pra 265, Messrs. Kurapati Venkata Satyanarayana v. State of Andhra Pradesh — Revers. AIR 1970 SC 306 A (C N 64).

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- (1967) Cri. Revn. No. 4 of 1967 (Assam)—Held not good law as interpreted AIR 1970 Assam 38 (C N 7).

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- Observations in AIR 1933 Bom 457 = 35 Bom LR 1033 (FB), Mukund Bapu v. Tanu Sakhu — Diss. AIR 1970 Guj 49 (C N 8).
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- AIR 1954 Bom 254 = ILR 1954 Bom 544, F. E. Darukhanawala v. Khemchand Lakan — Over. AIR 1970 SC 228 A (C N 49).
- AIR 1956 Nag 268 = ILR (1956) Nag 618, Kewalchand v. Dashrathlal — Over. AIR 1970 SC 228 A (C N 49).

- (1966) Spl. Civ. Applns. Nos. 1189 of 1965 and 394 of 1966 D/-20-12-1966 (Bom.) — Over. AIR 1970 Bom 86A (C N 12).
- (1968) 70 Bom LR 104 = 1968 Mah LJ 1 (FB), P. K. Porwal v. Labour Court—Held Overruled in view of AIR 1969 SC 1335 as interpreted AIR 1970 SC 209 A (C N 44).
- (1968) Appln. No. LCB-28 of 1965 D/-16-4-1968 (Bom.) — Revers. AIR 1970 SC 209 A (C N 44).

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- AIR 1924 Cal 895 = 28 Cal WN 873, Chandra Kumar Mukhopadhyaya v. Smt. S. B. Debi — Diss. AIR 1970 Ker 57 (C N 13).
- AIR 1933 Cal 627 = ILR 60 Cal 753, Midnapore Zamindary Co. Ltd. v. Abdul Zahir — Diss. AIR 1970 Ker 57 (C N 13).
- (1935) 39 Cal WN 1152, Ballav Dass v. Mohanlal Sadhu — Diss. AIR 1970 Andh Pra 70 (C N 9) (FB).
- (1947) 51 Cal WN 654, Nabakumar Roy Chaudhary v. Prafulla Chandra Chaudhary — Over. AIR 1970 Cal 99 (C N 13).
- AIR 1948 Cal 42 = 48 Cri LJ 236, Bhagirath v. Emperor — Diss. AIR 1970 Andh Pra 70 (C N 9) (FB).
- 1963 (1) Cri LJ 521 = 1962 Com Cas 1143 (Cal.), Dulal Chandra Bhar v. State of West Bengal — Diss. AIR 1970 Andh Pra 70 (C N 9) (FB).
- (1965) 1 ITJ 769 (Cal), Commissioner of Wealth Tax, Calcutta v. Tungabhadra Industries Ltd. — Revers. AIR 1970 SC 352 A (C N 75).

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- AIR 1966 Cal 68, Commissioner of Wakfs, West Bengal v. Smt. Ayesa Bibi — Revers. AIR 1970 SC 287 (C N 61).
- (1967) 37 Com Cas 195 = 70 Cal WN 486, Bangeswari Cotton Mills Ltd., In the matter of—Diss. AIR 1970 All 165 B (C N 21).

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- AIR 1956 Sau 73 = 1956 Cri LJ 1231, Polubha v. Tapu Ruda — Diss. AIR 1970 Ker 50 (C N 11).

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- AIR 1961 Ker 53 = 1960 Ker LJ 1029, Devraja Iyer v. Regional Transport Authority—Diss. AIR 1970 Mys 60 A (C N 14).
- (1965) ILR (1965) 2 Ker 639, Corporation of Calicut v. Jothi Timber Mart — Revers. AIR 1970 SC 264 B (C N 54).
- (1968) 1968 Ker LT (SN) P. 4=O.P. No. 2653 of 1967, D/-4-10-1967, Abdul Rahiman v. Rajan — Over. AIR 1970 SC 337 A (C N 71).
- (1968) W. P. No. 46 of 1967 D/-18-6-1968 (Ker.) — Revers. AIR 1970 SC 311 (C N 65).

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- (1965) S.A. No. 275 of 1962 D/-7-1-1965 (M.P.) — Revers. AIR 1970 SC 343 A, B (C N 73).

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- AIR 1915 Mad 1159 = 16 Cri LJ 268, Md. Kasim v. Emperor — Diss. AIR 1970 Ker 50 (C N 11).
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- (1961) C.R.P. No. 1764 of 1961 (Mad.)—Over. AIR 1970 Mad 107 (C N 29).
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- AIR 1966 Mad 415 = 1966 Cri LJ 1279, Ambalavana Chettiar P. S. N. S. and Co. (P.) Ltd. v. Registrar of Companies —Diss. AIR 1970 Andh Pra 70 (C N 9) (FB).
- (1968) 38 Com Cas 197 = (1968) 1 Com LJ 102 (Mad), In re, W. A. Beardsell and Co. (P.) Ltd. — Diss. AIR 1970 All 165 B (C N 21).

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JOURNAL SECTION

1970 MARCH

THE PRACTICE AND POWER OF THE EXECUTING COURT GRANTING TIME FOR PAYMENT OF THE AMOUNT DECREED.

(By SRI M. VENKATARATNAM, *Advocate, Tadepalligudem, Andhra Pradesh.*)

At the time of passing the decree for the payment of money, the Court may for any sufficient reason order that the payment of the amount decreed shall be postponed or shall be made by instalments, notwithstanding anything contained in the contract under which money is payable as provided in Rule 11(1) of Order 20, Civil P. C. After passing of the decree also the judgment-debtor may apply within 30 days from the date of the decree to permit him to pay the amount decreed by instalments. By shortening the period of limitation for such applications to 30 days under Art. 126 of the Limitation Act, 1963 from 6 months provided in Art. 175 of the 1908 Act, the intention of the Legislature is clear. No doubt, for an application by the judgment-debtor for postponement of payment, as no specific period of limitation is provided under the Limitation Act or the Code, residuary Art. 137 prescribing a period of 3 years is applicable. But such an application under Order 20 Rule 11 (2) can be allowed only on such terms as to payment of interest, the attachment of the property of the judgment-debtor, or the taking of the security from him or otherwise as the Court thinks fit in exercise of its judicial discretion, after enquiry. It is only the Court which passed the decree that can act under this rule.(1)

There is no provision in the Civil Procedure Code and in the rules framed under it generally enabling the Court executing the decree to grant time for payment. Before making an order for the detention of the judgment-debtor, to give him an opportunity of satisfying the decree the Court may leave him in the custody of an officer of the Court for a specified period not exceeding 15 days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period. The security should not be personal security.(2) Similarly the Court may postpone sale of the property on such terms and for such period as it thinks proper, for the purpose of enabling the judgment-debtor

to raise the amount by mortgage, lease or private sale of the property under Order 21 Rule 83.

But the Division Bench of the Madras High Court in *Madhavan Nambiar v. Chaldean Syrian Bank Ltd.*,⁽³⁾ held that there is no impediment in adopting the recognised practice of England not to make an order of committal to prison on the first application but to order payment by instalments in appropriate cases, although S. 51, Order 21, Rules 39 and 40 do not specifically direct an order for instalments first. The effect of Order 20 Rule 11 is not considered in that case. It is no doubt true that the fixation of instalments after an enquiry into the means and the ability of the judgment-debtor to pay, in many cases is much fairer to the judgment-debtor who, whilst not being in a position to discharge the decree in full can certainly pay something towards its discharge.

An opportunity for such an enquiry is provided not only at the time of passing the decree but after passing the decree also, under Order 20 Rule 11 (2). From the fact that provision is made only for conditional release of the judgment-debtor before committing him to civil prison under Order 21 Rule 40 (3) proviso, it is clear that no such enquiry is admissible at that stage. The enquiry that is contemplated when a judgment-debtor appears before the Court in obedience to the notice issued under Order 21 Rule 37 or is brought before the Court after being arrested in execution, under Order 21 Rule 40 (1), is regarding his liability for detention as per the proviso to S. 51 and other provisions of the Code. The above decision therefore requires reconsideration on this point.

Inherent powers of the Court cannot be exercised when there is express provision of law applicable to the case. Further when a procedure to be adopted in a particular case or a class of cases is provided by the Code or falls within the intentment of such provision, there is no inherent power to act except under the conditions specified in such provision, as

1. AIR 1961 All 1 (10) (FB); AIR 1943 Nag 340 (344) (FB); 1959 Andh L T 866.

2. AIR 1928 Cal 62.

1970 Journal 3.

3. AIR 1955 Mad 409.

that provision must be deemed to be exhaustive of the matters dealt with by it. The Court has no power to extend the period fixed for applications under Order 20 Rule 11(2). Section 148, Civil P. C. does not apply where time is allowed for doing an act by a decree.

Except in the States of Andhra Pradesh, Madras, Orissa and Madhya Pradesh, Rule 11 (2) of Order 20 provides for passing of the order "with the consent of the decree-holder". It was held by the Supreme Court in *Moti Lal v. Md. Hasan Khan*(4) that Order 20 Rule 11(2) does not affect the power of the executing Court to record and enforce a compromise, entered in an execution proceeding, by which the execution is postponed on the undertaking given by the judgment-debtor to pay interest at a higher rate than the decretal rate of interest. The object of execution of a money decree is to give all lawful and reasonable assistance to the decree-holder to realise the decree debt. In cases where the decree-holder himself consents for the granting of time for payment, the bona fide circumstances of the judgment-debtor warranting the indulgence of the Court cannot be doubted. In the absence of an agreement between the parties, the procedure to be followed must be according to law.

The relief which the judgment-debtor

4. AIR 1968 S C 1087.

cannot obtain by means of an application under Order 20 Rule 11(2), cannot be granted by the Executing Court. But the practice of the executing Court adjourning the execution applications a number of times without ordering next step for payment of the balance, on mere oral request on behalf of the judgment-debtor on payment of some portion of it, virtually converts the decree into an instalment decree. Such practice, as observed by the learned Judge in the above cited Madras case, may help to bridge the wide gulf between the dismissal of an execution petition for arrest of a decree-holder failing strictly to discharge the onus resting on him under the proviso to Section 51, and the commitment to prison of the judgment-debtor who while in a position to pay something simply, cannot discharge the decree in full as he has no means to do it. But it is not consistent with the express provisions of law. If it is considered that the executing Court as a Court competent to decide all questions relating to execution, discharge or satisfaction of the decree, should also have the power to grant time for payment in appropriate cases, suitable provision should be made, by the deleting Order 20 Rule 11 (2) thus giving statutory recognition to the practice prevalent. No such provision should have the effect of virtually nullifying the decree under execution. Otherwise the present practice should be deprecated.

MAHATMA GANDHI AS A LAWYER

(By OM PRAKASH MOTIWAL, *Research Officer (Law), Government of Uttar Pradesh.*)

Mahatma Gandhi has been recognised throughout the world as a glorious symbol of truth and non-violence. He laid great emphasis on the purity of means for achievement of noble ends. Truth is as old as hills. Every one knows its value and strength but Gandhiji applied it in every aspect of his life and proved that one could achieve success even in the most difficult areas of his activities by sticking to truth. There is a general belief that to be a successful lawyer one has to twist facts and sometimes present certain facts which are not wholly true. But this was not so with Gandhi. He had been in search of truth from his early life. There are a number of incidents of his life which go to show that he followed the path of truth even in the face of numerous difficulties. He disproved the conception that without using untruth no one could be a successful lawyer. He held

that 'it was not impossible to practice law without compromising truth'.

He had expressed that in England and South Africa Lawyers were consciously or unconsciously led into untruth for the sake of their clients. He vehemently opposed an English lawyer when he advocated that the duty of a lawyer was to defend a client even if he knew that he was guilty. Gandhi on the other hand was emphatic that the duty of a lawyer was to place correct facts before the judge and to help him to arrive at the truth, and not to prove the guilty as innocent.

BARRISTER IN THE MAKING

Gandhiji passed his matriculation examination in 1887. Some well-wishers of the family suggested that he should go in for Medical profession, while others desired him to join the service of Por-

bandar State, but on the suggestion of Joshiji, a will-wisher and adviser of the family, it was decided to send Gandhiji to England to study law. His father was dead. Initially his mother was opposed to the idea of sending him to England for such a long period, but ultimately she permitted him to go, on his taking a vow not to touch wine, women and meat. Gandhiji himself was hesitant to go in for law in England because of his poor knowledge of English and secondly he was afraid of studying Latin, which was essential to understand law books. In spite of all these considerations he decided to study law in England. After passing his law examination he was called to the Bar on June 10, 1891 and was enrolled as Barrister the next day in the High Court. His first reaction after his enrolment was "It was easy to be called, but it was difficult to practice at the Bar. I had read the laws but not learnt how to practice law."

On his return from England he settled at Bombay and started practice. In the profession he had to face another difficulty. In England he was taught Roman Law and Common Law, but this was of no use in India. If he was to practice in India, he had to study Indian Law: Civil Procedure Code and Evidence Act appeared to him very difficult. Finding Gandhi somewhat perturbed, a leading Barrister of Bombay at the time, Mr. Frederick Pincutt, advised Gandhi: "I understand your trouble. Your general reading is meagre. You have no knowledge of the world, a 'sine qua non' for a Vakil. You have not even read the history of India. A vakil should know human nature. He should be able to read a man's character from his face. Mr. Pincutt said all this in good faith, but he himself could not read in the face of Gandhi that one day he was going to be the greatest leader of India, who will be respected all the world over."

FIRST CASE—A FAILURE :

When he got his first case in a Small Causes Court, he was asked to part with a portion of his income for the tout, who had brought the case. He refused to pay the tout, because he felt it was a sort of bribery. Even after accepting this case he had no courage to conduct it. In his own words he describes the experience of his first case as follows: "I stood up, but my heart sank into my boots. My head was reeling and I felt as though the whole Court was doing likewise. I could

think of no question to ask. The judge must have laughed, and the vakils no doubt enjoyed the spectacle. But I was past seeing anything. I sat down and told the agent that I could not conduct the case, that he had better engage Patel and have the fee back from him." During his short stay of six months at Bombay, in spite of his hard labour, his income was so meagre that he could not afford to go to Court in a conveyance. He used to walk the distance from his residence to Court and back. But he regularly attended the High Court in order to watch the senior lawyers conducting difficult cases. Because of his failure in his first case he lost confidence in himself and decided not to appear in any case in a law court in future. He felt that a Barrister's profession was a bad job. He thought of joining a school as a teacher. Something unexpected happened at this time. He was asked by a senior counsel to draft a memorial pertaining to confiscation of land. His draft was not only approved, but was appreciated by other lawyers. This helped him to regain the lost confidence.

FIRST SHOCK :

From Bombay, Gandhiji shifted to Rajkot, where he could manage to earn about Rs. 300/- a month. Here he came to know that a certain percentage of the fee was to be given to the Vakil who sent work to him, but he did not remember to have given money to any Vakil on this account. Here too circumstances did not permit him to practice for a long time. His elder brother persuaded him to recommend to the Political Agent certain official matter concerning his brother which was pending before him. The Political Agent did not like this interference and he got Gandhi out of his office through a peon. Gandhi threatened the Political Agent to take legal action against him for his misbehaviour, but had to abandon this idea on the advice of Sir Feroz Shah Mehta, a leading lawyer practising there. He described this incident as the first shock of his life.

COOLIE BARRISTER :

Because of the above incident, it became difficult for Gandhiji to appear before the Political Agent in any case. He, therefore, wanted to leave the place and God helped him. He was offered a job by Messrs. Dade Abdulla & Co., to go to South Africa to help the Company in its litigation there. Gandhiji accepted the

offer. When he reached Natal, he found Indians were not given proper treatment by the English. Most of the Indians worked there as coolies. The Indian merchants were also known as coolie merchants. So Gandhiji was nicknamed as 'Coolie Barrister.' From Natal he went to Pretoria, where he acquired the true knowledge of legal practice. Mr. Leonard, a leading Barrister, told Gandhiji that in the preparation of each case 'if he took care of the facts of a case, the law will take care of itself.' Gandhiji acted on this advice and later observed: "Facts mean truth, and once we adhere to truth, the law comes to our aid naturally."

Gandhiji always liked cases to be settled amicably out of court, and this is how he thought about it: 'I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realised that the true function of a lawyer was to unite parties driven asunder.' He followed this practice throughout his legal career for about 20 years and was instrumental in settling hundreds of cases out of court. An Advocate of ordinary morals could never have such lofty ideas.

After finishing his legal work in South Africa, he decided to return to India, but his friends persuaded him to stay on, as in him they found a person who could give leadership to fight against the high-handedness of the people of the country and insults thrust upon Indians living there by them. Gandhiji himself had been a subject of such insults on a number of occasions. On the persuasion of his friends he applied for enrolment as an Advocate of the Supreme Court at Natal. A number of objections were raised by the local Law Society against his application only to discriminate him on the basis of colour. In spite of all this, he was enrolled as an Advocate. Gandhiji gained wide publicity in South Africa because of this episode.

In 1901 Gandhiji returned to India and started his practice in mofussil courts, where he won a number of cases, which gave him encouragement and confidence. He was persuaded by his well-wishers to settle in Bombay and practice at the High Court where he got some cases, most of which he won. He could now give better performance, and observed: 'I prospered in my profession better than I had expected.' He, however, could not stick to the profession for long as he was called to South Africa again, and this time to lead an agitation there.

'TRUTH' IN THE PROFESSION

While practising law, Gandhiji never resorted to untruth. He used to say "In my heart of hearts I always wished that I should win only if my client's case was right". He accepted minimum possible fees, which would help him to make both ends meet. He was not happy over heavy fees charged by Indian lawyers. In his opinion an Indian lawyers was comparatively the most extravagant and bears no relation to general economic condition of the people. He once said: "The best South African lawyer—and they are lawyers of great ability—dare not charge the fees the lawyers of India do. Fifteen guineas is almost a top fee for legal opinion. Several thousand rupees have been known to have been charged in India. There is something sinful in a system under which it is possible for a lawyer to earn from fifty thousand to one lakh rupees per month". He was of the view that the best legal talent must be available to the poorest at reasonable rates. While discussing the qualities of a true lawyer Mahatma Gandhi expressed the opinion that he is one who gives truth and service the first place and emoluments the next. Regarding the cheap and speedy administration of justice Gandhi was of the view that to get justice in Indian court was an expensive luxury and it was often the longest purse that won.

Gandhiji's principle to follow truth in the profession was put to test a number of times. When any new case was brought to him, he frankly told his client that he would not take up a false case or tutor hired witnesses. This practice made him known in the legal profession as the most honest lawyer. The courts also gave him much respect and honour. His words carried weight in courts. It was generally known that the parties having true facts would engage him and win the case. To have such a reputation for a junior lawyer in a foreign country was really creditable. It would be of interest to relate a case here. He was conducting a case which involved complicated account work. The award of arbitrator was in favour of Gandhiji's client, but there was a serious mistake in the accounts which could have affected the award itself. The senior lawyer engaged in the case was of the opinion that the mistake need not be pointed out to the court, but Gandhi vehemently opposed the idea and offered to argue the case himself even in the absence of the senior lawyer. He convinced the judges

that the mistake had crept into the accounts inadvertently. The mistake was corrected and the award was modified without any loss to his client. Gandhiji's reaction on his success was: "I was delighted, so were my client and senior counsel; and I was confirmed in my conviction that it was not impossible to practise law without compromising truth."

It will not be out of place to mention here one more instance to show how he stuck to truth in the profession of law. While conducting a case in Johannesburg, he discovered that his client had given him false facts. He requested the court to dismiss his case. The counsel appearing on behalf of the other side was astonished, but the presiding officer of the court appreciated his morale and character. The client was scolded by Gandhiji. In fact he had brought this false case to Gandhiji in the hope to win it on the basis of his reputation, which had spread far and wide, that he accepted only those cases which were based on true facts.

Gandhiji was not only honest and true in accepting genuine cases, he was honest to his clients also. He never tried to conceal his ignorance of any particular aspect of law to his clients and colleagues. Whenever he saw that he required the guidance of a senior counsel, he never hesitated in asking his client to pay extra

fee to the senior for his advice. He often discussed his difficulties in law with his colleagues only to gain more knowledge. He was never ashamed of admitting his narrow knowledge on particular laws. The path of truth adopted by Gandhi helped him to increase his clientage and after some time it became difficult for him to cope with his legal work single-handed. He, therefore, invited Mr. Polak to join him in his profession. He engaged Miss Schlesin also as his Secretary.

Path of 'Truth' followed by Mahatmaji saved his intimate and trusted friend Rustamji of South Africa from imprisonment. Rustamji was so near to him that he used to consult Gandhiji even in his domestic and private affairs. He had, however, not informed Gandhiji that he was carrying on smuggling business. When this was detected by Government authorities, it was evident that he will be sent to jail. It was at this stage that he broke the news to Gandhiji and requested him to save him. Gandhiji persuaded him to accept his guilt and he would exercise his utmost influence to save him. He met the Attorney General and Customs authorities and made them to agree to impose fine on his friend and not to take up the case in law court. This incident saved his friend from going to jail, but for Gandhiji it was a victory of truth and honesty. His faith in truth became all the more rigid.

REVISIONAL JURISDICTION UNDER S. 115, CIVIL P. C.

(By KEWAL CHAND SAMDERIA, *Advocate, Jodhpur*)

The perusal of series of judicial precedents on the subject delivered by Privy Council, Supreme Court of India and various Indian High Courts inspired me to express a few words on the subject. I feel that the ratios laid down in the decisions are not consistent and it requires a full reconsideration. It is true that the scope of S. 115 of the Code of Civil Procedure extends to such numerous circumstances that it is not possible to demarcate with each set of circumstances yet the range of its scope can be demarcated by laying down certain fundamentals.

For example in *Rajah Amir Hasan Khan v. Sheobaksh Singh*, (1883) 11 Ind App 237, the Privy Council held that the Judicial Commissioner had no jurisdiction in the case to interfere under S. 622 of Act X of 1877 (similar to S. 115, Civil P. C.) with the decree of the District Judge, against which no appeal lay, on the ground that the Courts below have

exercised their jurisdiction illegally and to the material prejudice of the appellant. It was further observed, "It appears that they had perfect jurisdiction to decide the question which was before them and they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

Thereafter in *Balakrishna Udayar v. Vasudeva Ayyar*, A. I. R. 1917 P. C. 71, the Privy Council observed that S. 115, Civil P. C. applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section does not apply to conclusions of law or fact in which question of jurisdiction is not involved. But the interference by the High Court on the ground that there was a breach of principle of natural justice viz. the other party was not given opportunity of hearing, was held valid.

In a later decision reported in A.I.R. 1949 P. C. 156 the Privy Council placed reliance on (1883) 11 Ind. App. 237 (P. C.) and A.I.R. 1917 P. C. 71 and further held that the section empowers the High Court to satisfy as to (1) whether the order of the subordinate Court is within its jurisdiction, (2) that the case is one in which the Court ought to have exercised jurisdiction, and (3) that in exercising jurisdiction the Court has not acted illegally; that is, in breach of some provision of law or with material irregularity, that is, by committing some error of procedure in the course of trial, which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere. In this case the High Court interfered on the ground that the construction of the "will" by the District Court was entirely out of accord. The Privy Council held that the interference in the case by High Court was unwarranted and out of the purview of S. 115, Civil P. C., and hence set aside the same.

But in a decision reported in A. I. R. 1949 P. C. 239 the Privy Council seems to have taken a somewhat different view. In this case the question was whether the loan in question was a "commercial loan" or not within the meaning of the Bengal Money-lenders' Act. The subordinate judge held that the loan in question was a commercial loan and therefore the Act was not applicable to that. In revision against that order under S. 115, Civil P. C., the High Court held that the loan in question was not a commercial loan and therefore the subordinate judge ought to have proceeded with the matter under Ss. 30 and 36 of the Bengal Money-lenders' Act. While deciding appeal against this decision of the High Court the Privy Council held that the High Court, upon the view which it took that the loan was not a commercial loan, had power to interfere in revision.

In the case reported in A.I.R. 1949 P. C. 239 the subordinate judge had jurisdiction to decide whether the application made before him related to a loan to which the "Act" is applicable or not and for that purpose he had jurisdiction to decide that what type of loan it was. Now applying the ratio laid down in the earlier Privy Council cases (viz., (1883) 11 Ind. App. 237 (PC), A.I.R. 1917 P.C. 71 and A.I.R. 1949 P. C. 156) we come to this that the subordinate judge had jurisdiction to decide whether the loan was a commercial loan or otherwise and come to a conclu-

sion whether rightly or wrongly that it was a commercial loan. Will in such circumstances High Court have any jurisdiction sitting under S. 115, Civil P. C., to interfere according to these earlier decisions? I think certainly not.

Now in *Keshardeo v. Radhakishen* AIR 1953 S C 23 the Supreme Court has placed reliance on above mentioned Privy Council decisions and on the "order of reference" made by Hon'ble Vivian Bose J. of the Nagpur High Court (as he then was) reported in AIR 1948 Nag 258 (FB). Thereafter in a case reported at AIR 1966 S C 439 their Lordships of the Supreme Court have held, "No doubt by an erroneous construction of the relevant provisions the principal judge of the City Civil Court granted relief of possession to the respondent to which he would not have been entitled had the provision been rightly construed. Even so, as observed by this Court in *Abbasbai v. Gulamnabi*, AIR 1964 SC 1341 at p. 1346, an erroneous construction placed upon the relevant provision would not furnish a ground for interference under S. 115 of the Code."

In a recent case reported in AIR 1968 SC 1355, *Premraj v. D. L. F. H. & Co. Ltd.*, their Lordships of the Supreme Court held the High Court entitled to interfere under S. 115, Civil P. C., on a point decided by the trial Court whether in suit for declaration of a particular contract void having been obtained by undue influence can as alternative plea of specific performance of the same be taken. Their Lordships held, "It is manifest that in holding that the appellant was entitled in the alternative to ask for the relief of specific performance, the trial Court had committed an error of law and so had acted with material irregularity or illegality in the exercise of its jurisdiction within the meaning of S. 115 (c) of the Civil P. C. It was therefore competent to the High Court to interfere in revision with the order of the trial Court on this point. To put it differently the decision of the trial Court on the question was not a decision on a mere question of law but it was a decision on a question of law upon which the jurisdiction of the trial Court to grant the particular relief depended. The question was therefore one which involved the jurisdiction of the trial Court; the trial Court could not, by an erroneous finding upon that question, confer upon itself a jurisdiction which it did not possess and its order was therefore liable to be set aside by the High Court in revision."

Now very recently a Full Bench of the High Court of Rajasthan in *Harakchand v. State of Rajasthan* has held that where a trial Court held a document to be inadmissible in evidence because of its being unregistered the High Court has no jurisdiction under S. 115, Civil P. C., to interfere with the trial Court's order however erroneous it might be. While delivering the judgment, Hon'ble Chief Justice Shri D. M. Bhandari observed, "Thus clause 'C' is applicable only if the Subordinate Court appears to have acted in the exercise of its jurisdiction illegally or with material irregularity. This clause is to be construed as meaning "if the Subordinate Court appears to have acted in the matter of exercise of its 'jurisdiction illegally or with material irregularity' not as meaning 'if the subordinate Court appears to have acted while exercising its jurisdiction illegally or with material irregularity.' Illegality or material irregularity must have occurred in the manner in which the jurisdiction of the subordinate Court is exercised i. e. in the manner in which that case is heard or decided."

Now thorough perusal of the above cases clearly shows the inconsistency in the view of Privy Council cases. The case reported in AIR 1968 S C 1355 has extended the scope of Section 115, Civil P. C. very widely whereas the full Bench decision in *Harakchand's* case has narrowed it undesirably and left the matter entirely to the discretion of a Judge instead of laying down certain principles for exercising jurisdiction under S. 115, Civil P. C.

In my humble opinion certainty and clarity in law is an essential element of an effective legal system. Therefore, it is expedient to demarcate with certainty the jurisdiction under S. 115 of the Code of Civil Procedure.

The Code of Civil Procedure provides for a well planned machinery for administration of justice. It further provides certain checks against perpetration of injustice and for that end it provides for appeals, second appeals, revision, and review, etc. In respect of certain decrees and judgments of lesser value it provides for one appeal only. In other more important decrees and judgments it provides for second appeals also. There are some types of orders also against which appeals have been provided for. But it was not possible to provide the right of appeal against each and every order relating to procedure, yet, it was essential to have a check on per-

verse judgments and orders regarding important matters of jurisdiction and procedure also and with that end S. 115, Code of Civil Procedure has invested the High Courts with supervisory jurisdiction over the subordinate Courts.

Clauses (a) and (b) of S. 115, Code of Civil Procedure provide that where the subordinate court has exercised a jurisdiction not vested in it or has failed to exercise jurisdiction vested in it, the High Court has power to revise the same, and cl. (c) of S. 115, Code of Civil Procedure provides very specifically that the High Court has jurisdiction to revise if the subordinate court appears to have acted in the exercise of its jurisdiction illegally or with material irregularity.

There is not much controversy as regards the interpretation of Cls. (a) & (b) of S. 115 yet Cl. (c) has always been a great controversial point in judicial precedents as referred above.

In some judgments this clause (c) has been restricted to matters of jurisdiction only, in some of the judgments it has been restricted to matters of *res judicata* and limitation only, in some of the judgments the illegality or material irregularity has been restricted to in the matter of exercise of its jurisdiction only and was not extended to any illegality or material irregularity while exercising jurisdiction. In my humble submission all these views are one-sided and do not appear to be sound.

For defining the scope of clause (c) we should see that it refers to those illegalities or material irregularities which a Court commits in the exercise of its jurisdiction. A plain and simple grammatical meaning of this phrase 'to have acted in the exercise of its jurisdiction illegally or with material irregularity' leads us to following conclusions:

(a) That it refers to the action of the Court (to have acted).

(b) That the above referred action of the Court was done by the Court in the exercise of its jurisdiction. More elaborately we may say that a Court having jurisdiction has acted exercising the same.

(c) That the above referred action of the Court was made either illegally or with material irregularity.

From the above analysis it is quite clear that this clause refers to 'an action of a Court in exercise of jurisdiction' and is not restricted only to 'the manner in exercise of jurisdiction'. If the view of the Full Bench decision of Rajasthan

High Court in Harakchand's Case delivered by the Hon'ble Chief Justice Shri D. M. Bhandari is taken to be in conformity with S. 115, Civil P. C. then we come to the conclusion that no action of a Court while exercising jurisdiction will be subject to S. 115, Civil P. C. Even if a Court having jurisdiction to deal with a suit, wrongly decides while exercising jurisdiction that the suit is barred by the principle of *res judicata*, that will not be subject to the revision under S. 115, Civil P. C. because it has been held while exercising jurisdiction.

Further, the words 'illegality' and 'material irregularity' have also been subjected to numerous interpretations. In a case reported at A I R 1949 P C 156 the Privy Council has given the meaning to the word 'illegally' as 'in breach of some provision of law' and the words 'material irregularity' as 'committing some error of procedure'. With all respects I disagree with them. Here, in this clause 'C' both the words 'illegally' or 'with material irregularity' refer to the action of the Court in the exercise of its jurisdiction.

Therefore in my opinion both the words 'illegally' and 'material irregularity' refer to procedure only. Therefore 'illegally' refers to an action of the Court which is contrary to the law (i.e. in breach of mandatory provision of law) and 'material irregularity' refers to an action of the Court which though not contrary to mandatory provision of law yet not in exact conformity with the law (i.e. in breach of directory provision of law) which is material in the sense that it leads to injustice.

Now, on the basis of above discussion, in my humble opinion the jurisdiction under S. 115, Civil P. C. extends to all procedural illegalities and material irregularities, which result in injustice (except mere wrong decisions either of fact or of law which has no relation to procedure) and against which no appeal lies. This is a supervisory jurisdiction of the High Court over the subordinate Courts and to guard the litigants against injustice being caused to them by following a procedure contrary to law.

PRECEDENT : SCOPE OF RECONSIDERATION

(By PRITHWIS BAGCHI, *Advocate, Calcutta 47.*)

In the case reported in AIR 1969 SC 864 : (1969) 2 S C A 351, the Supreme Court overruled the Full Bench decision of the Patna High Court reported in AIR 1961 Pat 321. The ratio of the decision is: "In law finality is of the utmost importance. Unless so required in the public interest, questions of law finally settled by a long course of decisions should not ordinarily be disturbed and it is all the more so in the case of an interpretation of law effecting property rights." Following long series of decisions the Supreme Court set aside the judgment of the Patna High Court.

Though the Full Bench decision of the Patna High Court was overruled by the Supreme Court, the merit of it appears to have been tacitly approved, for the Supreme Court held, "we agree with the Full Bench that the ratio of these decisions is open to question." The decisions which ultimately prevailed hold that if the head lease was held for agricultural purpose, the parcels of land thereunder in occupation of the sub-lessees under the said head lessee would also be agricultural tenancies, notwithstanding the mode or purpose of user. This proposition of law relating to real property has been

extended further to enunciate that the original purpose of tenancy will govern the incidents. To express it in local legal vocabulary, a raiyat will be an agricultural tenant no matter whether he uses his land for non-agricultural purpose or has raised his homestead thereon and a tenant holding land under him would be an under-raiyat. Apart from the cases referred to in the judgment, ranging from (1904) 8 Cal WN 454 to A I R 1941 Cal 606, there are recent decisions of Calcutta High Court endorsing the same view, for example, (1959) 63 Cal WN 939; 70 Cal WN 462; A I R 1967 Cal 191 and (1968) 72 Cal WN 796.

There is, however, decision of a single judge of the Calcutta High Court upholding a contrary view. It was reported in 57 Cal WN 703: AIR 1954 Cal 28 (Achala Sundari's case). The Supreme Court in the instant decision follows the reasoning of Justice Bejon Kumar Mukherjee, (as he then was), reported in A I R 1941 Cal 606, referred to supra.

In upholding the principle of *stare decisis*, the Supreme Court relied on dictum of the House of Lords pronounced in *Harding v. Howell*, (1889) 14 A C 307 and *Murphy v. Deichler*, 1909 A C 446 and

quoted with approval in Craies on Statute Law.

Our Supreme Court is not bound by the decisions of the House of Lords or of the Judicial Committee of the Privy Council although those are of immense persuasive value. It is also not bound by its own precedents, far to speak of the decisions of the Subordinate Courts, viz. High Courts. The question, therefore, was absolutely open before the Supreme Court and the principle of finality of the law ought not to have stood in the way of correcting a recognised error. I would humbly submit, had the decision of the Full Bench been upheld, it would only have prospective application and so ineffective with regard to any vested right to property.

The decision under review apparently stands on a principle. Anglo-Saxon jurisprudence of recent times giving substantial importance to the value of precedents, particularly their binding effect on the lower courts in the hierarchy, appears to be of the view that the House of Lords should be given power to correct its own mistakes. In *R. v. Bulton* (1965) 3 W L R 1131, the House of Lords overruled a precedent of its own which had been a statement of law for over a century and had found place in text books. Reasons for which the doctrine of precedent is justified are—that it makes the law certain, it is adequate proof of custom, it shows respect for the opinion of one's ancestors, and that convenience demands that a question once decided should not be subject to re-argument. All these reasonings contain some element of truth. But it is eternal difficulty of law to reconcile rule and discretion.

In Australia, wider theories have been enunciated by the High Court, and since that Court can overrule its decisions, there is no great danger of premature rigidity. For two reasons strict adherence to precedents at the cost of reason and legal sequence cannot be supported. First, it fetters the progress of law which ought to have concomitance with the progress of society, and secondly it tends to make the law a 'wilderness of single instance.' No doubt, a Division Bench of a Court differing from another Division Bench on a point of law is obliged to refer it to a larger Bench. But the Full Bench of a High Court should have the power to review its earlier decision so as to rectify a glaring error or to remedy some social

injustice which in the current social context the earlier decisions might have failed to eradicate. Interpretation of precedents is rather an art than a science. Being thus subjective, it becomes contradictory to social conscience unless the right of the ultimate Court to strike a synthesis is to be accepted as a principle of jurisprudence.

The decision under review, it is humbly submitted, in accepting the principles of stare decisis, ignored broad social facts which abundantly necessitated rectification of the case law.

Points involved in the case centre round the incidents of holdings which because of conversion lost agricultural character. It is to be noted that due to the growth of population, industrialisation, extension of urban areas and conglomeration of wage earners in suburban areas, vast tract of agricultural land has been converted into non-agricultural holdings. In West Bengal law provides for the machinery to grant such conversion (vide S. 72 of the West Bengal Non-Agricultural Tenancy Act). But the rate of actual conversion stands in great contrast with the number of formal applications which appear to be too insignificant. And instances also are numerous where from long before the enactment of the West Bengal Non-Agricultural Tenancy Act of 1949, homesteads unconnected with agriculture were constructed on agricultural land after raising the level or otherwise developing the land and the superior landlords too accepted the change as natural. The purpose of the tenancies in suburban areas also underwent natural alteration, since residential blocks, factories, barracks and hospitals were erected on those lands. To apply the law regarding agricultural land to them in contradistinction from similar land held under non-agricultural tenancies is certainly for making distinction without differentia. In applied law, however, the divergence is substantial. For example, the right of pre-emption is dissimilar in respect of the two types of tenancies concerning lands similarly situated and similarly enjoyed. So also the ceiling upon landholdings in respect of these two types of tenancies is also dissimilar, for in West Bengal there is, as yet, no ceiling regarding land held under non-agricultural tenancy, distinct from non-agricultural land of a raiyat. Therefore, to apply Bengal Tenancy Act or Bihar Tenancy Act to such lands as are held for specific non-

agricultural purposes by grants from raiyat or enjoyed as such for a considerable time past, even without any express grant but of course without any objection, is to go against the stream of historical development. To ignore these broad facts only to uphold the principle of stare decisis is paradoxical, although the fiction could have been dispelled simply by rectifying a recurring error.

The remarks of Lord Gardiner in (1965)

3 W L R 1131 is apposite for recapitulation here :

"The only result of the error has been that during that period, the citizen who has been the victim of affray in a private place has in practice been deprived of the protection of the law. That is not itself any reason to continue the deprivation".

If certainty of law perpetuates judicial error, in all fairness, it should be corrected before long.

REVIEWS

INDIAN COMPANY LAW. By Avtar Singh. Published by Eastern Book Co., 34 Lalbagh, Lucknow. Second Edition 1969, Price Rs. 12.50.

"In the realm of Company Law India is traversing new ground well away from the beaten track of Conventional Legislation," observed Mr. Vera A Da Silva. Innovations have been made to deal with problems peculiar to Indian scene. The recent decisions of the Supreme Court and the High Courts have given further guide lines in the matter of winding up under "just and equitable" clause, as well as in the matter of limiting the scope of doctrine of fraudulent preference.

The book under review keeps in tune with the changes. The subject has been well presented. There is a useful subject index as well as the table of cases. G.G.M.

HANDBOOK ON MERCANTILE LAW (INCLUDING INDUSTRIAL LAW) 6th Edition, By E. Venkatesam, B.A., M.L., Judge, High Court of Andhra Pradesh, Assisted by E. V. Bhagiratha Rao, B.Sc., LL.B., Advocate. Madras Law Journal Office, 1969. pp. xix and 655. Price: Rs. 18 (Postage Extra).

Mercantile law, as it exists today, is not to be found in our ancient texts which enunciated principles of Contract Law sufficient to meet the requirements of those times. Indian Mercantile Law is founded on the Mercantile Law of England, as modified by the various Acts of the Central and Provincial Legislatures in India. Prior to the passing of the Indian Contract Act IX of 1872, the English Common Law as modified to suit Indian conditions was applied for sometime by the British Indian Courts. The Indian Contract Act, 1872 substantially embodies the principles

of the English Law, and has to be applied in all Courts in India and to persons of all denominations; the various sections referred to in the volume under review relate to this Act. It repealed several enactments, but did not supersede the native usages and customs that are not inconsistent with it.

The book is divided into two parts. Part I deals with the general view and definition of contract offers, acceptance and form and consideration as well as all its other aspects. It includes different sections on indemnity and guarantee, bailments, agency, sale of goods, partnerships, and negotiable instruments. Part II covers Companies, securities, carriers and shipping, insurance, arbitration, insolvency, Societies Registration Act, Trade Unions Act, Factories Act, Industrial Disputes Act and Workmen's Compensation Act. There is a separate chapter for industrial legislation like Industries (Development and Regulation) Act, Employees State Insurance Act, Employees Provident Funds Act, Payment of Wages Act, Minimum Wages Act, Employer's Liability Act and the Fatal Accidents Act.

In the present edition of the book all the statutory amendments, in particular the Companies (Amendment) Act 31 of 1965, 34 of 1966, 37 of 1966 and 17 of 1967 and the Marine Insurance Act of 1963 have been incorporated. Also included in it are the provisions of the Banking Companies (Amendment) Act of 1958, extending social control over the Banks, and the Banking Companies (Acquisition and Transfer of Union Undertakings) Act 22 of 1969, nationalising fourteen banks in the country. All important decisions of the Supreme Court upto the end of March 1969 have been noticed and efforts made to revise the text whenever necessary.

The book should meet with the requirements of students appearing for the LL.B., B.Com. degree examinations of Indian Univer-

cities and students appearing for Chartered Accountants' Examination and also those appearing for the All India Competitive Examinations. The statutory provisions of the law have been stated in simple language, omitting the procedural and technical details, in order to meet the needs of the student. The names of the parties and the citation of cases have been relegated to the footnotes as a matter of convenience. A complete table of cases and an alphabetical index, both with their relevant page numbers, add greatly to the usefulness of the volume. R.S.S.

PAYMENT OF BONUS (LAW AND PRACTICE IN INDIA). By F. L. Berarwalla, M.A., LL.M., Advocate, Bombay High Court and Supreme Court of India. With a Foreword by Justice V. A. Naik, President, Industrial Tribunal, Maharashtra. Vora & Co., Publishers (Pvt.) Ltd., 3 Round Buildings, Kalbadevi Road, Bombay 2. Pp. xii and 590, Price Rs. 50/-.

The volume under review is believed to be the first comprehensive treatment of the subject of bonus payment in industries. The working of the Labour Appellate Tribunal for India formerly for the payment of bonus, which had held the field for 14 years is known to have created many problems and resulted in discontent among both workers and employers. The Bonus Commission was therefore appointed by the Government of India at the instance of the Supreme Court to recommend a simple bonus formula keeping in view the difficulties encountered by various industrial tribunals in deciding bonus disputes. The idea was to minimise industrial disputes regarding payment of bonus and to evolve a uniform formula for determining the quantum of profit bonus instead of leaving the same to be determined by industrial tribunals.

Mr. Berarwalla, who is also the author of "The Theory and Practice of Provident Funds in India", has written the book in the form of a commentary on the Payment of Wages Act, 1965.

It is well to remember that the National Commission of Labour, while conceding that the quantum of bonus can be settled by collective bargaining, was of the opinion that the formula which may serve as a guideline for such settlement has to be statutory and therefore, wanted that the Payment of Wages Act, 1965 should be given a longer period of trial.

The commentary on the various sections of the Act is exhaustive and well documented,

preceded by a useful synopsis. To make it more useful as a reference work, chapters on commutations of bonus, jurisdiction of tribunals, writ petitions, bonus linked with dividends, bonus settlement agreements and the relevant provisions of the Draft Labour Code have been included. The case law cited has been brought upto 1st October, 1969, and all the decisions of the Supreme Court, High Courts, National Industrial Tribunals and the Bombay Industrial Tribunals have been included.

The Introduction to the book deals succinctly with the evolution of the bonus concept, the Labour Appellate Tribunal formula, the origin of the Bonus Commission, its recommendations and Minute of dissent, the Government's decision and the Statement of Objects and Reasons of the Payment of Bonus (Amendment) Act, 1969. Intended for legal practitioners, chartered accountants, trade union leaders, company executives and Government officials dealing with the payment of bonus cases, the book should really prove useful to those for whom it is intended. As observed by Mr. Naik in the foreword, the author has taken pains to make his book a complete guide for all those concerned with the law on the subject. The subject index at the end of volume enhances its usefulness.

R.S.S.

THE DETROIT RIOT OF 1967. By Hubert G. Locke. Wayne State University Press, Detroit, Michigan 48202, U. S. A., pp. 160 with Map and 8 Photographs, Price \$. 6.50.

It was in 1942 that Gunnar Myrdal, the Swedish social economist, expressed his optimism that "the future looks fairly peaceful in the North" of the United States. About Detroit, however, he had sounded a note of caution; in the spring of that year it had experienced a clash between Negroes and Whites and Myrdal described that City as being "almost unique among Northern cities for its large Southern-born population and for its 'Ku Klux Klan.'" In less than a year later, Detroit erupted in the longest and most violent riot since the days of World War I. But the experience of mass violence which broke out in Detroit in 1967 was said to be more massive in its destruction than the 1943 riot, but more difficult to explain what happened and why it happened.

During the last week of July 1967 Detroit went through a week of terror, the worst civil disorder in 20th century Urban America. Forty-three persons were killed and \$. 50 million in property was destroyed and the city itself was left in a state of panic and

confusion from which it is believed to have not yet recovered. The book under review seeks to tell the story of this civil explosion in every detail. This is perhaps the first authentic account to give details of the looting and arson, and of the problems faced by the police and the incredible problems faced by the Courts in those days. It deals also with the aftermath of the upheaval in the emergence of new problems and explores many of the critical questions that confront contemporary America. It offers observations on the problems of the police system and on redefining urban law enforcement in American society.

The author of the volume under review is specially well-fitted for the work he has undertaken. Himself a native of Detroit, his career has been intimately related to Detroit in administrative posts in a University, in a civil rights organisation, in the city police department and as a Minister of one of the city's churches. At the time of the 1967 Detroit riot he was administrative assistant to the Detroit Police Commissioner and was, therefore, well qualified to assess the experience of July 1967 and to find their significance for America's fifth largest city — Detroit.

R.S.S.

THE ARBITRATION ACT, 1940. By N. Basu, B.L., 6th Edition. Edited by Sudhir Kumar Bose, M.A., LL.B., Advocate, Supreme Court of India. Eastern Law House Private Ltd., 54, Ganesh Chunder Avenue, Calcutta-13, 1969. Pages 842 and CXL Price : Rs. 28/-.

Until 1940 the law as regards arbitration was contained in the second Schedule to the Civil Procedure Code and the Indian Arbitration Act of 1899. The Special Committee on the Civil Procedure Code, 1908, had placed the arbitration clauses in a special Schedule of the Civil Procedure Code, although they would have preferred to eliminate them altogether from it. But they hoped that in due course these clauses could be transferred into a comprehensive Arbitration Act. And that is the Arbitration Act, 1940.

The Arbitration Act, 1940 which made various improvements in the old laws and incorporated certain new sections for the smooth working of arbitration proceedings, standardised the law relating to arbitration throughout British India. As the old rulings are not helpful in the interpretation of this Act, some of them having become obsolete, the volume under review has tried to indicate these changes and gives an exhaustive commentary under each section. Where a case has been reported in more than one report, all the cross-reference as well as the name of

the case have been given, in view of the fact that all law reports are not available in every library. The principle underlying each section has been thoroughly discussed because it is absolutely necessary for understanding any particular section. All the older Acts, both Indian and English, have been given in the Appendices. For a fuller appreciation of the reasons for the changes made by the Act, an extract from the report of the Civil Justice Committee (1924-25) has been appended. The Appendices include the rules framed by the High Courts under S. 44 of the Act, the rules framed by the different Chambers of Commerce, extracts from the Civil Procedure Code of 1859, 1862, 1908, and the Indian Arbitration Act, 1899 and the English Arbitration Act, 1899. The contents themselves are divided into seven different chapters, the first one being introductory, arbitration without the intervention of a Court, arbitration with the intervention of a Court where there is no suit pending and arbitration in suits, are covered in the next three chapters, while the following two deal with appeals and general topics.

The first edition of this volume, useful alike to the Bench and the Bar, appeared in 1942. All cases and amendments upto 31st July 1960 as well as the Arbitration (Protocol and Convention) Act of 1937 with annotations found a place in the fourth edition, which also included for the first time a Case Index. In the fifth edition, which appeared in 1965, upto-date case law was for the first time duly paragraphed and serially numbered. In the latest edition the editor has revised the commentary and added some new matters. The cases and amendments upto 31st of July 1969 have been incorporated in it. Quite valuable from the practical point of view are the alphabetical table of cases and subject index.

R.S.S.

THE MARINE INSURANCE ACT, 1963 : By A. K. Bhattacharjee, Barrister-at-law, Calcutta. 1st Edition 1969. Eastern Law House, Private Ltd., 54 Ganesh Chunder Avenue, Calcutta. Pp. xxvii & 242.....Price Rs. 14-00 or £ 2 or \$ 7.

The Indian Navy and Indian Shipping have since Independence undergone considerable expansion. But there was no Indian legislation governing marine insurance, Indian Marine insurance continuing to be governed by the British Marine Insurance Act of 1906. At the same time insurance contracts in India also became subject to the provisions of the Indian Contract Act, 1872. But the Insurance Policy form used in India is the English Form. It was possible for the

wordings of an Indian Marine insurance policy to be at times in conflict with the provisions of the Indian Contract Act, leading to unsatisfactory situations in which the Court's interpretations are the last word on the subject. In order, therefore, that Indian marine insurance may develop on sound lines, the Indian Parliament felt it necessary in 1963 to introduce legislation consistent with Indian conditions. Thus it was that the law relating to marine insurance was codified in the Marine Insurance Act, 1963, by copying *verbatim* the language of the corresponding British Act of 1906. That may perhaps be taken to show that the customs, conventions, and usages of trade prevailing in this country in 1963 were more or less identical with those obtaining in England in 1906. That more than half a century should have been allowed to lapse only indicated the stagnant state of the Indian Navy and Indian Shipping during the period. Since India attained Independence, however, there has been considerable expansion of both and the lacuna felt by the want of Indian legislation on marine insurance was filled by the Act which is the subject-matter of this volume.

The wordings of a Marine Insurance Policy are based principally on mercantile customs & business conventions. These customs & conventions are governed in India by the Indian Contract Act, 1872, which embraces all types of contract, including marine insurance, which is a special type of contract. Indian decisions on the sections of the Marine Insurance Act have been few in recent years, so much so that one has to fall back upon English decisions on each and every section of the Marine Insurance Act, 1963. As a matter of fact, it is stated that each section of the Act—both English & Indian—is based on a chain of English judicial decisions. The most important case decided in 1967-68 in England was that in which the House of Lords settled the rule relating to the measure of damages in the case of late delivery of cargo at the port of discharge (*Annual Survey of Commonwealth Law*, p. 802).

According to the Marine Insurance Act, a Contract of Marine Insurance is an agreement whereby the insurer undertakes to indemnify the assured against marine losses, i.e., the losses incidental to marine adventure. And it is deemed to be included when the proposal of the assured is accepted by the insurer, whether the actual policy has been issued or not. The volume under reference gives us the text of the

Marine Insurance Act, 1963 with the author's commentary on each section, preceded by a useful synopsis. The different sections of the Act have been grouped together under Marine Insurance, Insurable Interest, Insurable value, Disclosure and Representations, the Policy, Double Insurance, Warranties, etc., the Voyages Assignment of Policy, Premium and Loss & Abandonment. Other heads include partial losses including salvage and general averages and particular averages, measure of indemnity, rights of insurer on payments and return of premium. The text and notes are followed by Schedule which gives the form of Policy, and annexed to it are definitions of the terms and expressions in the policy. In the appendices are given the York Antwerp Rules, the Insurance Cargo Clauses and the Institute Time Clauses. There is an Index at the end of the volume.

R.S.S.

CONVEYANCING (A THEORETICAL AND PRACTICAL STUDY OF DRAFTSMANSHIP IN INDIA): By C. C. Anajwala, B.A. (Hons.) LL.B., Project Officer (Legal), Agricultural Finance Corporation Ltd., Bombay. C. Jamnadas & Co. Educational and Law Publishers, 146, C, Princess Street, Bombay-2, 1297/167 Relief Road, Ahmedabad 1. First Edition 1969 pp. xxi & 378 . . . Price Rs. 15/-.

"Conveyancing" connotes an instrument by which the right to any property passes from the vendor to the vendee and is not strictly restricted to the drafting of a conveyance; it covers the drafting of any document, whether unilateral or not, recording any conceivable transaction between the parties. It seems to be true that several legal instruments or parts thereof have turned out to be illegal and ineffectual when drafted by untrained persons. Before a legal document can be drafted it is necessary to grasp the law on the subject in view of the risk involved in drafting by unqualified laymen. It is not surprising in these circumstances that some State Governments should have framed rules under the Indian Registration Act, 1908 for licensing document writers after holding qualifying tests, e.g. Bihar Document Writers' Licensing Rules, 1968.

In the book under review: the author has tried to explain the general principles of conveyancing in the introduction under several heads, such as Deeds poll and Indentures, Figures and Words, Intention,

Statutory requirements, Commencement, Place and Date, Parties and their description, Abbreviations, Recitals, Narrative and Introductory, Testation consideration Receipt, operative words, Schedule of Property, Exceptions and Reservations Covenants and Obligations, Delivery of Title Deeds, Attestation and Construction of deeds. Each topic of conveyancing as generally practised in India is covered and arranged alphabetically. Theoretical Notes have been prepared having regard to the law in force and the latest case-law. Model forms of Conveyancing are provided care being taken to avoid repetition of forms, only the minimum number of forms necessary for a comprehensive study of the subject is given. The theoretical notes also indicate the latest rates of stamp duty applicable to different types of instruments as obtaining in the different States; these being susceptible to amendments to suit the needs of the State Governments, it is advisable to check the local Stamp Acts for ascertaining the rate applicable in a given case. These notes also show whether the instrument requires compulsory registration.

The subject is treated under more than thirty heads or sections, each section being introduced by the theoretical notes followed by their model forms to which we have already referred. These section titles cover adoption, agreements, apprenticeship, arbitration, assignment of actionable claims, powers of attorney, bond, composition, compromise & family settlements, easements, exchange, gift, guarantee, hire and hirepurchase, indemnity, lease, licence, mortgage and negotiable instruments. Other section titles cover partition, partnership, patents, rectification and modification of deeds; release, rescission of contract, sale, separation and divorce, Service contracts, Trusts, settlements, endowments and waqfs and wills.

Speaking of wills, it is stated that a millionaire on his deathbed cannot in a huff will away his millions to religious and charitable institutions in order to cut off his near relatives with a shilling unless the will is prepared a year or more before his death. As regards partition, it is said to be a process by which co-parceners of any property agree to divide it among themselves, and on partition each sharer is said to have a right to his slice of the property, not merely its money value (pp. 203-4). Model form No. 126 (P. 211) gives the deed of partition and release between two branches

of Hindu co-parceners. These model forms are of great importance in draftsmanship, that being one part of conveyancing, the other being investigation of title.

The table of cases and the general index are useful to the busy lawyer and student of law. The Appendices include model forms in a comprehensive way for the mortgage of a lease-hold; deed of conveyance of land to a co-operative housing society; deed of conveyance of land and dwelling house, and contract of service as managing director of Corporation. On the whole the book should be of practical guidance to the practising advocate and student of law.

Mr. Anajwala, the author, was for long in the Secretariat service of the Government of Bombay, where he was concerned with the interpretation of statutes and other legal matters. With this background he joined the legal profession in Bombay. He is at present working with a company established by the Indian Banks' Association for facilitating the flow of increased financial resources for modernising Indian agriculture. R.S.S.

CO-OPERATIVE LAW IN INDIA: By M. D. Vidwans, M.A.L.L.M. Advocate. 2nd Edition, July 1969 with a foreword by P. B. Gajendragadkar, Ex-Chief Justice of India. Published by the Committee for Co-operative Training (National Co-operative Union of India), 34 South Patel Nagar, New Delhi 8, Pp. xx and 276, Price Rs. 10.

This is the second edition of Mr. Vidwans's authoritative Commentary on the provisions of the Model Co-operative Societies Bill circulated by the Government of India for the guidance of State legislatures in framing enactments in their respective States with suitable local modifications. At the end of 1965 there were said to be 3,56,000 co-operative credit institutions of all types with a membership of 450 lakhs in India. Mr. Vidwans discusses the various problems raised by the Bill and gives a comparative view of the relevant provisions of the Co-operative laws obtaining in the different States. Since many new State Co-operative Acts have been passed subsequent to the publication of the first edition, new material has had to be added from the new or amended Acts. References to important cases decided by the High Courts and the Supreme Court have been brought upto-date and some of the

decisions of State Co-operative tribunals, where they have started functioning, have been included in the Commentary; references to other enactments, whenever relevant, have also been included.

The book itself has been divided into three separate parts. Part I deals with important matters relevant to the study in a connected way. It contains seven sections, of which the first deals with the place of Indian Co-operative laws in the schemes of co-operative laws of the world, and the second gives the historical retrospect of the development of the law in India. The third section is devoted to an explanation of co-operative principles and the fourth to a description of the economic characteristics of co-operative bodies. Section V elaborates the legal frame-work of co-operative association, explains the terminology and the difference in the connotations of the same terms as used both in Co-operative law and the law of commercial corporations. The general discussion is wound up with an explanation of the features of Co-operative law in the next section, while the seventh and last section deals with the bye-laws meant for the internal management of co-operative societies. The synopsis given for each section and chapter under the heading of "Detailed contents" are a useful feature as well as the table of cases given at the beginning, but there is no index.

The author of the work under review is specially well qualified for the work he has undertaken. He was Professor in the Law College, Poona, and also in the erstwhile Co-operative Training College, Poona. He was a Member of the Committee on Co-operative Law set up by the Government of India in 1956 to review the Co-operative legislation in the different States and to recommend a uniform Co-operative law. As pointed out by Mr. Gajendragadkar in order to achieve success in the field of co-operative activities, co-operative institutes should function efficiently and serve as centres of training for co-operative workers. The commentary under reference should achieve the purpose the Committee on Co-operative Law had in view by being placed in the hands of the teachers of co-operative training institutes and their students. The references to the sections of State laws will enable the teachers

readily to refer to the local laws and supplement their instructions. It is needless to add how useful the volume can be also to students of co-operation in the colleges and universities, the field workers of the co-operative department and other active workers in the movement.

But the Model Co-operative Societies Bill, of which so much has been written, has a long history behind it. Convinced that in a predominantly agricultural country like India the best means of developing its agricultural wealth is by pursuing the path of co-operation. The Government of India passed in 1904 the Co-operative Credit Societies Act, which was an all-India Act. It provided for the formation of credit societies only, and societies for production, distribution, purchase and sale could not be formed under it. After the Act was passed the activities of co-operative societies expanded and there was demand for organising other types of co-operative institutions. The Co-operative Societies Act II of 1912 was therefore passed; more comprehensive than its predecessor, it was the parent of all further co-operative legislation in India. This Act made it possible to organise co-operative federal bodies, which could not be done under the old Act. Subsequently, the constitutional reforms of 1919 empowered provincial Governments to pass Co-operative Acts within their own territories. This led to the passing of as many as 20 co-operative laws in the Provinces. In 1935 the Constitution Act empowered Provincial Governments to make laws regarding co-operative societies. Under the Present Constitution co-operation is an exclusively State subject and the matter of making adequate statutory provision to guide the co-operative movement in India now rests with the State Legislatures. That, in spite of all this, the co-operative movement in India had not made much progress was, however, the discovery made by the Rural Credit Survey Report of 1954. Its report led to the formation of the Committee on Co-operative Law, which examined the problem of co-operation in India in all aspects and framed a model bill for guiding the State legislatures in the matter. And that, in brief, is the story of the Model Bill which is the subject-matter of this book under review.

R.S.S.

(From: Secretary, Bar Council of Maharashtra.)

BAR COUNCIL OF INDIA ELECTS VICE-CHAIRMAN

At the recent meeting of the Bar Council of India held on 10th and 11th January 1970, Shri R. B. Jethmalani, LL. M.,

Advocate of Bar Council of Maharashtra has been elected Vice-Chairman of the Bar Council of India.

CORRESPONDENCE

Law Reporting in Hindi

Sir,

The Union of India in the Ministry of Law publishes "Uchattam Nyayalaya Nirnaya Patrika" and "Ucha Nyayalaya Nirnaya Patrika" a monthly Hindi Journal containing the Hindi translation of reportable judgments of Supreme Court and High Courts with the sole purpose of use of Hindi in the Courts of Law.

The publication of these journals has been recently commented upon by the Hon'ble Sri S. P. Kotwal, Chief Justice of the High Court of Bombay, in his address while paying a visit to A. I. R. office. He has remarkably said, "Of course, as you all know, translation in Hindi of the I. L. R. series has already taken place in Delhi and I receive a complimentary copy. I do not claim to understand Hindi well but I fail to understand how a decision given by a particular Judge in English, will convey exactly the same idea in Hindi, because every translation may not have the exact words for the English version. Then again the translations will have different words for same meaning. Thus the result will be that without a Statutory Dictionary, that is, a Dictionary, the meaning given in which are made statutorily binding on all High Courts, there will be a chaos. Then unless the Statutes are translated first, no purpose will be served by translating judgments alone in Hindi."

The effectiveness and use of the aforesaid journal has been rightly exposed before the exponents of Hindi. Firstly, these judgments are not in Hindi. Unless the judgments are pronounced in Hindi, the use of translation into the Court of law cannot be said to be legal and constitutional also. Secondly the publication cannot be said to be authorised by law. The Indian Law Reports Act, 1875 is the special statutory provision on the subject. Section 3 of the said Act provides, "no Court shall be bound to hear, cited, or shall receive or treat as an authority binding on it, the report of any case decided by any High Court for a State

other than a report published under the authority of any State Govt." The publication of the Union Law Ministry is against law and it is not published under the authority of any State Govt. as also the translated version of the reportable decisions in English can have no authority of any State Govt. It has other qualified demerits also. This is an official publication and Sri P. P. Dēo, Chairman in the same address has rightly said, "We are all aware that official reports are published very late and irregularly, long after they have appeared in one or the other non-official journal. The authority of a decision is its merit and not its publication in a particular series". Thus these difficulties and handicaps are also there. It cannot be used and cited in subordinate Courts at present. Articles 233 to 237 of the Indian Constitution prescribe the constitution and the establishment of subordinate Courts. These articles do not provide for the use of Hindi in subordinate Courts. No doubt these subordinate Courts are under the direct control and supervision of their respective High Courts. Article 348 (2) provides that the Governor of a State may with the previous consent of the President authorise the use of the Hindi language for any official purposes of the State, in proceedings in the High Court. But there is no such consent anywhere. Hence there appears to be impediments in the use of the aforesaid journal in the Courts to help the Bench and the litigants. The publication of this journal may be considered as a duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment under Art. 351 of the Indian Constitution.

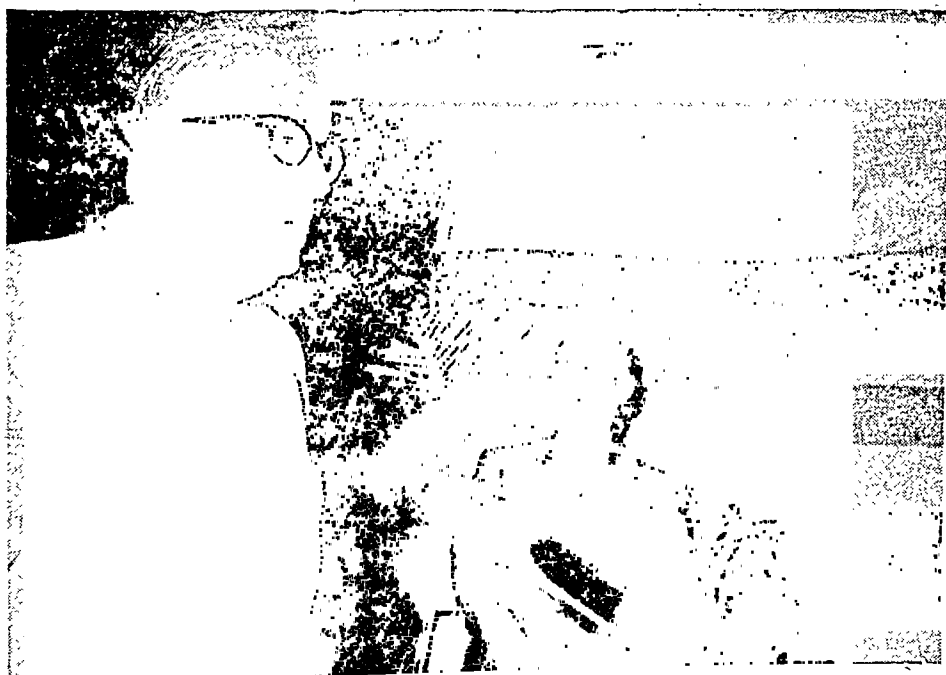
It is hoped the Union Law Ministry will look into the matter very seriously.

Yours faithfully,

Girija Shankar Verma,
Advocate, Motihari.



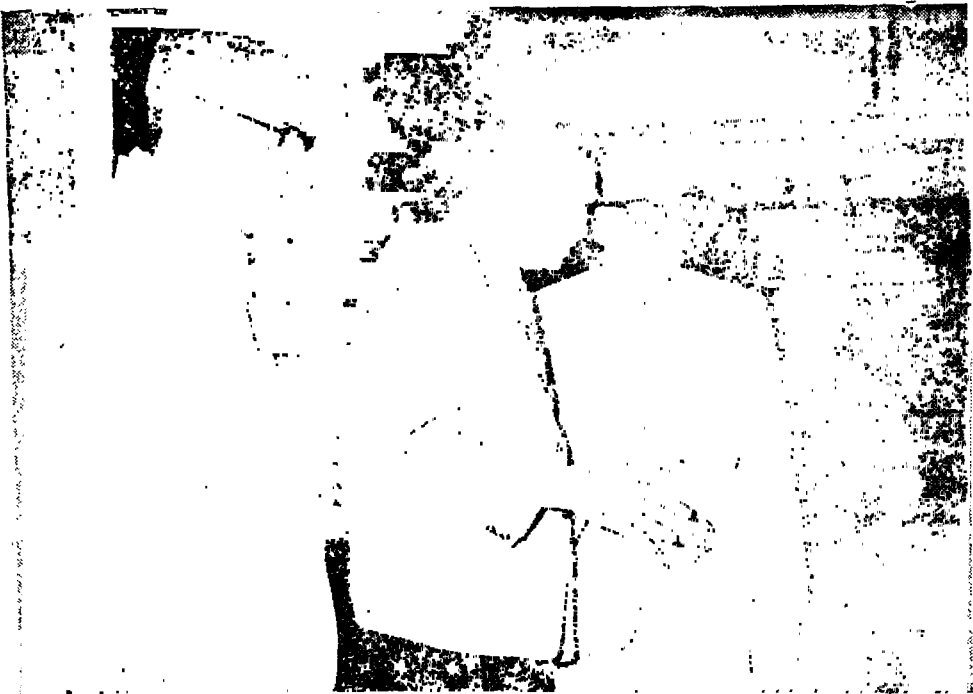
Shri P.P. DEO, Chairman of the Board of Directors, A. I. R. Ltd.
garlanding the honoured guest.



The Chief Justice addressing the gathering.



The Chief Justice being shown the Binding Section of the
A. I. R. Press by D. W. CHITALEY, General Manager of the A. I. R.



Shri D. V. CHITALEY, Manager, Law & Editorial Division, explaining a
point to the Chief Justice, when he was being shown round the Press.

VISIT OF THE CHIEF JUSTICE OF INDIA TO A.I.R. OFFICE

[15th February, 1970]

The A.I.R. had the pleasure and privilege of welcoming to its premises and receiving the Hon'ble Shri Muhammad Hidayatullah, Chief Justice of India, on the evening of Sunday, the 15th February last. Shri V. V. Chitale, the founder of the concern, read a welcome address on the occasion. Several Judges of the Nagpur Bench of the Bombay High Court, and other eminent persons graced the occasion with their presence. The Chief Justice responded suitably to the welcome address. An important theme of both the welcome address and the Reply by the Chief Justice was judicial candour seen in Judges admitting, when necessary, that their previous judgments were not correct and overruling themselves. The function ended with light refreshments and coffee.

WELCOME SPEECH

By

Shri V. V. Chitale.

1. "May it please your Lordship,—It gives me very great pleasure, indeed, to welcome you to the All India Reporter, this evening. We have been looking forward to this visit for a long time. Sir, we are proud that a Nagpurian is adorning the highest seat of justice in the country and we consider it a privilege and honour to have you in our midst this evening, for however short a time. We are indeed grateful to you, that in spite of your many engagements, you have been kind enough to make it convenient to spare a short time for us also and to honour and encourage us by your acceding to our request to grace this occasion with your presence.

2. My Lord, I may be excused for pointing out on this occasion that, the Nagpur High Court has contributed not less than four Judges to the Supreme Court and in your Lordship's person Nagpur is justly proud of having contributed a second Chief Justice of the Supreme Court, (the first being Mr. B. P. Sinha).

3. The fact that when the office of the President of India falls vacant, the mantle of the highest office in the country falls on the Chief Justice of India shows the exalted nature of the office of Chief Justice. And, permit us to express our humble congratulations to your Lordship, on the fact that this unique honour also was yours.

4. It is not necessary and perhaps it would be impertinent on my part to praise the very high quality, both legal and literary, of your pronouncements from the Bench. But permit me to say that your judgment in Ranjit Udesi's case was not only an illuminating exposition of what constitutes obscenity in literature but was a piece of literature in itself. Your separate judgment in Golak Nath's case, concurring with Chief Justice Subba Rao's conclusion but on different grounds, was, again, a remarkable pronouncement which will be a permanent landmark in our law reports, representing an altogether original point of view.

5. Before concluding, it is my wish to draw attention with special pride to one quality which I have noticed in your judgments — your exemplary frankness in freely stating that in some previous judgment of yours you expressed a certain view which, owing to certain factors which were responsible for the oversight, was not correct. In this connection, I beg leave to mention your Lordship's judgment in State of Gujarat v. Shantilal, AIR 1969 SC 634 at p. 637.

6. In this connection, I am reminded of certain eminent Judges in our country who were so noble that they would consider it below their dignity to try to avoid stating plainly that on a former occasion they had expressed a view of the law which on further consideration they found was not correct. One of these noble persons was Justice Holloway of the Madras High Court who, if I remember right, once wrote, "At that time, the jargon of English law was in my head."

7. The other honoured name which I remember in this connection is that of Ismay, J. C. of our own Judicial Commissioner's Court of Nagpur,

8. Your Lordship, I have recently read somewhere that Gladstone used to say that infallibility is not expected of any human being, but it is useful to be sure of one man's integrity.

9. I mean no disrespect to the Bench when I say that the same noble words of Gladstone may also be applied to the Judiciary, from the highest echelons downwards. That will make the rule of law an accomplished fact in our beloved motherland.

10. Let me say that in my humble opinion, your Lordship stands for the highest judicial ideals from every point of view.

11. Let me again thank your Lordship for having made it convenient to be in our midst this evening and honouring us by your presence."

Reply by the Hon'ble Mr. Justice M. Hidayatullah, Chief Justice of India.

"Mr. Chairman, my former colleagues and friends, — It was one year back that I promised Mr. Chitale, that I would like to pay a visit to the All India Reporter Press. Chief Justice Mr. Sinha once came to the A. I. R. Press and I had then a chance to visit this Press along with him but for some reason or other, I was not able to do so.

I am glad to be here today for two reasons. Firstly, because this is a premier law-publishing house. Secondly, I am very familiar with the Chitale family and the Chitales have been knowing me for the last so many years. My father knew Mr. V. V. Chitale very well. I was also very fortunate to know him from my student days.

As I went round the Press and saw the mechanisation and automation process, etc., I was reminded of a rotary club where they have a method of classifying members as representing different professions. In classifying members of the judiciary for purposes of admission, an appellate Judge was classified as "judicial wholesale" and other Judges as "judicial retail". Just so, I think among law reports, the All India Reporter may be classified as Law Reports "wholesale" and other reports may be classified as Law Reports "retail".

In the section relating to the Supreme Court alone, the All India Reporter covers about 2000 pages per year. And then there are the reports of the cases of the various State High Courts. It is indeed a colossal work that the All India Reporter is doing and it is doing a very good job of it. The price also is very moderate when we consider the vastness of the publication and its usefulness."

Then His Lordship proceeded to dwell on the place of law reports in the work of Courts. He observed that one should first study the problem in each case with reference to its own circumstances before turning to the law reports.

His Lordship also dealt with the question of Judges frankly admitting their mistakes and retracting their own previously expressed views on law when they find that they were not correct. His Lordship called this "judicial honesty." His Lordship went on to observe that he was always ready to rectify his own views on law when he found them not to be sound. He also instanced the case of Mr. Justice Bose who, on an error being pointed out, immediately and readily corrected it. His Lordship also gave the instance of Lord Hewart who, while sitting as an appellate Court in a criminal case, reversed his own decision which he had given in the court of first instance.

His Lordship observed that Judges must always keep their minds open to new ideas. In this connection he remarked that Judges take the law from the lawyers and are sometimes misled. This is one of the reasons why decisions of the same Court are overruled sometimes.

NATIONAL CONFERENCE ON LEGAL AID

PUBLIC NOTICE

The Centre for the Study of Law and Society of the Institute of Constitutional and Parliamentary Studies is organising a National Conference on Legal Aid on Saturday, the 28th and Sunday, the 29th March, 1970. The Conference would be inaugurated at the Vigyan Bhavan, New Delhi on Saturday, the 28th March, 1970 at 10.30 A. M. by Shri V. V. Giri, President of India. The President would also be inaugurating the National Legal Aid Association of India at the same time.

(Centre for the Study of Law and Society, Institute of Constitutional and Parliamentary Studies, 18, Vithalbhai Patel House, Rafi Marg, New Delhi-1.)

THE LAWYER, DEVELOPING NATIONS AND LEGAL AID:

A PROPOSAL *

(By ARTHUR L. BERNEY, Consultant on Legal Education Centre for the Study of Law and Society.)

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*NOTE: (The views expressed in this paper are the author's and not those of the Centre for the Study of Law and Society nor of The Ford Foundation which has made his services available to the Centre.)

PART I

ONE VIEW OF THE LAWYER: A CHANGE BROKER

To say that we are living in a period of revolutionary change is commonplace. Let's leave the accuracy of this description to others to quibble over, along with the endless inquiry about its causes. It is enough for us lawyers — Professional contingency discounters — that the possibility of revolutionary change exists. For that possibility alone thrusts upon us the basic question: Will the revolution, should it come, be bloody or bloodless? And never mind that too, for the final question for the lawyer — professional pragmatist — is: How to make sure it is bloodless?

Failing this — the ascertainment of the bloodless way — we fail our very selves, for in cataclysm we lawyers cease to exist. We function only within the bounds of order. Only there can we serve our calling as brokers of change. If this characterisation is doubted, then may I challenge you to think of any engagement, great or trivial, in which the lawyer serves, that does not involve him in negotiating, facilitating, channelizing or resisting change.

Often, too often, the profession is identified with the status quo — "hand-maidens of vested interests" and that sort of declamation. Well, there is no use denying that our services are generally sought by those who would resist and retard change for the simplest reason: those clients consider their present state satisfactory. And it may be that resistance is sometimes the best counsel, but it is more often the worst. For, by nature, man and his world are not static. A good broker is an accommodator.

This means that the lawyer must constantly exercise a judgement about the validity, force and imminence of the impinging changes if he is to serve well. It is this judgement that distinguishes his activity, by the way, from that of a legal technician. And the converse holds that when he shirks the exercise of this judgement he surrenders his professional role. So it is when he counsels resistance or is immobilized because he perceives that the change he foresees is fraught with danger. It is best to remember in such circumstances Alfred North Whitehead's observation that major advances in civilization are processes which all too nearly wreck the societies in which they occur.

Enough of abstractions. The change to which the author invites your examining judgement is the uprising of the poor — the outward signs of which run from the rage of the riot-torn streets of affluent urban centers to the zeal of the revolutionary guerrilla fighter. Like it or not these are the manifestations of a change struggling to become. Somehow it carries more impact when it's read in the words of an assessment from spokesmen of a people whose qualities of passivity, forbearance and patience we profess to admire. To quote: "It is the patience of the Indian people, sometimes mistaken for inertness or passivity, which has created an impression that a revolt of the masses is unthinkable. . . . If poverty is not treated adequately in the next ten years, the Indian rural proletariat may produce the classic spearhead for mounting a revolutionary, instead of an evolutionary, process of change. Indian democracy, which has hitherto not had to absorb the active-discontent of the masses, can be shaken to the core if it cannot devise new . . . policies to change the militant psychology of the disillusioned poor." 1

This is no excerpt from some revolutionary tract either. It is a note of urgency struck by men who have studied poverty in India and despite their seeming despair, reflect, in their call for Government action, continued commitment to orderly change; 2 in their prescription for action, modesty and proportion; 3 and in a poignant paean, hope. 4

The document from which these passages are drawn, replete with its graphs and charts, is the kind of muffled anguish that convinces this observer. Others may prefer to draw their conclusions from the explosive episodes of the daily front pages.

LAWYERS OF INDIA — PROFESSIONAL FORFEITURE?

Of particular interest to this writer is the judgement exhibited by the Indian legal profession. This, not merely because he lives and works there, but because India, with its enormous numbers of destitute people and its depth of commitment to social uplift through orderly change, 5 epitomizes the challenge of discovering the bloodless way.

If the observations and findings of commentators are to be relied on, a bleak prospect emerges. For it is difficult not to conclude that, if the Indian legal profession indeed perceives the need to produce drastic social reform, it must have long since forfeited its professional role of contributing to that reform.

In 1963 Dr. Richard Schwartz, 6 a careful student of the Indian scene wrote: "Limitation of legal activity largely to litigation leaves the Indian lawyer far from the center of power in contemporary India." 7

One consequence of this, he continued in an article that outlined the decline of the profession since preindependence, is the profession's failure to help counter-balance the power of Government through "negotiation and enforcement of contracts . . . legislative lobbying . . . and challenging the power of administrative agencies in the Courts." 8

In a more recent remark that same author recognized what is, for this observer, the more significant failure of the profession, the failure to produce "real changes in the life conditions of the underprivileged segments of Indian Society." 9 The reference made to Myrdal's multiple examples of laws intended for the poor, paradoxically being turned against them through the legal processes, (e.g., the land reform law which produces Court backlogs and lawyers' bills but no land for the landless, and co-operatives intended to reduce debt slavery actually strengthening the creditor with Government funds) is most telling. 10

This tantalizing divergent failing on the part of the profession, on the one hand to assume a part in controlling national destiny through existing power vortices, and, on the other, to play a role in articulating and formulating the modes of social reformation, are captured in Dean Mukerjee's dilemma in attempting to state the objects of Indian legal education:

"The truth is, probably that the object of law teaching, being so intimately bound up with other social and economic problems crying for urgent solutions, defies definition in clear and unambiguous terms. . . . We in India may outwardly still be wedded to the doctrinal law but are unable to shut our eyes completely to the sociological factor. . . ." 11

The picture one gets is of a profession in a "hang-up." One might surmise from his closing remarks on the "objects of law teaching" that the Dean believes the lack stems from the fact that "(i)n the sociological context. . . . Our legal education and knowledge has always been singularly irrelevant." Therefore, he concludes, "we are a long way away from . . . education that will train a man not merely in the work of solving problems of individual clients but of the society in which he lives." 12

OR PROFESSIONAL RECLAMATION?

It may be the personal need to shake pessimism, but this observer, for one, senses a shift. Not so much a new wave yet as a ripple. It may have been just this sort of wishful intuition that led Professor Schwartz to end his "prefatory" introduction to the papers prepared for the Conference on the Comparative Study of the Legal Profession with Special Reference to India, 13 on this note:

"Indian lawyers gained great esteem during the struggle for independence. Are they now ready to recapture this position by joining and leading the struggle for social justice?" 14

There is much in the Conference papers themselves to sustain hope. And this in the context of full appreciation of the shortcomings. 15 For example, a prominence of lawyers as organizers and spokesmen of civic and reform groups denotes that lawyers are playing the role of agents of change. 16 Likewise, lawyers were seen as "instrumental in devising modern organizational forms articulated to action in the national world of Government policies and plans." 17 Perhaps most promising was the reference to the lawyer's work in the district towns which related to cases involving enforcement of Government regulations or the accountability of Government officials under the law. This was the aspect of the lawyer's work viewed as "creating in the public mind a sense of political efficacy and . . . establishing an image of the judiciary as an independent intermediary between Government and citizen." 18

These, of course, were only straws or leanings. There was nowhere a claim that these preliminary findings were more than suggestive concerning such queries the investigators set themselves as:

(1) does the Indian lawyer function as an intermediary, linking the "higher law" with the law as applied at the lower level?

(2) does the Indian lawyer act as a carrier of a nationwide "legal culture" who disseminates official norms while putting them in the service of various groups? 19

Or from the political scientist's point of view:

(3) is the lawyer instilling that sense of satisfaction with the legal system in the citizenry, such as would give them to perceive that system as a modality for realizing justice; and thereby presumably gain from them acceptance of the underlying political system? 20

But nothing in the existing studies pretends to answer the delineation Professor Galanter gives to Dr. Schwartz's challenge:

"India's simultaneous commitments to economic development, a welfare State and democracy imply vast new demands on the legal system—demands for systematic but flexible regulation, for new forms of protection and participation, and for broader distribution of legal resources." Will the Indian legal profession expand its role to meet these new demands? . . . Such a transformation depends upon the adaptive capacity of the profession and upon the capacity of legal education to impart the needed skills and attitudes. But to an equal extent it requires that the demand for more differentiated, complex and widely distributed legal services be made effective." 21

A PROVING GROUND

Only the future can tell whether the profession will meet these demands and reclaim its status and role. There are recent positive signs in the horrendous efforts of the leading law colleges to transform themselves. 22 A crescendo of legal scholars are sounding the call to action in the law journals of India. But the proving ground will come, if we are to look for signs, in the fate of the latest efforts to establish a meaningful legal aid scheme in India. 23

Our reasons for this assertion are twofold:

(1) On four occasions since Independence serious efforts to establish wide-ranging legal aid programs have been mounted and failed. Once more, the battle is being joined, this time by one of the most vigorous institutes of legal reform in India. If it fails too, it would be difficult to deny that there exists an insurmountable paralysis of will on the part of the profession.

(2) A legal aid program is more than symbolically relevant to the question of whether the profession can meet the challenge of ushering in the requisite social reforms. In the very operation of such a program dual basic objectives are served:

(a) the impoverished, the downtrodden and the underprivileged — In a word the alienated ones — receive, along with their writ, a sense of hope, uplift, entitlement and, may be, even involvement; and

(b) the attorneys who organize and operate these programs are, especially as they learn to perform with imagination and scope, fulfilling their calling as the brokers of change and the instruments of justice.

So it is that the natural testing ground of the Indian legal profession may be seen in its capacity to establish a national legal aid program.

PART I—FOOTNOTES

1. The Anatomy of Indian Poverty, Monthly Commentary, Indian Institute of Public Opinion, December 1968, at page 28.

2. "The Fourth Five Year Plan has brought this country face to face with the problem of its own poverty. It has also arrived at a time when 'the green revolution'....(has) opened the eyes of the nation to the possibility that a solution might....be in its own hands....A moderate plan of investing Rs. 500 crores. (\$2/3 billion) on a crusade against poverty each year is capable now of making a major impression on the problem....The time is ripe for a major transformation of the minds of the leaders of Indian society in respect of the priorities which they must lay down as imperative in all India's future plans." (Id at 154).

3. "...firstly, a new approach to education among the underprivileged; secondly, a special contribution to their health and productivity; thirdly, the allocation...of specific employment, particularly for those left outside the operation of a crude market place for labour; and finally, the provision of leadership capable of initiating and running new enterprises on which the momentum of change can be enduringly built." (Id. at 16).

4. "To be a leader in this epic fight against the most persistent of the world's enemies would be glory in itself. To be a victor, by a grand strategy to defy mankind's degradation by its failure to mobilise its resources, in peace as in war, will be truly to inherit the earth." (Ibid).

5. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Indian Const. Article 38.

6. Professor of Law, Northwestern University, Chicago, Illinois, USA, Dr. Schwartz is a sociologist by training.

7. Schwartz, Reflections on the Status and Functions of the Indian Lawyer, "1" Kerala University Law Review 17, 21 (1968). (Paper delivered at American Sociological Association, 1963).

8. Ibid.

9. Schwartz, Preface, Lawyers in Developing Societies, Especially India, 3: Law and Society Review 195, 196 (1969).

10. Ibid.

11. B. N. Mukerjee, Legal Education in Indian Universities, Vol. V Journal of All-India Law Teachers' Association 24, 25 (December 1968).

12. Id. at 25-26.

13. Conference sponsored by the Committee on Southern Asia Studies of the University of Chicago, held in Highland Park, Illinois, U. S., from August 10-12, 1967. Published as a Special Issue of *Law and Society Review*, Vol. III, Nos. 2 and 3, November 1968 — February 1969. (Hereafter referred to as Conference.)

14. *Id.* at 199.

15. In the Introduction, *Study of the Indian Legal Profession*, Prof. Marc Galanter recounts such insights as:

"the Indians' strong orientation to Courts (as compared to other legal settings); their orientation to litigation rather than advising, negotiating or planning; the conceptualism in their handling of rules; and their individualism and lack of specialization." (Conference at 207).

"Writing and teaching are, with significant exceptions, confined to close textual analysis on a verbal level with little consideration either of underlying policy.... or problems of implementation."

(*Id.* at 208).

Professor Rowe, *Indian Lawyers and Political Modernization*, reported dryly that "District Lawyers had given little or no thought to the relationship of the law to the social and economic goals of contemporary India" (*Id.* at 239).

16. Conference, at 212.

17. Galanter, Conference at 212; Rowe, Conference at 236.

18. Rowe, Conference at 228.

19. Galanter, Conference at 202.

20. Rowe, Conference at 220-21.

21. Galanter, Conference 216-17.

22. See e. g. All India Legal education seminar issue, IV Jaipur Law Journal (1964); P. K. Tripathi, In the Quest for a Better Legal Education, 1968, *Journal of the Indian Law Institute* (forthcoming); Report of the Committee on the Reorganization of Legal Education in the University of Delhi, P. B. Gajendragadkar, Chairman (1964).

Von Mehren, *Law and Legal Education in India*, 78 *Harvard Law Review* 1180 (1965). The Ford Foundation in India has helped support reforms in legal education at Delhi and Banaras Universities during the last five years.

PART II

THE INSTITUTE OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES: A PROPOSAL

Recognizing a need to bolster India's democratic institutions and to focus her attention of her political leaders on the problems of democratic development, a group of parliamentarians, jurists and distinguished private citizens formed the Institute of Constitutional and Parliamentary Studies in March 1965.

In general the Institute, under the chairmanship of one of India's foremost Supreme Court Advocates, Dr. L. M. Singhvi, has pursued with steadfastness, vigor and imagination its goals of improving the functioning of political, legislative and judicial institutions through research and training in parliamentary affairs, legislative process, judicial interpretation and constitutional developments.

Its more innovative and successful programs include a Parliamentary Fellowship Program, an Orientation course for Freshman Legislators, Diploma courses in such subjects as legislative drafting, and parliamentary institution and procedure, and a Legislative Reference Service.

It cannot be gainsaid that this Institute has had an invigorating and stimulating impact on the legislative process in India. The recent passage of a bill establishing the office of Lokpal (Ombudsman), for example, may well be attributed in some measure to scholarly work on that subject carried forward at the Institute.¹

THE CENTER FOR THE STUDY OF LAW AND SOCIETY

In 1969, the Institute expanded its purpose along lines that had been already emerging, to focus attention on the dynamics of the process of interaction between the legal system and the social fabric of the nation. In order to accommodate its new purview the Institute dramatically extended its self-mandate by establishing a Center for the Study of Law and Society. With this step the Institute openly affirmed its willingness to confront the problems of securing a democratic welfare state, even though this might mean exceeding its original confinement to constitutive and procedural matters. Although in its list of objects² the Center maintains a promise of scholarly objectivity and neutrality, it can be expected in its work to forthrightly address the congeries of demands for social reform that summons the nation.

In this endeavor the Institute may be understood as taking on the burden of the legal profession itself — the pursuit and securement of social justice and civil rights — perhaps in the faith that through its example it may bestir that profession to its potential contribution to a stable and democratic India.

THE LEGAL AID PROJECT

Remaining true to its mother institution's custom of not shrinking from its challenge, the Center initially set for itself a task which India had failed to surmount on at least four previous serious efforts. The ill-usiveness of the goal of a comprehensive legal aid system for India is told in the history of these failures.³ The Center staff has studied that history and determined to go ahead not because it perceived any significant change in the circumstances that conspired to defeat previous attempts, nor because it viewed the earlier proposals as ill-conceived,⁴ but simply because the establishment of such a program was intrinsic to the Center's very purpose and design. Almost every other program and research aim of the Center presupposed the ultimate identification of a class of lawyers, spread throughout the nation from city to village, who could conceive of themselves as "brokers of change," as representatives of aggrieved communities and interests,⁵ and who above all aspired to "a high moral purpose of service to the nation."⁶ The Center would not be impatient or unrealistic with the job of discovering and mobilizing such a force,⁷ but it had to know at the outset if it was forthcoming. No other technique lent itself better to that need than the active development of a legal aid program.

Given the diverse motivations and thorough awareness of the pitfalls of prior attempts it is not surprising that the Center determined to pursue a quite different course from that of its predecessors. First, it saw nothing to be gained from setting out any particular scheme at the outset. On the one hand many that had already been devised had obvious merit;⁸ on the other, none that existed or might be dreamed up could claim any special relevance to the Indian scene.⁹ Secondly, with no scheme to pedal there was no point in approaching any official or private body in search of support. So much for what was not done.

The initiatives the Center took immediately were dictated by (1) the motivation of discovering and generating supporters, what we called "our constituency", and (2) utilizing that which we believed to be our resources — needless to say this was not money, but manpower. In the words of the program advisor a major working premise was:

... that any workable program must be grounded in community-organized and operated schemes. Any superimposed centrally-run program will have an inhibitive effect on local initiative and responsibility; the immensity of the job and heavy financial burdens it would entail would doom any effort that did not rely substantially on community resources. In poor nations, such as India, these resources are mainly human — in this context the lawyers (social workers) and law students of each district or community.¹⁰

Consistent with this thinking the Center has embarked on two initiatives thus far:

1. It has begun a series of mailings to all judges, governmental officials, social workers and lawyers who it has reason to believe would be interested, with the purpose of soliciting and fathoming the depth of their interest. In this series of mailings, culminating in a number of regional workshops, information will be

exchanged regarding the existence of legal aid programs (a questionnaire accompanied the first issuance); the history of efforts in India and foreign programs; and monographs on such subjects as the "Constitutional Brief for Legal Aid and the Role of the Lawyer and the Social Worker" will be distributed. The major purpose of this effort, to quote from the first mailing, is:

...to identify, inspire and inform the individuals, associations and organizations who are capable of making the indispensable basic contribution of will and effort.

2. A research effort, engaging the services (and not insignificantly the involvement) of law and social work students, relating to the legal needs, and their current fulfillment, of poor people in urban and rural India. This aspect was also elucidated in the first mailing:

Concurrent to all its operative activities the Center shall be engaging in sociological research of the poor. In this we shall be seeking to learn something about the legal service needs of the poorer classes, how and to what degree such needs are being fulfilled or sublimated; the receptivity to legal assistance that may be exhibited; the possible disruptive consequence of such assistance, and the like.

This research was viewed as essential to correct resource requirement and feasibility assessment. It was also seen as an important preliminary¹¹ to the formulation stage, by which time we would want to know something about the possibility of building on indigenous dispute resolution systems, articulating with traditional norms, and the degree of congruence between the value premises of official law and customary practice. For example, it would be useful to do more than speculate about the chance that an Indian legal aid scheme might partake of the consensual techniques of conflict resolution — arbitration, conciliation and accommodation — typical of the communal society of traditional India.¹²

A MISSING ELEMENT — FINANCIAL RESOURCES

The Center is currently moving ahead according to plans, with a healthy sense of industry, save for one nagging misgiving: Would the necessary financial support be forthcoming? In 1962 the Law Ministry called a meeting of the law ministers of the various states to discuss provision for legal aid services. At that conference the State Governments recorded their inability to bear the financial burdens of a broad-scale legal aid scheme. The Central Government likewise designated financial limitations as the barrier.¹³ There is, underlying this fact, the probability that the Government still regards legal aid, as it did a decade ago, "as of very minor importance."¹⁴

In the letter to its "constituency" the Center bravely promised to "seek, in whatever ways are open to it, to attract support from every available source — private or public, domestic or international — that is free and willing to contribute."

AN APPEAL TO THE INTERNATIONAL LEGAL COMMUNITY

In the report entitled the Anatomy of Indian Poverty¹⁵ of last year it was made perfectly clear that in its drive to become a modern industrial state the poor were being left behind — if anything, the gap between the haves and the have-nots was widening. And the state of poverty becomes increasingly difficult to forbear when the signs of betterment are coming up all around you.

This brutal fact should mean something to lawyers, who as a class thrive on order, and particularly to a special group of lawyers who have travelled around the globe in a quest for world order. For two reasons then the participants of this meeting ought to be especially concerned to relieve the plight of the poor in the developing nations by devoting themselves to discovering means of providing them meaningful alternatives:

1. if such means are not provided then ultimately the resort to disruptive force will come, carrying threat of shattering world peace;

2. peace through law can only be pursued in a community where widespread respect for law has been generated. The absence of respect is especially acute today among the impoverished sections of every society.¹⁶ Only when the poor

come to see lawyers as champions of their causes and law as a potent instrument of social change, then alone will some hope of abandoning force as the primary means of dispute resolution emerge.

A PROPOSAL

It is proposed that this international Conference adopt a resolution requiring its executive officers to investigate the possibility of identifying, promoting or establishing an international agency which would devote itself to the raising of funds for the broad purpose of securing to the poor peoples of the nations of the world justice under law, with particular reference to the provision of legal assistance, through lawfully constituted programs, to such people. It is further suggested that unless some existing organization assumes this undertaking, the organization that may be established be called, for reason of clearly fixing its specific aim, the Foundation for International Legal Assistance to the Poor.

PART II—FOOTNOTES

1. See e.g. M. P. Jain, *The Ombudsman in India* (1969) (forthcoming). Generally, the *Journal of Constitutional and Parliamentary Studies*; (a quarterly that often reflects current activities at the Institute).

2. (a) "To study legislation, administrative practice and judicial trends with a view to examining, on the one hand, the impact of socio-economic forces on legislation and judicial trends; and, on the other, to analyse the impact of legislation and judicial pronouncements on social change."

(b) "To analyse social realities, study new ideas for legislation and prepare draft legislation."

(c) "To generate and sustain interest among intellectuals and the wider public in the processes of interaction between the legal system and the society."

3. See Koppell, *Legal Aid in India*, 8 *Journal of the Indian Law Institute*, 224 (1966); Legal Department, Government of Bombay, *Bhagwati Committee Report on Legal Aid and Legal Advice in the State of Bombay* (1950); Law Commission Fourteenth Report, Ch. 27, p. 587 (1958); India, Ministry of Law, *Outline of a Scheme for Legal Aid to the Poor* (1961).

4. On the contrary the plans, all the way back to the Bhagwati Committee Report, are carefully worked out. See Appendices A and B, Koppell, *supra* at 246 and 249.

5. Cahn and Cahn, *The War on Poverty: A Civilian Perspective*, 73 *Yale Law Journal*, 1317, 1346 (1964).

6. Among a group of attorneys who were dissatisfied with their profession, a sub-group, the author denominated "Gandhians," claimed such a high moral purpose and saw the profession as "self-serving, immoral and materialistic." Rowe, *Indian Lawyers and Political Modernization*, 3 *Law and Society Review* 219, 238 (1969).

7. A Legal Services Clinic operated by the Bombay Committee for Legal Aid, established in 1967, represents one known group of such persons.

8. Note 4 *supra*.

9. Most of the older schemes bore a marked resemblance to the British model, *Legal Aid Advice Act*, 1949; and one, the Bombay Legal Services Clinic is fashioned on the American Neighborhood Law Office pattern. The danger of employing foreign models, with careful regard to their relevance and adaptability to Indian conditions, cannot be over-emphasized.

10. It should be stressed that this was merely a working premise directed toward heading off the tendency to devise schemes at headquarters level without awaiting participation of those who would be expected to implement and run the programs. It should not be understood as a predisposition against centrally-controlled, unitary schemes.

11. Prior to the formulation stage, we informed our correspondents, the Center;

"...will continue to perform its more characteristic functions of research and study. The step preceding the formulation stage — the gathering and systemization of existing information and data — is essential even in an activist-oriented program. Even while it presses for development, the Center can attempt to make its study systematic and comprehensive. Carrying no responsibility for program adoption, the Center can treat any programs that may be instituted during the course of the research as experimental. Because it need not work against a deadline as such, the Center can entertain long-term, open-ended and continuous investigation, even performing evaluative functions subsequent to the establishment of a legal aid program. And most importantly, because it holds no brief for any particular approach, the Center can maintain that critical objectivity required of a scientific contribution; its work can serve any and all proponents or, if this should be the case, intimate the unworkability of any and all proposed schemes."

12. Just as it may be dangerous to impose foreign models, there is the need to guard against the near fetish of the foreigner to idealize ancient customary models. These may well have as much irrelevance to modern India. Prof. Rowe, for one, expressed the belief that there could be no accommodation between the customary and modern legal cultures. The value premises of the modern (competitive, contractual and individualistic) were in basic conflict with those of the traditional system (hierarchical, status-oriented and communal). Rowe, *Indian Lawyers and Political Modernization*, 3 *Law and Society Review*, 219, 235 (1969).

13. Personal interview with Mr. R. S. Gae, Secretary, Ministry of Law, February 1966, reported by Koppell, *supra* at 226.

14. Law Commission of India, *supra* Note 3, at 589.

15. Indian Institute of Public Opinion, *Monthly Commentary*, Annual Number, 1968.

16. "American Lawyers, sociologists, and Government officials now recognize that in order to rehabilitate members of society who are culturally and economically deprived, it is necessary to provide them with a means for redressing their grievances and asserting their rights. If the law can be made to work for people, they will be more likely to become contributing members of society. If the law, on the other hand, is an "enemy" and if a poor person cannot find a way in which to redress his grievances through the instruments of the law, he may turn against the legally constituted authorities and his destructive impulses will be encouraged." Koppell, *supra* note 3, at 244.

COMMENTARY ON MADHYA PRADESH ACCOMMODATION CONTROL ACT, 1961.

By S. T. Malgwa, B.A. LL. B., Advocate, Supreme Court, with a foreword by Chief Justice Bishambhar Dayal of the High Court of Madhya Pradesh. October 1969. Wadhwa & Co., Indore 2. Pp. LVI, 280 and 181. Price Rs. 28.:

Law suits under the Accommodation Control Act form a large part of the litigation in our Courts and the present publication is a welcome addition to the treatises on the subject. The problem is more or less a post-war one. After the II World War the shortage of accommodation necessitated rent control legislation, and in Madhya Pradesh various rent control Orders were promulgated under the Defence of India Rules. The 1961 Madhya Pradesh Act, while retaining the salient features of the repealed laws on the subject, has been drafted on the lines of the Delhi Rent Control Act, 1958 to meet the needs of the times. It is expected that readers will find in this book whatever needs to be known when dealing with ejection suits and rent control matters in all their aspects. The author has included in it the parent piece of legislation like the Delhi Rent Control Act, 1958 and the Madhya Pradesh Rent Control repealed Act, 1955 and twenty more allied statutes in Appendices A to V of Part II, the pages of which have been numbered separately. It contains all the relevant law which may have to be referred to for a complete understanding of the subject. Also included are the Full Bench decision recently pronounced by the Hon'ble the Chief Justice Bishambhar Dayal and Justices K. L. Pandey and J. J. Singh and an unreported decision of Justice Krishnan.

Part I of the book gives the Schedule and text of the Act separately for purposes of reference, and they are followed immediately by the Commentary. The Commentary is section-wise, with synopsis, headings and sub-headings under each section on the top of each of the pages so as to facilitate quick reference to the subject of the reader's choice. In the discussion, Indian and Foreign decisions have been pressed into service and the case-law has been brought upto August 1969. Provisions regarding rent control of eviction of tenants, deposit of rent, appointment of rent controlling authorities, their powers, functions and appeals, provisions regarding the special obligations of landlords and tenants and penalties, and miscellaneous,

are the titles of the several Chapters in the Act. Commenting on S. 39 of the Act the author says that the mere fact that the landlord had once let out the accommodation to a person does not necessarily mean that, when the tenant quits that accommodation, the landlord does not need it or intends to let it out again. All amendments, notifications, rules and orders have been duly noted and the author gives his own point of view on some sections which have not yet been matter of judicial decisions.

It is common knowledge that there have been other books on the subject, but as different authors present different points of view, a comparative study should help one to arrive at the right conclusions. The author has taken pains to collect pronouncements on the subject-matter of the Act not only of the Madhya Pradesh High Court but also of the Supreme Court and other High Courts on provisions similar to those in the Madhya Pradesh Act, making it the more useful to lawyers and members of the judiciary as well as landlords and tenants. It may come in handy specially for the junior lawyer who seeks an introduction to the provisions of the Act through case-law. There are a few blank pages at the end for personal notes.

There is a useful alphabetical subject index and table of cases giving reference to pages. Well-printed and got-up, the Volume has been dedicated to the memory of Rai Bahadur Hazarilal Kishan Sahai Sanghi, the author's teacher and guide in law.

R.S.S

LAW RELATING TO COURT-FEE STAMP & REGISTRATION (with critical and analytical case-Law): By C. C. Anajwala, B.A. (Hons.) LL.B., Advocate, High Court, Bombay. 2nd Edition. C. Jamnadas & Co. 146/C Princess Street, Bombay 2; 1297/167 Relief Road, Ahmedabad, Pp. xvi & 234; Price Rs. 10.

This publication may be treated as a Companion volume besides that on conveyancing and it is by the same author. It contains the complete text of the laws relating to Court-fee, Stamp and Registration. These laws are the Bombay Court-fees Act, 1959; the Suits Valuation Act, 1887; the Indian Stamp Act, 1899; The Bombay Stamp Act, 1958; and the Indian Registration Act, 1908. These are matters with which not only legal practitioners, but commercial and industrial establishments also are concerned in their daily transactions. The author provides critical

and analytical notes on each Act, with the latest case-law wherever available, and the comments on the various provisions of these enactments are presented in simple and easily understandable language. A comparative table of the provisions of the Bombay Stamp Act and the Indian Stamp Act is also given.

Sectionwise, the different sections of each of these enactments have been grouped under appropriate Chapter headings like fees in the High Court and Court of Small Causes in Bombay. Computation of fees; probates, letters of administration and certificates of administration; process fees and the mode of levying fees. The Suits Valuation Act is dealt with under the heads of suits relating to land and other suits. In the section on the Indian Stamp Act, 1899, the matter is covered under the heads of stamp duties, adjudication as to stamps, instruments not duly stamped, allowances for stamps in certain cases, reference and revision, and criminal offences and procedure. The Bombay Stamp Act section is on the same lines as the above. The different parts of the Indian Registration Act have been grouped under establishment. Registrable documents, time of presentation, place of registration, presenting documents for registration, enforcing the appearance of executants and witnesses, presenting wills and the authorities to adopt, the deposit of wills, the effects of registration and non-registration, the duties and powers of registering officers, fees for registration and penalties.

The value of a suit for the purposes of court-fees is determined with reference to the Court-fees Act and that for the purpose of jurisdiction with reference to the Suits Valuation Act. With regard to stamps, the Bombay Act deals with the levy of stamp duty in respect of documents other "than" "bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of Insurance, transfer of shares, debentures, proxies and receipts." For the purposes of ascertaining the stamp duty, one has therefore to consult the Central or the State Law according to the nature of the document. In any case, where the registration of a document is compulsory, it becomes necessary to refer also to the Registration Act.

The author has given selected questions and the reader may test his knowledge of the subject by trying to answer them. Altogether this is a handy reference book useful alike to the lawyers, the law student and the layman.

R.S.S.

VILLAGE OFFICES SERVICE RULES, 1969, ANDHRA PRADESH (ANDHRA AREA) (COMMENTARY) : By P. Venkataramana Murty, Advocate, 2-1-540 Nallakunta (Chowrasta) Hyderabad-20. With a foreword by V. K. Rao, I. C. S., First Member, Board of Revenue, Hyderabad. pp. 90 & iii. Price Rs. 8/-.

In his commentary on the Madras Hereditary Village Offices Act (Act III of 1895) Mr. Venkataramana Murty had brought out the growth of the legislation and the various rulings given by the Board of Revenue and the High Court. When the Supreme Court struck down the hereditary principle as unconstitutional, the Government of Andhra Pradesh examined the situation arising out of this decision and decided that the appointment, disciplinary control and conditions of service of village officers should be regulated by rules framed under Art. 309 of the Constitution. The Governor of Andhra Pradesh promulgated Ordinance 1 of 1969 on the 22nd May 1969 repealing, inter alia, the A. P. (Andhra Area) Proprietary Estates Village Service Act II of 1894 and the A. P. (Andhra Area) Hereditary Village Offices Act, III of 1895. The Governor promulgated the Village Offices Service Rules 1969 under the proviso to Art. 309 of the Constitution with effect from 22nd May 1969. Since that date the Government and the Board of Revenue have been issuing instructions to the Collectors for the implementation and clarification of the Service Rules, which have been given on pages 86 to 90 of the book under review, with the author's assurance of supplementing them as need arises as in a stockpile.

The articles of the Constitution relevant for the interpretation of the Service Rules, viz., 16, 309, 311 and 313, along with important case law, are given in the beginning of the book. Art. 16 deals with equality of opportunity in matters of public employment and Art. 309 with recruitment and conditions of service of persons serving the Union or a State. The other articles deal with the dismissal, removal or reduction in rank of persons employed in civil capacities under the Union of India or a State and with transitional provisions. The sections of the repealed Act, III of 1895 and the Rules framed thereunder which form the basis of the Service Rules are noted under the relevant Service Rules in small type for tracing the history of the Service Rules, if necessary. The repealed Act, III of 1895 with recent case law and twelve un-

reported cases have been included in the book to facilitate the verification of the exact position of the law in force on 22nd May 1969. The Village Offices Service Rules, which are given after the articles of the Constitution referred to above, have been appropriately divided into seven parts, dealing respectively with the appointment of village officers and village servants and their qualifications, duties of village officers and village servants, payment of salaries, sanction of leave and the like, disciplinary matters and appeals. In respect of certain categories of these village officers, the Revenue Divisional Officer is the appointing authority and in respect of the others, the Tahsildar.

Mr. Venkataramana Murty has again codified in this book the constitutional provisions and the rules framed under Art. 309 giving the legal background, quoting the relevant rulings of the Courts on the earlier law and giving his own interpretation of certain points. The legal profession and the Revenue Department should find the publication quite as useful as the author's earlier attempts. A nominal index of cases and an alphabetical index at the end are further useful features. R.S.S.

CRIMES AND CASES. By P. Basi Reddy, Barrister-at-law formerly Judge of the Andhra Pradesh High Court 1st Edition. Vivekananda Printers, Lakdikapul, Nilowfer Hospital Road, Hyderabad 4. With a foreword by N. Somasundaram, Retired Judge, Madras High Court, Pages 166. Price Rs. 8.

The slender Volume under review is an account, in racy and readable style, of fourteen murder cases in which the author participated either as Judge or Counsel for accused. Mr. Basi Reddy is well known to the members of the Andhra and Madras Bars; he was practising in the Madras High Court till the formation of the Andhra High Court. A prominent member of the Andhra Bar on the Criminal Side before his elevation to the Bench, his is supposed to be a unique instance of prisoners in jail appealing to their lawyer from inside the jail not to accept a Judgeship as they felt there would be none to defend them as ably as he did. No wonder, then, that in cases where the author has come out with flying colours he shares with the reader his undisguised pleasure.

The first criminal case of any import-

ance in which the author appeared forms the first of the fourteen cases. It was a case in which an agricultural labourer was charged with the murder of his wife by strangulation while in the process of enforced sexual intercourse. The accused was found guilty and sentenced by the trial Court and the Division Bench. On a subsequent petition for mercy presented by author, the sentence of transportation for life was reduced to one of five years' imprisonment. This first case, which the author lost, we are informed, was what led him, paradoxically enough, to settle down as a Criminal lawyer. The titles of the various cases, such as "The Love Potion that killed," "The Innocent Man Hanged," "The Dead Man comes to Life," "A Son's Revenge," "The Perfect Alibi," and "Gamekeeper Turns Poacher" remind one forcibly of the titles of numerous thrillers and detective novels, which are bound to catch the reader's attention and hold it to the last. As apt as they are, catching are other titles such as "The Female of the Species," "The Worm Turns," "Unnatural Vengeance," "A Daughter's Vow," "The Sub-Inspector Murder case," "The Poisoning Plan that Miscarried" and "The Death Warrant that was not executed."

Besides raising purely legal issues, the cases reveal different facets of human nature and the variety of motives that determine human conduct. These are real cases of murder out of dozens which came up before the Andhra Pradesh High Court at the appellate stage. Under each case heading or chapter title are given the facts of the case, the course of proceedings in the different Courts, the basic principles on which the judgments have been or should be based, and the final judgments. They would seem to make it clear that justice according to law does not always coincide with truth. As observed by the author, technical rules of evidence and procedure, faulty police investigation, prevalence of perjury and misapplication of the principle of benefit of doubt are some of the causes that have led to this gap between justice and truth, which, in the name of humanity, has to be bridged as far as possible.

The book is of value to junior lawyers who wish to specialise on the criminal side and should be of considerable interest to the layman also. But there are some typographical errors and idiomatic lapses which could perhaps have been avoided by more careful editing of the manuscript. R.S.S.

rejected by this Court in Punjab National Bank Ltd. v. Their Workmen, 1961-2 Lab LJ 162 (SC) on the ground that a teller does not perform supervisory functions and he does not have the status of a supervisor and that the mere fact that the work done by a teller is responsible and onerous is not material in determining the question as to whether his work is supervisory in character or not.

44. Again, in Eastern Bank v. Shivdas Vishnu Naik, 1963-2 Lab LJ 365 (SC) this Court negatived the claim of certain routine-clerks for the special allowance payable to comptists, coming under category 1, on the ground that in the course of discharging their duties as routine-clerks they had to operate the adding machines for the purpose of making additions mechanically. This Court further observed that obviously it was not the intention of the Sastry Award to make such persons eligible under category 1 of paragraph 164 (b) as:—

"They are not described as such, and the nature of the work, the responsibility attending to the work and the skill required of them for discharging the said work do not justify their claim to be comptists for the purpose of special allowance."

45. The work done by the Head Cashiers in the instant case may be considered very important, responsible and onerous, but, in our opinion, on the basis of the items of work claimed to be done by them, they are not entitled to the special allowance as supervisors, under category 9 of paragraph 164 (b) of the Sastry Award, or under the Desai Award.

46. In the result, the appeals are allowed and the order of the Labour Court set aside. The three applications filed by the respondents before the Labour Court will stand dismissed. There will be no order as to costs.

Appeals allowed.

AIR 1970 SUPREME COURT 209
(V 57 C 44)

(From Labour Court, Bombay)*

S. M. SIKRI, R. S. BACHAWAT AND
V. RAMASWAMI, JJ.

Nityanand M. Joshi and another, Appellants v. The Life Insurance Corporation of India and others (In all the Appeals), Respondents.

*(Appln. No. LCB-28 of 1965, D/- 16-4-1968—Lab. Court, Bom.)

IM/IM/D295/69/MVJ/D

1970 S. C./14 III G—2

Civil Appeals Nos. 301 to 319 and 1105 of 1969, D/- 25-4-1969.

(A) Industrial Disputes Act (1947), Section 33C (2) — Limitation Act (1963), Article 137 and Sections 5, 4 — Application under Section 33C (2) — Article 137 does not apply — (1968) 70 Bom LR 104 (FB), held overruled in AIR 1969 SC 1335 — Order D/- 16-4-1968 of Central Government Labour Court, Bombay in Appln. No. LCB-28 of 1965, Reversed.

In view of Sections 4 and 5 of the Limitation Act it would be clear that the Scheme of the Act is that it only deals with applications to courts and the Labour Court is not a Court within the Limitation Act. Therefore, an application under Section 33C (2) cannot be held to be barred under Article 137 insofar as the claim was for period beyond three years. AIR 1969 SC 1335, Applied; (1968) 70 Bom LR 104 (FB), held overruled in AIR 1969 SC 1335; Order D/- 16-4-1968 of Central Government Labour Court, Bombay in Appln. No. LCB-28 of 1965, Reversed.

(Para 3)

(B) Industrial Disputes Act (1947), Section 33C (1), (2) — Sub-sections (1) and (2), relative scopes.

Where applications are filed by the employees against the employer for computing in terms of money the benefit of holidays and for recovering the amount and there is no award or settlement under which the benefit of holidays had already been computed, the case squarely falls within sub-section (2) of Section 33C.

(Para 6)

It is plain from the wording of sub-section (1) and sub-section (2) of Sec. 33C that the former sub-section deals with cases where money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter VA, while the latter sub-section deals with cases where a workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money.

(Para 6)

(C) Limitation Act (1963), Article 137 — Whether applications to Courts under other provisions apart from Civil P. C. are included within Article 137 or not (Quaere). AIR 1969 SC 1335 and AIR 1964 SC 752, Ref. to.

(Para 4)

Cases Referred: Chronological Paras (1969) AIR 1969 SC 1335 (V 56) = Civil Appeals Nos. 170 to 173 of 1968, D/- 20-3-1969 = 1969 Lab IC 1538, Town Municipal Coun-

cil, Athani v. Presiding Officer
Labour Court, Hubli 2, 4
(1968) 70 Bom LR 104 = 1968 Mah
LJ 1 (FB), P. K. Porwal v. Labour
Court 1
(1964) AIR 1964 SC 752 (V 51) =
(1964) 3 SCR 709, Bombay Gas
Co. Ltd. v. Gopal Bhiva 2

Mr. Madan Mohan, Advocate, for Appellants (In all the Appeals); Mr. C. K. Daphtary, Senior Advocate (Mr. O. P. Malhotra, Advocate and Mr. K. L. Hathi, Advocate of M/s. Hathi and Co., with him), for Respondents Nos. 1 and 2 (In all the Appeals).

The following Judgment of the Court was delivered by

SIKRI, J.: These appeals by special leave are directed against the order of the Central Government Labour Court, Bombay holding that the applications filed by the appellants against the Life Insurance Corporation of India under Section 33C (2) of the Industrial Disputes Act, 1947, were barred under Article 137 of the Limitation Act, 1963, insofar as the claim was for period beyond three years. In holding this the Labour Court followed the decision of the Full Bench of the Bombay High Court in *The Manager M/s. P. K. Porwal v. The Labour Court*, (1968) 70 Bom LR 104 (FB). The Bombay High Court held that applications filed under Section 33C (2) of the Industrial Disputes Act prior to its amendment by Central Act XXXVI of 1964 were governed by the period of limitation laid down in Article 137 of the Limitation Act, 1963, and this article applied to applications under laws other than those contained in the Civil Procedure Code, 1908.

2. This Court in *Town Municipal Council, Athani v. The Presiding Officer, Labour Court, Hubli*, Civil Appeals Nos. 170 to 173 of 1968, D/- 20-3-1969 = (AIR 1969 SC 1335) has dissented from the decision of the Bombay High Court and has held that Article 137 of the Limitation Act, 1963, does not apply to applications under S. 33C(2) of the Industrial Disputes Act. This Court gave two reasons for coming to this conclusion. The first ground was that in spite of the changes made in the Indian Limitation Act, 1963, no drastic change was intended in the scope of Article 137 so as to include within it all applications irrespective of the fact whether they had any reference to the Code of Civil Procedure or not. This Court held that in spite of the changes the interpretation of

Article 181 of the Limitation Act, 1908, by this Court in *Bombay Gas Co. Ltd. v. Gopal Bhiva*, (1964) 3 SCR 709 = (AIR 1964 SC 752) would apply to Article 137 of the Limitation Act, 1963. The second ground given by this Court was that it is only applications to Courts that are intended to be covered under Article 137 of the Limitation Act, 1963.

3. In our view Article 137 only contemplates applications to Courts. In the Third Division of the Schedule to the Limitation Act, 1963, all the other applications mentioned in the various articles are applications filed in a court. Further Section 4 of the Limitation Act, 1963, provides for the contingency when the prescribed period for any application expires on a holiday and the only contingency contemplated is "when the court is closed". Again under Section 5 it is only a court which is enabled to admit an application after the prescribed period has expired if the court is satisfied that the applicant had sufficient cause for not preferring the application. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to courts, and that the Labour Court is not a court within the Indian Limitation Act, 1963.

4. It is not necessary to express our views on the first ground given by this Court in Civil Appeals Nos. 170 to 173 of 1968, D/- 20-3-1969 = (AIR 1969 SC 1335). It seems to us that it may require serious consideration whether applications to courts under other provisions, apart from Civil Procedure Code, are included within Article 137 of the Limitation Act, 1963, or not.

5. The learned counsel for the respondent contends that the appeals should fail on another ground. He says that these applications were filed under Section 33C (2) of the Industrial Disputes Act, while they should have been filed under Section 33C (1). He further says that, at any rate, no application can be filed under Section 33C (2) because the sub-section does not mention how the question is to be decided. There is no force in these submissions.

6. It is plain from the wording of sub-section (1) and sub-section (2) of S. 33C that the former sub-section deals with cases where money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter VA, while the latter sub-section

deals with cases where a workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money. In the present case applications were filed by the employees against the respondent for computing in terms of money the benefit of holidays and for recovering the amount. This case falls squarely within sub-section (2) of Section 33C. There is no award or settlement under which the benefit of holidays had already been computed.

7. It is true that sub-section (2) of Section 33C does not indicate the mode in which the question as to the amount of money due or as to the amount at which the benefit should be computed, may be decided. But the sub-section had left it to the rule-making authority to make a suitable provision. This is indicated by the expression "subject to any rules that may be made under this Act" in sub-section (2) of Section 33C. Rules have been made and Rule 62 (2) of the Industrial Disputes (Central) Rules, 1957, provides:

"Where any workman or a group of workmen is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money, the workmen or the group of workmen, as the case may be, may apply to the specified Labour Court in Form K-3 for the determination of the amount due or, as the case may be, the amount at which such benefit should be computed."

According to this rule an application in Form K-3 can clearly be made.

8. In the result the appeals are allowed and the order of the Labour Court set aside insofar as the Labour Court held that the applications were barred by Article 137 of the Limitation Act. The Labour Court will now pass the final order in accordance with law. The appellants will be entitled to their costs, one hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 211
(V 57 C 45)

(From Madhya Pradesh)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

H. V. Kamath, Appellant v. C. H. Nitraj Singh, Respondent.

Civil Appeal No. 1517 of 1968, D/- 24-2-1969.

(A) Representation of the People Act (1951), Section 123 (1) (A) — Long standing agitation by agriculturists and class III and class IV employees for better conditions — Strike by employees threatened — Chief Minister belonging to Congress Party announcing at election meeting of party nominee steps taken in the very recent past by Government to ameliorate the conditions of agriculturists and Class III and IV employees by granting certain exemptions in the former case and by increasing dearness allowance in the latter case — Held that Chief Minister or the State Government was not an agent of the returned Congress candidate and that the candidate did not commit corrupt practice.

At the time of election, to be held on 20th February 1967, the Congress Party was in power in Madhya Pradesh and the Chief Minister belonged to the Congress Party. In December 1966 the State Government (headed by the Chief Minister) promulgated an Ordinance exempting certain class of agriculturists from payment of land revenue. The question of exemption of uneconomic holding from payment of land revenue was being agitated for some time past. In connection with their demand for increased dearness allowance class III and IV employees had given a notice to the Government stating that they would go on strike with effect from February 13, 1967. Without their co-operation the entire election would have been at a standstill. The Government thought that their demand was legitimate and therefore announced on or about February 11, 1967 its decision to grant the increased dearness allowance with effect from April 1, 1967. One S, a member of the Congress Party published a pamphlet on 7-2-1967 refuting the false propaganda that the exemption from land revenue was temporary and was granted with a view to forfeit

* (Ele. Petn. No. 45 of 1967, D/- 15-3-1968—MP, Indore Bench.)

the lands and urging the electors to vote for Congress. In an election speech of a Congress nominee on 16-2-1967, the Chief Minister announced the benefit of such exemption and also the grant of the increased dearness allowance.

Held that it could not be said that the returned candidate of the Congress Party committed the corrupt practice under Section 123 (1) (A). Such an exemption or the grant of increased dearness allowance could not be regarded as a gift, offer or promise of any gratification within the meaning of Section 123 (1) (A). Nor could it be said that the State Government or the Chief Minister was the agent of the returned candidate. The Ordinance was passed by the State Government and as a result of the Ordinance a large number of agriculturists got exemption from land revenue. The announcement of the declaration at the election meeting or by the pamphlet also did not carry the matter further.

(Paras 2, 3)

(B) Representation of the People Act (1951), Section 123 (4) — Candidate or his agent distributing dummy ballot papers with candidate's name and his election symbol and also the name of other contesting candidate without his election symbol — Such dummy ballot papers, held, were in contravention of instructions issued by Election Commission of India — But it could not be said that the dummy ballot papers conveyed to voters the impression that the other candidate had withdrawn his candidature.

(Para 4)

M/s. K. A. Chitale, Y. S. Dharmadhikari, S. S. Khanduja and K. B. Rohatgi, Advocates, for Appellant; Mr. G. N. Dikshit, Advocate, for Respondent.

The following Judgment of the Court was delivered by

BACHAWAT, J.: This appeal is directed against the judgment of a Single Judge of the High Court of Madhya Pradesh dismissing an election petition for setting aside the election of the respondent Chaudhury Nitiraj Singh to the Hoshangabad Parliamentary Constituency No. 27. The appellant was the Praja Socialist Party candidate with the election symbol "hut". The respondent was the Congress Party Candidate with the election symbol "Two bullocks with yoke on". The voting took place on February 20, 1967. The votes were counted on February 21 and February 22, 1967. The respondent having got a majority of about 20,000 votes

was declared duly elected. The petition charged the respondent with several corrupt practices. The appellant now presses before us only the charge under paragraph 5 (i), (ii), (iii) and (iv), paragraph 5 (v), paragraph 6 and paragraph 7 (ii).

2. At the time of the election, the Congress Party, was in power and the Chief Minister Shri D. P. Mishra belonged to the Congress Party. In November 1966 the respondent was nominated by the Congress Party as its candidate for the Hoshangabad Parliamentary Constituency. The substance of the charge as made in paragraph 5 (i), (ii), (iii) and (iv) and as pressed before us is that on December 23, 1966 the Government of Madhya Pradesh headed by Shri D. P. Mishra promulgated an Ordinance No. 19 of 1966 exempting agriculturists holding land less than 7.50 acres or paying land revenue not exceeding Rs. 5 from payment of land revenue, that Shri D. P. Mishra as the agent of the respondent and with his consent made speeches at Narsinghpur and Piparia on February 16, 1967 announcing the benefit of such exemption and that the respondent thus committed the corrupt practice under Section 123 (1) (A) of the Representation of the People Act, 1951. The evidence shows that the question of exemption of uneconomic holding from payment of land revenue was being agitated for some time past. Towards the close of 1966 a resolution was moved by the members of the opposition parties in the Madhya Pradesh Vidhan Sabha urging such exemption. But no bill to that effect was then passed. The Government reconsidered the matter and when the Vidhan Sabha was not in session it passed Ordinance No. 19 of 1966 granting the exemption. The Ordinance was later replaced by Act No. 6 of 1967 which was published on April 26, 1967. The exemption was advocated by the Praja Socialist Party also and was welcomed by all parties. Nevertheless on the eve of the election the opposition parties started a campaign stating that the object of the exemption was to forfeit the land to the State and raised the slogan "Lagan Maaf Zamin Saaf". The propaganda was refuted by the Congress Party. In an election speech on February 16, 1967 Shri D. P. Mishra raised the slogan "Lagan Maaf Sab Party Saaf." His object was to tell the voters that the exemption should be granted and that the opposition parties should be routed in the election. It also appears that one Shri

S. K. Dixit a member of the Congress Party published a pamphlet Ex. P-2 on or about February 7, 1967 refuting the false propaganda that the exemption was temporary and was granted with a view to forfeit the lands and urging the electors to vote for the Congress. On the materials on the record it is impossible to hold that the respondent committed the corrupt practice under Section 123 (1) (A). The Ordinance was passed by the Government of Madhya Pradesh. As a result of the Ordinance a large number of agriculturists got exemption from land revenue. Such an exemption does not amount to a gift, offer or promise of any gratification within the meaning of Section 123 (1) (A). Nor is it possible to say that the government was the agent of the respondent. It is true that the Congress Party was then in power. But the exemption was not given by the Congress Party. It was given by the Ordinance which was passed by the Government. Nor does the announcement of the declaration at the meeting held on February 16, 1967 or by the pamphlet Ex. P-2 carry the matter any further. On the materials on the record it is not possible to say that either Shri D. P. Mishra or Shri S. K. Dixit acted as the agent of the respondent. The charge under paragraph 5 (i), (ii), (iii) and (iv) is not established. Some additional embellishments of the charge were dealt with by the learned Judge and they were not pressed before us.

3. The substance of the charge as laid in paragraph 5(v) and as pressed before us is that on the eve of the election the Government of Madhya Pradesh headed by Shri D. P. Mishra declared that Class III and Class IV government employees would get increased dearness allowance from April 1, 1967 according to the rates sanctioned for Central Government employees that Shri D. P. Mishra with the consent of the respondent and as his agent announced the grant of these benefits at the meetings held on February 16, 1967 at Narsinghpur and Piparia and that the respondent thus committed the corrupt practice under Section 123 (1) (A). It appears that Class III and Class IV employees gave a notice to the government stating that they would go on strike with effect from February 13, 1967. Without their co-operation the entire election would have been at a standstill. The Government thought that the demand of the employees for increased dearness al-

lowance was legitimate and therefore announced on or about February 11, 1967 its decision to grant the increased dearness allowance with effect from April 1, 1967. The grant of the increased dearness allowance cannot be regarded as a gift, offer or promise of any gratification within the meaning of Section 123 (1) (A) nor is it possible to say that the Government or Shri D. P. Mishra was the agent of the respondent. The announcement of the grant of the increased dearness allowance at the meeting held on February 16, 1967 does not carry the matter any further. The charge under paragraph 5 (v) is not established.

4. The charge under paragraph 6 is that the respondent or his agent distributed dummy ballot papers with the respondent's name and his election symbol of "Two bullocks with yoke on" and, also the appellant's name without his election symbol printed thereon, that those papers conveyed to the voters the impression that the appellant had withdrawn his candidature, that the appellant and his agents on the eve of the election told the voters that the appellant had withdrawn his candidature and that the respondent thereby committed the corrupt practice under Section 123 (4). The evidence shows that dummy ballot papers as mentioned above were printed and distributed on behalf of the respondent. Such dummy ballot papers were in contravention of the instructions issued by the Election Commission of India. The appellant's name should not have been printed in them. But it is impossible to say that the dummy ballot papers conveyed to the voters the impression that the appellant had withdrawn his candidature. On this issue the appellant examined P.W. 6, P.W. 7, P.W. 10, P.W. 23, P.W. 25, P.W. 27, P.W. 29, P.W. 30, P.W. 31 and P.W. 32 and the respondent examined R.W. 2, R.W. 3, R.W. 11 and R.W. 13. In agreement with the learned Judge we do not accept the statement of the appellant's witnesses that on the eve of the election the respondent and his agents informed the voters that the appellant had withdrawn his candidature. The voters knew that there were two candidates in the field, viz., the appellant and the respondent. Even on February 16, 1967 Shri D. P. Mishra stated that the appellant was contesting the election. The respondent carried on a vigorous election propaganda until February 18, 1967. If the respondent or his agent had informed the

voters that the appellant had withdrawn his candidature it was not likely that such intensive propaganda would be carried on until that date. The charge under paragraph 6 is therefore not established.

5. The charge under paragraph 7 (ii) was that Chaudhury Diwan Singh, the Station House Officer at Sohagpur, and a member of the police force in the service of the government, with the consent of the respondent actively canvassed for the respondent and that the respondent thereby committed corrupt practice under Section 123 (7). To prove this charge the appellant examined P.W. 3, P.W. 4 and P.W. 9. Chaudhury Diwan Singh and the respondent denied the charge. For the reasons given by the learned Judge, it is impossible to accept the testimony of P.W. 3, P.W. 4 and P.W. 9. Their evidence does not ring true. P.W. 3 never spoke to anybody that he was asked by Chaudhury Diwan Singh to vote for the respondent. It is not likely that Diwan Singh would approach P.W. 4. It is impossible to believe that P.W. 9 could overhear a conversation between Diwan Singh and the respondent when the respondent is said to have asked Diwan Singh to canvass for him. The charge under paragraph 7 (ii) is also not established.

6. In the result, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 214 (V 57 C 46)

(From Punjab: (1963) 65 Pun LR 975)

J. M. SHELAT, V. BHARGAVA,
C. A. VAIDIALINGAM AND
I. D. DUA, JJ.

State of Punjab, Appellant v. Khemi Ram, Respondent.

Civil Appeal No. 1217 of 1966, D/- 6-10-1969.

(A) Civil Services — Punjab Civil Services (Punishment and Appeal) Rules (1952), R. 3.26 (d) — Word “communicate” — Meaning of — Order of suspension passed against Government servant — Takes effect from date of communication and not from date of actual receipt. (1963) 65 Pun LR 975, Reversed.

Where a Government servant, being on leave preparatory to retirement, an order suspending him is communicated to him by the authority by sending telegram to his home address before the date of his retirement, the order is effective from the date of communication and it is immaterial when he actually receives the order. Decision of Punjab High Court. (1963) 65 Pun LR 975, Reversed. (Para 16)

The ordinary meaning of the word ‘communicate’ is to impart, confer or transmit information. It is the communication of the order which is essential and not its actual receipt by the officer concerned and such communication is necessary because till the order is issued and actually sent out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it.

(Para 16)

The word “communicate” cannot be interpreted to mean that the order would become effective only on its receipt by the concerned servant unless the provision in question expressly so provides. Actually knowledge by him of an order where it is one of dismissal, may, perhaps, become necessary because of certain consequences. But such consequences would not occur in the case of an officer who has proceeded on leave and against whom an order of suspension is passed because in his case there is no question of his doing any act or passing any order and such act or order being challenged as invalid. Case law discussed.

(Para 16)

(B) Civil Services — Punjab Civil Services (Punishment and Appeal) Rules (1952), Rule 3.26 (d) — Government servant on verge of retirement — Disciplinary action against him — Procedure.

If disciplinary action is sought to be taken against a Government servant it must be done before he retires as provided by Rule 3.26 (d). If a disciplinary enquiry cannot be concluded before the date of such retirement, the course open to the Government is to pass an order of suspension and refuse to permit the concerned public servant to retire and retain him in service till such enquiry is completed and a final order is passed therein.

(Para 11)

| Cases Referred: | Chronological | Paras |
|--|---------------|--------|
| (1966) AIR 1966 SC 1313 (V 53)= | | |
| (1966) 2 SCJ 777, State of Punjab v. Amar Singh Harika | | 15, 16 |
| (1964) AIR 1964 SC 72 (V 51)= | | |
| 1964-4 SCR 733, Pratap Singh v. State of Punjab | | 14 |
| (1963) AIR 1963 SC 395 (V 50)= | | |
| 1962 Supp (3) SCR 713, Bachhit-tar Singh v. State of Punjab | | 13, 14 |
| (1963) AIR 1963 Punj 298 (V 50)= | | |
| ILR (1962) 2 Punj 642, Dr. Pra-tap Singh v. State of Punjab | | 8A, 14 |
| (1961) AIR 1961 SC 493 (V 48)= | | |
| 1961-2 SCR 371, State of Punjab v. Sodhi Sukhdev Singh | | 14 |
| (1961) AIR 1961 SC 1500 (V 48)= | | |
| 1962-1 SCR 676, Harish Chandra Raj Singh v. Deputy Land Acqui-sition Officer | | 13 |

The following Judgment of the Court was delivered by

SHELAT, J.— The question arising in this appeal under certificate granted by the High Court of Punjab is whether an order of suspension passed against a Government servant takes effect when it is made or when it is actually served on and received by him.

2. The respondent was appointed as a Sub-Inspector, Co-operative Societies, in 1925 in the service of the State of Punjab. He was promoted to the post of Inspector and was confirmed thereon in 1939. In 1952, he was approved for promotion to the post of Assistant Registrar and officiated thereafter as such in short term vacancies from March to November, 1953. While he was serving as the Inspector, he applied for the post of Assistant Registrar in Himachal Pradesh, and on a reference by that Government, his services were lent to Himachal Pradesh Government for appointment as the Assistant Registrar. While he was so serving there, he was charge-sheeted on August 9, 1955, by the Registrar, Co-operative Societies, Punjab in connection with certain matters which occurred in 1950 while he was working under the Punjab Government. Those proceedings, however, were kept in abeyance as the police in the meantime started investigations in those matters.

3. In 1958, the Punjab Government decided to take disciplinary action against

the respondent and informed the Himachal Pradesh Government of it on July 17, 1958. On July 16, 1958, however, the Himachal Pradesh Government had granted to the respondent 19 days' leave preparatory to retirement, which was to take place on August 4, 1958. On being so informed, the Punjab Government by its telegram dated July 25, 1958 informed the Himachal Pradesh Government that it had no authority to grant such leave and requested that Government to cancel it and direct the respondent to revert to the Punjab Government immediately.

4. On July 31, 1958, the Punjab Government sent a telegram, Ex. P-1, to the respondent at his home address as the respondent had already left for his home town on leave being granted to him as aforesaid. The telegram informed him that he had been suspended from service with effect from August 2, 1958. On that very day, i. e., on July 31, 1958, the Punjab Government sent to him a charge-sheet at the address of the Registrar, Co-operative Societies, Himachal Pradesh, who re-directed it to the respondent's said home address. By its letter dated August 2, 1958, the Himachal Pradesh Government informed the respondent that his services were reverted to the Punjab Government and that the leave granted to him had been curtailed by two days, i.e., upto August 2, 1958, instead of August 4, 1958, as originally granted.

5. On August 25, 1958, the respondent sent a representation to the Registrar, Co-operative Societies, Punjab in which he contended that he had already retired from service on August 4, 1958 and that the order of suspension which he received after that date and the order for holding the enquiry against him were both invalid. On October 6, 1958, the Punjab Government replied to him rejecting his aforesaid contentions and informed him that if he did not attend the said enquiry, the same would be held ex parte. It appears that the respondent attended the said enquiry, but under protest. On the completion of the enquiry, the officer holding it made his report and sent it to the Punjab Government. On August 14, 1959, that Government sent him a notice to show cause why the penalty of dismissal should not be awarded against him. The respondent sent his reply to the said notice. By its order dated May 28, 1960, the Punjab Government ordered the respondent's dismissal.

6. Thereupon, the respondent filed a writ petition in the High Court of Punjab challenging the order of dismissal and contending: (a) that the said enquiry was illegal as by the time it was started he had already retired from service, and (b) that the order of suspension which was sought to be served on him by the said telegram, dated July 31, 1958, was received by him after his retirement on August 4, 1958, and therefore, it could not have the effect of refusal to permit him to retire.

7. The writ petition was, in the first instance, heard by a learned Single Judge. He noted that it was not denied before him that the respondent on being granted leave had proceeded to his village Batahar, post office Haripur in Tehsil Kulu, that he was there when the Himachal Pradesh Government issued the notification dated August 2, 1958 curtailing his leave upto that date and that a copy of that notification with the endorsement calling upon him to report to the Punjab Government for duty on August 4, 1958, was sent to the respondent on August 6, 1958. He also noted that the telegram dated July 31, 1958 informing the respondent of his suspension with effect from August 2, 1958, did not reach him till about the middle of August 1958. On these two facts it was contended by the respondent that he had already retired from service when the order reverting his service to the Punjab Government was passed, and that therefore, the subsequent proceedings starting with the order of suspension and ending with his dismissal were void.

8. This contention was raised on the strength of Rule 3.26 (d) of the Punjab Civil Services Rules, as it then stood. That rule provided that a Government servant under suspension on a charge of misconduct shall not be permitted to retire on his reaching the date of compulsory retirement but should be retained in service until the enquiry into the charge was completed and a final order was passed thereon. The argument was that as the respondent was not served with the said order of suspension on or before August 4, 1958, and as he had retired on that day and was, therefore, no longer in service, the said enquiry and the said order of dismissal were in breach of Rule 3.26 (d) and were illegal. The learned Single Judge accepted the contention and allowed the writ petition with the following observations:

"It is indubitably correct that action for dismissal against a Government servant can be taken during the tenure of the service. It is not denied that the petitioner was due to retire on the afternoon of 4th August, 1958. It has not been challenged that the petitioner had gone to his village in Kulu Tehsil after the leave preparatory to retirement was granted to him. The petitioner was entitled to treat himself as on leave preparatory to retirement till he received information to the contrary. No order has been proved to have been served on him before the 4th August, 1958 intimating the petitioner that he had been reverted to the Punjab State or that he had been suspended. It must, therefore, be held in the circumstances that the petitioner had actually retired from service and he cannot be bound by any subsequent proceedings."

8A. On the State Government filing a Letters Patent appeal against the said order, a Division Bench of that High Court followed its earlier judgment in *Dr. Pratap Singh v. State of Punjab*, ILR (1962) 2 Punj 642 = (AIR 1963 Punj 298) which had held that an order passed under Rule 3.26 (d) took effect from the day it was served on the concerned Government servant, and upheld the order of the learned Single Judge in the following terms:

"In the present case the fact remains that the respondent was not in a position to know and could not possibly have submitted to or carried out the orders which had been made before 4th August, 1958, and that also without any fault on his part, with the result that the decision of the learned Single Judge must be upheld."

In this view, the Division Bench dismissed the State's appeal.

9. It appears that the respondent had, besides the said contention, raised three more contentions summarised by the Division Bench in the penultimate paragraph of its judgment. These three contentions were left undecided in view of the Division Bench deciding the appeal on the first contention.

10. The question for determination thus is whether the said order of suspension admittedly made before the date of the respondent's retirement as required by the said Rule 3.26 (d) did not take effect by reason only that it was received by the respondent after the said date of retirement and whether he must, therefore, be

held to have retired on August 4, 1958, rendering the enquiry and the ultimate order of dismissal invalid.

11. There can be no doubt that if disciplinary action is sought to be taken against a Government servant it must be done before he retires as provided by the said rule. If a disciplinary enquiry cannot be concluded before the date of such retirement, the course open to the Government is to pass an order of suspension and refuse to permit the concerned public servant to retire and retain him in service till such enquiry is completed and a final order is passed therein. That such a course was adopted by the Punjab Government by passing the order of suspension on July 31, 1958, cannot be gainsaid. That fact is clearly demonstrated by the telegram, Ex. P-1, which was in fact despatched to the respondent on July 31, 1958, by the Secretary, Co-operative Societies to the Punjab Government, informing the respondent that he was placed under suspension with effect from August 2, 1958. As the telegram shows, it was sent to his home address at village Batahar, post office Haripur, as the respondent had already by that time proceeded on leave sanctioned by the Himachal Pradesh Administration. Ex. R-1 is the memorandum, also dated July 31, 1958, by which the Punjab Government passed the said order of suspension and further ordered not to permit the respondent to retire on August 4, 1958. That exhibit shows that a copy of that memorandum was forwarded to the respondent at his said address at village Batahar, post office Haripur. Lastly, there is annexure H to the respondent's petition which consists of an express telegram dated August 2, 1958, and a letter of the same date in confirmation thereof informing the respondent that he was placed under suspension with effect from that date. Both the telegram and the letter in confirmation were despatched at the address given by the respondent, i.e., at his village Batahar, post office Haripur. These documents, therefore, clearly demonstrate that the order of suspension was passed on July 31, 1958, i.e., before the date of his retirement and had passed from the hands of the Punjab Government as a result of their having been transmitted to the respondent. The position, therefore, was not as if the order passed by the Punjab Government suspending the respondent from service remained with the Government or that it

could have, therefore, changed its mind about it or modified it. Since the respondent had been granted leave and had in fact proceeded on such leave, this was also not a case where, despite the order of suspension, he could have transacted any act or passed any order in his capacity as the Assistant Registrar.

12. But the contention was that this was not enough and the order of suspension did not take effect till it was received by the respondent, which as aforesaid, was sometime in the middle of August 1958, long after the date of his retirement. In support of this contention certain authorities were cited before us which we must now examine to find out whether they lay down the proposition canvassed by counsel for the respondent.

13. The first decision brought to our notice was in *Harish Chandra Raj Singh v. Deputy Land Acquisition Officer, 1962-1 SCR 676*=(AIR 1961 SC 1500) where the question canvassed was as to what was the date of the award for purposes of Section 18 of the Land Acquisition Act, 1894, and where it was held that such an award of the Collector is not a decision but an offer of compensation on behalf of the Government to the owner and is not effective until it is communicated to him. The making of the award, it was said, did not consist merely in the physical act of writing the award or signing it or filing it in the office of the Collector. It also involved its communication to the owner either actually or constructively. No question, however, arose there whether an award can be said to have been communicated to the owner if it was despatched to him but was not actually received by him. In *Bachhittar Singh v. The State of Punjab, 1962 Supp (3) SCR 713*=(AIR 1963 SC 395) a case of disciplinary action taken against a Government servant, it was said that an order would not be said to have come into effect until it was communicated, as until then it can be reconsidered and modified, and therefore, has till then a provisional character. That was a case where the Minister concerned had made a note on a file and no order in terms of that note was drawn up in the name of the Governor as required by Article 166 (1) of the Constitution or communicated to the concerned Government servant.

14. As stated earlier, the High Court relied on its own judgment in *ILR (1962) 2 Punj 642*=(AIR 1963 Punj 298) (supra)

and its observations at p. 656 of the report (ILR (1962) 2 Punj) = (at p. 306 of AIR). That decision came up before this Court in appeal and the decision therein of this Court is to be found in *S. Pratap Singh v. State of Punjab*, 1964-4 SCR 733=(AIR 1964 SC 72). The appellant there was a Civil Surgeon in the Punjab State service. In 1956, he was posted to Jullundhar where he remained until he proceeded on leave preparatory to retirement sometime in December 1960. His leave was sanctioned on December 18, 1960, and was notified in the Gazette on January 27, 1961. On June 3, 1961, the Governor passed an order of suspension with immediate effect and revoked his leave. He also passed an order under Rule 3.26 (d) to the effect that as he was to retire on June 16, 1961, he should be retained in service beyond that date till the completion of the departmental enquiry against him. These orders actually reached the appellant on July 19, 1961 but were published in the Gazette Extraordinary on June 10, 1961. On the question whether the State Government could validly pass the aforesaid orders, this Court held that under Rule 8.15 of the Punjab Civil Services Rules there was no restriction on the power of revocation of leave with respect to the time when it is to be exercised, that the date from which a Government servant is on leave preparatory to retirement cannot be treated as the date of his retirement from service and that an order of suspension of the Government servant during such leave is valid. Two of the learned Judges held at p. 771 of the Report (1964-4 SCR)=(at p. 96 of AIR) that an order of suspension of the appellant when he was on leave could be effective from the moment it was issued. They distinguished the decisions in 1962 Supp (3) SCR 713=(AIR 1963 SC 395) (*supra*) and *State of Punjab v. Sodhi Sukhdev Singh*, 1961-2 SCR 371=(AIR 1961 SC 493) firstly, on the ground that the first case was one of dismissal and not of mere suspension, and secondly, that in neither case a final order had been passed. We may, however, mention that the other three learned Judges did not deal with this question, and therefore, neither expressed their dissent nor agreement. Indeed, Ayyangar, J., who spoke for them, observed at p. 737 (of 1964-4 SCR)=(at p. 81 of AIR) of the Report that whereas they agreed with the main conclusion that the impugned orders were not beyond the Government's

power they should not be taken to have accepted the interpretation which Dayal, J., had for himself and Mudholkar, J., placed on several of the rules considered by them. In view of these observations it is difficult to say whether the majority agreed or not with the view taken by Dayal, J., that a Government's order becomes effective as soon as it is issued.

15. The last decision cited before us was that of *State of Punjab v. Amar Singh Harika*, AIR 1966 SC 1313 where one of the questions canvassed was whether an order of dismissal can be said to be effective only from the date when it is made known or communicated to the concerned public servant. The facts of the case show that though the order of dismissal was passed on June 3, 1949, and a copy thereof was sent to other 6 persons noted thereunder, no copy was sent to the concerned public servant who came to know of it only on May 28, 1951 and that too only through another officer. On these facts, the Court held, rejecting the contention that the order became effective as soon as it was issued, that the mere passing of the order of dismissal would not make it effective unless it was published and communicated to the concerned officer.

16. The question then is whether communicating the order means its actual receipt by the concerned Government servant. The order of suspension in question was published in the Gazette though that was after the date when the respondent was to retire. But the point is whether it was communicated to him before that date. The ordinary meaning of the word 'communicate' is to impart, confer or transmit information. (cf. *Shorter Oxford English Dictionary*, Vol. 1, p. 352). As already stated, telegrams dated July 31, and August 2, 1958, were despatched to the respondent at the address given by him where communications by Government should be despatched. Both the telegrams transmitted or imparted information to the respondent that he was suspended from service with effect from August 2, 1958. It may be that he actually received them in or about the middle of August 1958 after the date of his retirement. But how can it be said that the information about his having been suspended was not imparted or transmitted to him on July 31, and August 2, 1958, i.e., before August 4, 1958 when he would have retired? It will be seen that

in all the decisions cited before us it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication was held to be necessary because till the order is issued and actually sent out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it. In our view, once an order is issued and it is sent out to the concerned Government servant, it must be held to have been communicated to him, no matter when he actually received it. We find it difficult to persuade ourselves to accept the view that it is only from the date of the actual receipt by him that the order becomes effective. If that be the true meaning of communication, it would be possible for a Government servant to effectively thwart an order by avoiding receipt of it by one method or the other till after the date of his retirement even though such an order is passed and despatched to him before such date. An officer against whom action is sought to be taken, thus, may go away from the address given by him for service of such orders or may deliberately give a wrong address and thus prevent or delay its receipt and be able to defeat its service on him. Such a meaning of the word 'communication' ought not to be given unless the provision in question expressly so provides. Actually knowledge by him of an order where it is one of dismissal, may, perhaps, become necessary because of the consequences which the decision in AIR 1966 SC 1313 (supra) contemplates. But such consequences would not occur in the case of an officer who has proceeded on leave and against whom an order of suspension is passed because in his case there is no question of his doing any act or passing any order and such act or order being challenged as invalid.

17. In this view, we must hold that the order of suspension was validly passed and was communicated to the respondent before August 4, 1958, and therefore, was effective as from July 31, 1958. Accordingly, we allow the State's appeal and set aside the judgment and order of the High Court. But as the High Court did not decide the aforesaid three questions raised on behalf of the respondent,

we remand the case to the High Court with the direction to give its decision thereon in accordance with law. The cost of this appeal will be costs before the High Court.

Appeal allowed and
case remanded.

AIR 1970 SUPREME COURT 219

(V 57 C 47)

(From Gujarat)

V. BHARGAVA AND K. S. HEGDE, JJ.

Kanbi Nanji Virji and others, Appellants v. State of Gujarat, Respondent.

Criminal Appeal No. 20 of 1967, D/- 6-10-1969.

(A) Criminal P. C. (1898), Sec. 423 — Appreciation of evidence by appellate court — Evidence of prosecution witness — Truth and falsehood not separable — Entire evidence has to be rejected — Decision of *Guj H. C.*, Reversed.

Having come to the conclusion that right from the beginning a prosecution witness was giving a distorted version of the incident, the appellate Court is not right in holding that any portion of evidence deposed by such prosecution witness can be relied upon merely because that some portion of his testimony in Court accords with the version given by him to another prosecution witness. It is true that oftentimes the Courts have to separate the truth from falsehood. But where the two are so intermingled as to make it impossible to separate them, the evidence has to be rejected in its entirety. Decision of *Guj. H. C.*, Reversed.

(Para 7)

(B) Penal Code (1860), Ss. 149 and 34 and 323 and 304 — Free fight between two groups of persons — Injuries sustained by persons of both group in course of such fight — Death of two persons — Only persons found to have inflicted injuries can be convicted for the injuries caused by them.

Where there was a melee at the time of the incident and the two groups indulged in a free fight resulting in injuries to persons of both groups and death of two, if the Court comes to the conclusion that the injuries sustained by the persons were in the course of a free fight, then only

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those persons who are proved to have caused injuries or death can be held guilty for the offence individually committed by them. (Para 8)

(C) Penal Code (1860), Ss. 34 and 304 Part I — Bona fide assertion of right of way through uncultivated portion of private land by villagers — Does not amount to common intention to commit a criminal act — Conviction under Ss. 304 Part I/34, held, illegal — Decision of Guj. High Court, Reversed.

A bona fide assertion of right of way through the uncultivated portion of private land, by the villagers when the road is submerged during rainy season, cannot in the absence of any other evidence be considered as a common intention to commit a criminal act within the meaning of Section 34. From the fact that one villager had a spade in his hand and the other two had sticks in their hands, it is not safe to draw the inference that they intended to commit any offence.

(Para 11)

Even assuming that the common intention of the accused persons was to force their way through the uncultivated portion of private land by using force, if necessary, their conviction under 1st part of Section 304, I. P. C. was not legal in the absence of finding that they intended to cause any injury to any person. Decision of Guj. High Court, Reversed.

(Para 12)

The following Judgment of the Court was delivered by

HEGDE, J.:— This is an appeal by special leave. In the trial court as many as eight persons were charged under Sections 147, 148, 201/149, 302/149 and 447/149, I. P. C. They were also charged alternatively under Sections 323/34, 302/34, 307/34, 447/34 and 201/34, I. P. C. The learned trial judge acquitted A-6 to A-8 of all the charges for which they were tried. He convicted accused 1 and 3 under the second part of Section 304, I. P. C. and sentenced each of them to suffer rigorous imprisonment for two years for the said offence. He convicted accused 2, 4 and 5 under Section 323, I. P. C. and sentenced each of them to suffer imprisonment for 6 months for the same. Both the State as well as the convicted persons went up in appeal against the judgment of the trial court to the High Court of Gujarat. The State was

aggrieved by the acquittal of the accused under the murder charge. The High Court accepted the appeal of A-1 and A-3 and acquitted them. It also accepted the appeal of the State in part and convicted Accused 2, 4 and 5 under the 1st Part of Section 304/34, I. P. C. For that offence each one of them was sentenced to suffer rigorous imprisonment for five years.

2. The incident giving rise to this case occurred at about noon on September 22, 1964, in Survey No. 265 on the outskirts of the village Ghanad of Lakhatar taluka in Surendranagar District. According to the prosecution case deceased Sabalsingh and P. W. 5 were the owners of the said Survey No. 265. The field in question lies by the side of the road running North to South from Ghanad village to Nana Ankewalia. Survey No. 265 is about a mile from the village site of Ghanad. Across the road mentioned earlier, some of the villagers of Ghanad own lands. To reach those lands as well as to reach Nana Ankewalia, the villagers had to go by the road referred to earlier. But that road used to be submerged during rainy season and during that time, the villagers used to pass through the uncultivated portion of Survey No. 265 known as Mocham land.

3. The prosecution evidence discloses that on September 21, 1964, i.e., a day before the occurrence when Accused 4 and 5 who have fields on the eastern side of the road were passing through the Mocham land, they were obstructed by deceased Sabalsingh. He warned them not to go by that way thereafter though as a matter of concession it is said he allowed them to go over the land on that day. On the day of the occurrence, it is said that A-4 and A-5 again tried to go by that way. At that stage Sabalsingh and his brother P. W. 5 obstructed them. On being so obstructed A-4, returned to the village and thereafter A-1 to A-5 came there armed with spades and sticks. When they tried to pass through the Mocham land, they were obstructed by deceased Sabalsingh, deceased Bhupatgar and P. Ws. 5 and 6. On being so obstructed, the deceased as well as P. Ws. 5 and 6 were attacked by A-1 to A-5 as a result of which Sabalsingh and Bhupatgar died and P. Ws. 5 and 6 seriously injured.

4. The defence version as given by A-1 is that at about noon on the day of occurrence, A-4 came to him and told

him that five to six Darbars and Bavas (evidently referring to the deceased persons and P. Ws. 5 and 6) had assaulted his brother on the previous day and had restrained him from passing through the Mocham and again on that day those Darbars and Bavas had assaulted him and obstructed him from going to his lands. He also told him that he had given that complaint to the Sarpanch and that he had come to tell him thereafter. He further says that after receiving that information he went to the Panchayat office. At that time he saw village people running to Nana Ankewalia road. He thought that there may be a fight and so he went along the Ankewalia road. At the scene of the occurrence he found two groups of persons facing each other. Very soon thereafter Sabalsingh inflicted knife blows on the chest and abdomen of A-2, his brother who on receiving those blows fell down and thereafter Sabalsingh inflicted knife blows on him (A-1); then he also fell down unconscious. He pleads that he does not know what happened subsequently.

5. The High Court has substantially accepted the plea of A-1. It has come to the conclusion that he is a responsible person. He had no motive to attack the deceased persons or P. Ws. 5 and 6. He had gone to the scene on a peaceful mission and that he is likely to have been attacked by the prosecution party during the course of the melee. The only witnesses who speak to the occurrence are P. Ws. 5 and 6. Both the trial Court as well as the High Court wholly disbelieved P. W. 6. They have entirely rejected his testimony. So far as P. W. 5 is concerned, he has been disbelieved in material particulars by the High Court but yet relying on some portions of his evidence, accused 2, 4 and 5 have been convicted. The question for our consideration is whether there is reliable evidence to support their conviction.

6. The first question that arises for decision is whether the villagers of Ghanad or at any rate those villagers who had fields on the eastern side of Ankewalia road had a right of way over the Mocham land. Even according to the prosecution case, the villagers used to pass through the Mocham land whenever the road was submerged. Admittedly on the day of the occurrence, the road was submerged. Therefore prima facie Sabalsingh and P. W. 5 were not justified in

obstructing A-4 and A-5 when they tried to go over that land. The High Court was unable to come to any positive conclusion whether the villagers had acquired a prescriptive right of way over that land but it did come to the conclusion that the assertion of that right by the villagers was a bona fide one.

7. As mentioned earlier both the trial Court and the High Court have completely rejected the testimony of P. W. 6. Hence the prosecution case entirely rests on the testimony of P. W. 5. P. W. 5 was not believed by the High Court in several important respects. It came to the conclusion that he was not a truthful witness. It opined that his version as to the incident is a garbled one and that he has suppressed the part played by him and others on his side. But yet the High Court evidently influenced by the fact that two persons had been killed during the incident undertook a salvaging operation in an attempt to fish out truth out of the mass of false evidence given by him. In doing so it went in search of some corroborative evidence. According to P. W. 5, after the occurrence he ran to the house of Kasalsingh, P. W. 10 and informed him about the occurrence. The High Court thought that to the extent the evidence of P. W. 5 tallies with the information given by him to Kasalsingh the same may be accepted as true. But yet the High Court in many respects disbelieved the testimony of P. W. 5 even when it accorded with the version given by him to P. W. 10. It came to the conclusion that P. W. 5 did not give a full and correct version to P. W. 10. In particular it opined that while informing Kasalsingh about the incident, P. W. 5 deliberately suppressed the part played by the persons on his side. Having come to the conclusion that right from the beginning P. W. 5 was giving a distorted version of the incident, the High Court was not right in holding that any portion of P. W. 5's evidence can be relied upon merely because that some portion of his testimony in court accords with the version given by him to P. W. 10. It is true that oftentimes the courts have to separate the truth from falsehood. But where the two are so intermingled as to make it impossible to separate them, the evidence has to be rejected in its entirety. The High Court overlooked this well accepted principle. If we reject the evidence of P. W. 5, as we think we should,

the prosecution case must be held to be unsubstantiated because there is no other evidence to support it. Whatever other evidence was there it has been rejected by the trial court as well as by the High Court as false. In this view it is not necessary to go into the question whether Kasalsing's evidence comes within the scope of Section 157 of the Evidence Act.

8. The High Court has found, in our opinion, rightly, that there was a melee at the time of the incident and the two groups indulged in a free fight as a result of which four persons were injured on the side of the prosecution and two on the opposite side. A-1 and A-2 had sustained very serious injuries, several of which were incised injuries. At one stage it was thought that A-2 may not survive. His condition was so precarious that it became necessary to immediately operate upon him. The deceased Sabalsing had sustained two injuries only one out of them was a serious one. The other was a mere abrasion. The head injury proved fatal. Bhupatgar had received several injuries. Similarly P. Ws. 5 and 6 had also received several injuries. Once we come to the conclusion that the injuries sustained by the persons were in the course of a free fight, as the High Court had come to, then only those persons who are proved to have caused injuries can be held guilty for the injuries caused by them.

9. The High Court has come to the conclusion that it is not possible to come to any positive conclusion as to how the incident commenced as there is no reliable evidence about the same. We agree with that finding. In fact the first information sent to the police by Sajubha on the basis of the information given to him by Kunverji Khushal is that there was a 'Tofan' (fight or riot) at the scene of the occurrence. That was also the information given by P. W. 5 to P. W. 10. Therefore the evidence of P. W. 5 that it was a one-sided attack appears to be baseless.

10. Dealing with the actual occurrence this is what the High Court observed:

"We are not prepared to accept Parbatsing's (P. W. 5) word regarding the participation of the different accused in the infliction of the injuries on Bhupatgar and Sabalsing and Parbatsing. The reason is that judging by the number of injuries on both the sides, something in the nature

of a melee must have taken place and it would be difficult to judge who inflicted what blow on what part of the body in the course of such a melee."

Again in another portion of the judgment it observed:

"As to what exactly transpired at the time of the incident and who acted as aggressors and who dealt with the first blow, there is no clear evidence available on the record of the case. According to the evidence of Parbatsing, to the extent that it is corroborated by Kasalsing the persons on the side of the accused acted as aggressors but we are not prepared to accept Parbatsing's version on that aspect of the matter, when he is silent about the injuries on accused Nos. 1 and 2.

11. After having observed as above, strangely enough, the High Court still came to the conclusion that Accused 2, 4 and 5 went to the scene of occurrence with the common intention of forcing their way through the Mocham, by force, if necessary. The evidence on record discloses that as soon as A-4 came back to the village and informed the villagers that Sabalsing and his brother are not allowing them to pass through the Mocham there was a drum beating at the instance of A-2. It is most likely that thereafter the villagers gathered there and all of them went to Mocham with a view to see that their right of way is not obstructed. In our opinion, the High Court was not right in relying on the testimony of P. W. 5 to come to the conclusion that only A-1 to A-5 went to the scene at that time. This finding of the High Court in a way conflicts with its finding as regards the role played by A-1 at the time of the incident. The probabilities are in favour of the version put forward by A-1. There was no basis for the High Court's finding that when A-2, 4 and 5 went to the scene they had the common intention of forcing their way, using violence, if necessary. At one stage the High Court arrived at a finding that the only common intention that the villagers had was to enforce their right of way. Such a common intention cannot be considered as a common intention to commit a criminal act within the meaning of Section 34, I. P. C. The inference drawn by the High Court that A-2, A-4 and A-5 had a common intention to force their way through the Mocham, using violence if necessary was evidently drawn solely on the basis of the fact that at the time of the occurrence A-2 had spade

with him and A-4 and A-5 had sticks in their hands. From the fact that one villager had a spade in his hand and the other two had sticks in their hands, it is not safe to draw the inference that they intended to commit any offence. Again on the material on record, it is not possible to draw a firm inference that A-4, A-2 and A-5 had any common intention. It is not proved that they had met together earlier. From the proved facts, it is not possible to draw a conclusive inference that they acted in concert, which is the essential requirement of Section 34, I. P. C. Again for coming to the conclusion that A-2 had a spade and A-4 and A-5 had sticks in their hands, we have to largely rely on the testimony of P. W. 5, a wholly unreliable witness.

12. Even if the High Court is right in its conclusion that the common intention of A-2, A-4 and A-5 was to force their way through Mocham by using force, if necessary, it could not have convicted them under Section 304, I. P. C. because it is not the finding of the court they intended to cause any injury to any person. The High Court has failed to bear in mind the distinction between Sec. 34 and Section 149 of I. P. C.

13. In the result this appeal is allowed and the appellants are acquitted.

Appeal allowed.

AIR 1970 SUPREME COURT 223 (V 57 C 48)

(From Kerala: AIR 1961 Ker 161)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Anthonywamy, Appellant v. M. R. Chinawamy Koundan (died) by L. Rs. and others, Respondents.

Civil Appeal No. 2020 of 1966, D/- 6-10-1969.

Hindu Law — Mitakshara School — Inheritance and Succession — Vannia Tamil Christians of Chittur Taluk, Kerala — Law as to inheritance and succession — Community is governed by Mitakshara School of Hindu law — Son's liability to discharge father's debt — Doctrine of pious obligation — Nature — Doctrine applies to Vannia Tamil Christians.

LM/LM/F154/69/DVT/M

The Vanniya Tamil Christians of Chittur Taluk, Kerala are governed by the Mitakshara School of Hindu law in regard to inheritance and succession. The son of a member of such community gets by birth an interest in ancestral property owned by the father. The doctrine of pious obligation applies and the son is bound to discharge his father's debts not tainted by illegality or immorality.

(Para 4)

It is not a correct proposition to state that the doctrine of pious obligation is of religious character or is inextricably connected with Hindu religious belief. The doctrine of pious obligation is not merely a religious doctrine but has passed into the realm of law. The doctrine is a necessary and logical corollary to the doctrine of the right of the son by birth to a share of the ancestral property and both these conceptions are correlated. The liability imposed on the son to pay the debt of his father is not a gratuitous obligation thrust on him by Hindu law but is a salutary counterbalance to the principle that the son from the moment of his birth acquires along with his father an interest in joint family property. The doctrine is in consonance with justice, equity and good conscience and is not opposed to any principle of Christianity. It cannot, therefore, be said that though the Vannia Tamil Christians of the Chittur Taluk are governed as a matter of custom by the Mitakshara School of Hindu law, the doctrine of pious obligation is not applicable. AIR 1961 Ker 161, Affirmed. Case law discussed.

(Paras 6, 7)

Cases Referred: Chronological Paras

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|---|---|
| (1938) AIR 1938 Mad 377 (V 25) = ILR (1938) Mad 568 (FB), Maruthamuthu Naicker v. Kadir Badsha Rowther | 9 |
| (1936) AIR 1936 Mad 937 (V 23) = 71 Mad LJ 766, Balakrishnan v. Chittoor Bank | 7 |
| (1924) AIR 1924 PC 50 (V 11) = 51 Ind App 129, Brij Narain v. Mangala Prasad | 6 |
| (1881-82) 9 Ind App 128 = ILR 6 Mad 1 (PC), Muttayan v. Zemin- dar of Sivagin | 6 |
| (1878-79) 6 Ind App 88 = ILR 5 Cal 148 (PC), Suraj Bansi Koer v. Sheo Pershad Singh | 6 |
| (1873-74) 1 Ind App 321 = 14 Beng LR 187 (PC), Girdharee Lall v. Kantoo Lal | 6 |

(1963) 9 Moo Ind App 195 = 1 Suth

WR 1 (PC), *Charlotte Abraham**v. Francis Abraham*

34 Cochin 881

4 Sel Dec 485 (Cochin)

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The following Judgment of the Court was delivered by

RAMASWAMI, J.: This appeal is brought by certificate from the judgment of the High Court of Kerala dated July 13, 1960 in Appeal Suit No. 251 of 1956.* By its judgment the High Court allowed the appeal of the deceased M. R. Chinnaswamy Goundan, 1st defendant, reversing the judgment and decree of the Subordinate Judge of Chittur in O. S. No. 131 of 1950 which the appellant had filed on March 31, 1949 in forma pauperis for declaring that certain execution proceedings resulting in the sale of suit properties were invalid and for partition of one-fourth share therein. The appellant also claimed in the alternative a decree for payment of Rs. 30,000 as damages sustained by him on account of fraud and collusion in the execution proceedings.

2. The plaintiff is the son of the 8th defendant and the 9th defendant is the brother of the 8th defendant. The plaintiff and defendants 8 and 9 are Tamil Vannian Christians of Chittur Taluk who are governed in the matter of inheritance and succession by Hindu Mitakshara law. The plaintiff has acquired a right by birth in the ancestral properties and during the lifetime of his father the son has a right to claim partition. The plaintiff properties belonged to the family of plaintiff and defendants 8 and 9 which yield an annual profits of 4000 paras of paddy and Rs. 1,500. Kanakappa Koundan, the father of 8th defendant became the manager of the family. He led an immoral life and incurred debts for immoral purposes. He hypothecated the family properties to the 5th defendant and obtained money. The 5th defendant sued upon the mortgage bond in O. S. No. 75 of 1107 (M. E.) of the Trichur District Court and impeaching the validity of the debts, the 9th defendant who was a minor at that time filed a suit for partition of his half share in O. S. 65 of 1107 (M. E.) in the same District Court. During the pendency of the two suits the 5th defendant applied for the appointment of a receiver and the Court appointed the 7th defendant, a friend of the 5th defendant,

as receiver with a direction to pay Rs. 40 per mensem to the 9th defendant as maintenance till the disposal of the suit. The plaintiff properties were committed to the possession of the 7th defendant as receiver in those suits.

3. The suit for partition was dismissed on November 14, 1933 as by this date the equity of redemption had been sold in execution of simple money decree against defendants 8 and 9 in O. S. 203 of 1107 (M. E.). The 8th defendant for himself and as guardian of his younger brother executed a promissory note on 11-10-1105 (equivalent to May 1930) to one Somasundara Swamiyar for Rs. 1,500 the consideration for which was paid partly in cash and partly in discharge of an earlier promissory note dated 11th Vaisakhi 1104 (June, 1929). The promisee endorsed the note to Ramachandra Iyer on 24th Thulam 1107 (equivalent to November, 1932). Ramachandra Iyer filed a suit on this note, I. S. 213 of 1107 on 6-5-1107 (1931) against the 8th and 9th defendants. The suit was decreed and the decree-holder executed the decree. The disputed properties were attached. The properties at that time were in the possession of the 9th defendant for sometime as receiver and then in the hands of a vakil appointed by the Court in his place. In execution, one Harihara Subramania Iyer purchased the equity of redemption on 31st Karkatam 1108 (July-August, 1933). The auction-purchaser was duly put in possession on 22-3-1109 (1933). The mortgagee Sadasiva Iyer who had obtained a decree on one of the mortgages on 29-3-1109 (M. E.) purchased the property from the auction-purchaser on 5-5-1109 (1934). As possession had already been taken by the auction purchaser in execution of the decree passed against them, the 9th defendant did not press the partition suit — O. S. 65 of 1107. In 1938 Sadasiva Iyer was adjudged insolvent and the official receiver took possession. He sold the property in auction and the deceased 1st defendant became the purchaser for Rs. 24,000. Exhibit XIV is the sale deed executed by the Official Receiver on 13-7-1116 (1941). The appellant thereafter brought the present suit for partition. The claim of the appellant was based on the allegation that Vannia Tamil Christians living in Chittur Taluk were governed as a matter of custom by the Mitakshara School of Hindu law. It was said that joint family relationship subsisted as between father and sons and

*(Reported in AIR 1961 Kerala 161.)

where the father has inherited properties from his father, they became ancestral properties in his hands and so his sons acquired a right therein by birth including the right to claim the property by survivorship. It was also said that the decree debt in O. S. No. 213 of 1107 ME was not incurred for legal necessity but was incurred for immoral purposes and so the mortgage debts were not binding on the appellant. The appellant was, therefore, entitled to one-fourth share in the properties and to partition of his one-fourth share. The deceased, 1st defendant, contested the suit. He claimed to be a bona fide purchaser for value of the entire interest in the property from the Official Receiver in whom the properties had vested on the insolvency of Sadasiva Iyer. It was said that he had no notice of any vitiating circumstance affecting the title at public auction conducted by the Official Receiver. After the sale, defendant No. 1 became the absolute owner of the properties and was in full possession and enjoyment of the same. It was also contended that the plaintiff could not claim any interest in the properties during the lifetime of his father. There was no customary right of birth in the community to which the plaintiff belonged and even if such right existed, the plaintiff was bound to pay off his father's debts on the doctrine of pious obligation before claiming any partition in respect of the properties. It was also said that the debt which was the basis of the decree in O. S. 213 of 1107 ME was not tainted by illegality or immorality.

4. The Subordinate Judge came to the following findings: The plaintiff has established the custom that Vanniya Tamil Christians of Chittur Taluk were governed in the matter of inheritance and succession by Hindu Mitakshara law. The plaintiff has acquired right by birth in the ancestral properties and was entitled to claim a share therein and the properties acquired with the aid of income from ancestral properties also became joint family properties. The Manager of the family for the time being cannot alienate the properties except for legal necessity but the doctrine of pious obligation imposing a liability on the son to discharge his father's debts incurred either for illegal or immoral purposes did not apply to the community to which the plaintiff belonged. The decree made on

the promissory note by defendant No. 8 could not be executed against the plaintiff's share because the right of an endorsee of a promissory note executed by the managing member of a joint Hindu family was limited to the note unless the endorsement was so worded as to transfer the debt as well. In the present case there was an ordinary endorsement and there was no transfer of the debt and, therefore, the endorsee cannot sue the non-executing coparcener on the ground of his liability under the Hindu law. Exhibit F on which the decree was obtained was for immoral purposes and the decree cannot bind the plaintiff and his share in the disputed properties cannot pass in execution sale. The mortgage-decree-holder contrived to get the assignment of the promissory note debt and had a suit brought on it, brought the properties to sale and got the properties purchased for his own benefit. The execution proceedings were collusive and fraudulent and not binding on the plaintiff. On these findings the Subordinate Judge granted a decree for partition and recovery of possession in favour of the plaintiff subject to the mortgages on the property created before his birth. Aggrieved by the decree of the Subordinate Judge the 1st defendant preferred an appeal to the High Court of Kerala which allowed the appeal and dismissed the suit. The High Court held that the Vanniya Tamil Christians of Chittur Taluk are governed by the Mitakshara School of Hindu law in regard to inheritance and succession. The son of a member of such community gets by birth an interest in ancestral property owned by the father. The doctrine of pious obligation applies and the son is bound to discharge his father's debts not tainted by illegality or immorality. The debt which resulted in the execution sale was not so tainted. The question whether the debt was incurred for legal necessity was not decided. The High Court held that the execution proceedings and the sale in auction are not vitiated by fraud or collusion.

5. The first question to be considered in this appeal is whether the doctrine of pious obligation according to the Mitakshara School of Hindu law is applicable to Vanniya Tamil Christians of Chittur Taluk. In para 1 of the plaint the law applicable to the community is stated as follows:

"The plaintiff and defendants 8 and 9 are Tamil Christians residing in Chittur Taluk, the plaintiff being the son of the 8th defendant and defendant 9 being the younger brother of the 8th defendant. The plaintiff and defendants 8 and 9 are of the Vanniya Caste and in the matter of property rights of inheritance and succession alone they are governed by the Hindu Mitakshara Law. The plaintiff by birth is entitled to a share in the ancestral property and that even during the lifetime of his father the son has every right to demand his share in the ancestral property and recover the same even by a suit. In the community to which the plaintiff belongs the properties of a man become on his death ancestral properties in the hands of the sons and thereafter it continues for ever to be family ancestral property and therein the son has by his birth a right to a share even during the lifetime of the father. This custom is a very ancient one and is adopted as the law from time immemorial, and governs the community. The above is the customary law of the plaintiff's community accepted and followed by them from ancient times."

6. In 4, Select Decisions 485 the Chief Court of Cochin held that the Tamil Vanniya Christians of Chittur Taluk were governed by the rules of Hindu law in matters of inheritance and succession. The decision was followed some 35 years later in 34 Cochin 881. The Report of the Cochin Christian Succession Bill Committee stated that "as to the Tamil Christians of the Chittur Taluk, the evidence shows that they follow the Hindu law of succession and inheritance" and recommended that they should be excluded from the proposed legislation. The recommendation was accepted by the Maharajah of Cochin. Section 2 (2) of the Cochin Christian Succession Act (VI of 1097) provided that nothing therein contained shall be deemed to affect succession to the property of "the Tamil Christians of Chittur Taluk who follow the Hindu Law". In this state of facts it was not contended on behalf of the appellant that the Tamil Vanniya Christians of the Chittur Taluk were not governed by the Mitakshara law in matters of inheritance and succession. But it was argued that the doctrine of pious obligation originated in Hindu religious belief and was opposed to the tenets of Christianity. It was said that the doctrine was not applicable to Tamil Vanniya Chris-

tians of Chittur Taluk. We are unable to accept this argument. It is not a correct proposition to state that the doctrine of pious obligation is of religious character or is inextricably connected with Hindu religious belief. It is true that according to Smriti writers the non-payment of a debt was a sin the consequences of which will follow the debtor into the next world. But the doctrine as developed by the Judicial Committee in *Girdharilal's Case*, (1873-74) 1 Ind App 321 (PC); *Surajbansi's case*, (1878-79) 6 Ind App 88 (PC) and in *Brij Narain v. Mangal Prasad*, 51 Ind App 129 = (AIR 1924 PC 50) is different in several important respects. Under the Smriti texts there was only a religious and not a legal obligation imposed upon the sons to pay the debt of their father. Also the obligation of the son to pay the debt arose not in the father's lifetime but after his death. The text of Narada says that fathers desire male offspring for their own sake reflecting "this son will redeem me from every debt due to superior and inferior beings". Therefore, a son begotten by him should relinquish his own property and assiduously redeem his father from debt lest he fall into a region of torment. If a devout man or one who maintained a sacrificial fire die a debtor, all the merit of his devout austerities or of his perpetual fire shall belong to his creditors (1 Dig. Higg. Edition 202). The text of Vishnu states: "If he who contracted the debt should die, or become a religious anchorite, or remain abroad for twenty years, that debt shall be discharged by his sons or grandsons but not by remoter descendants against their will": (1 Dig. Higg. Edition 185). Brihaspati also states "the sons must pay the debt of their father, when proved, as if it were their own, or with interest; the son's son must pay the debt of his grandfather but without interest and his son or the great grandson shall not be compelled to discharge it unless he be heir and have assets. But the Judicial Committee held in the *Sivagiri case*, (1881-82) 9 Ind App 128 (PC) that the obligation of the son was not a religious but a legal obligation and the rule would operate not only after the father's death but even in the father's lifetime. Under the old texts of Hindu law only the son and grandson are liable to pay the ancestor's debt but the obligation is personal and independent of any assets derived from the joint family. The Judicial Committee, however, extended

the doctrine to the great grandson but confined the liability to the extent of coparcenary property. From the son's duty to pay his father's untainted debt the Judicial Committee deduced the proposition that the father had the right to alienate his son's interest to pay such a debt and this right was also made available to the creditor of the father.

7. It is evident therefore that the doctrine of pious obligation is not merely a religious doctrine but has passed into the realm of law. The doctrine is a necessary and logical corollary to the doctrine of the right of the son by birth to a share of the ancestral property and both these conceptions are correlated. The liability imposed on the son to pay the debt of his father is not a gratuitous obligation thrust on him by Hindu law but is a salutary counterbalance to the principle that the son from the moment of his birth acquires along with his father an interest in joint family property. It is, therefore, not possible to accept the argument addressed on behalf of the appellant that though the community is governed as a matter of custom by the Mitakshara School of Hindu law the doctrine of pious obligation was not applicable. In *Balakrishnan v. Chittoor Bank*, AIR 1936 Mad 937 the question arose whether among the Ezhava community of Palghat though they follow Maktayam Law and not Marumakatayam Law, the sons are liable for the debts of their father not incurred for illegal or immoral purposes irrespective of any question of family necessity. It was held by Varadachariar J., that the sons were so liable and it was observed that there was no warrant for introducing one portion of the Hindu Law in governing a certain community without taking along with it the other portions which form an integral part of the whole system. In this connection reference may be made to the following passage from the judgment of the Judicial Committee in *Charlotte Abraham v. Francis Abraham*, (1863) 9 Moo Ind App 195 at p. 243 (PC).

"The profession of Christianity releases the convert from the trammels of the Hindoo law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert though not bound as to such matters, either by the

Hindoo law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters had adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed."

For the reasons already given we are of opinion that the doctrine of pious obligation is not merely a religious doctrine but has passed into the realm of law. It is an integral part of the Mitakshara School of Hindu law wherein the sons from the moment of their birth acquire along with their father an interest in the joint family property. The doctrine is in consonance with justice, equity and good conscience and is not opposed to any principle of Christianity. It follows that the High Court is right in its conclusion that the doctrine of pious obligation is applicable to the community of Tamil Vanniya Christians of Chittur Taluk.

8. The next question to be considered is whether the liability of the son was excluded because at its inception the debt was tainted by immorality. The evidence adduced on behalf of the plaintiff to establish the immoral character of the debt consists of the testimony of P. Ws. 19 and 20. P. W. 19 deposed that the plaintiff's father was keeping a married woman called Thankammal, that Thankammal was residing opposite to his house at Alambadi with her husband, that he had seen the plaintiff's father frequenting her house, that plaintiff's father executed a promissory note in favour of Somasundara Swamiyar, payee under Ex. F and out of the consideration a sum of Rs. 1,000 was paid to Thankammal. P. W. 20 gave evidence to a similar effect. P. Ws. 19 and 20 are not the attesting witnesses of the promissory notes. They were mentioned by the plaintiff for the first time in the supplemental list of witnesses dated 12-11-1954.

The High Court has disbelieved the evidence of P. Ws. 19 and 20 and held that the allegation of the appellant that the debt was tainted by immorality was not established. We see no reason to differ

from the view taken by the High Court on this point.

9. We proceed to consider the next question arising in this appeal, that is, whether the endorsee of the promissory note is entitled to obtain a decree against the defendants personally and for sale of the family properties upon the original debt. The contention of the appellant was that the 4th defendant was not the payee under Ex. F but was an endorsee of the promissory note and was not hence entitled to obtain a decree against the non-executant coparceners and to proceed against the joint family properties. In support of this proposition reliance was placed upon a decision of the Full Bench of the Madras High Court in *Maruthamuthu Naicker v. Kadir Badsha Rowther*, AIR 1938 Mad 377 (FB) in which it was held that an indorsee of a promissory note executed by the managing member of a Hindu family was limited to his remedy on the promissory note, unless the endorsement was so worded as to transfer the debt as well and the stamp law was complied with and, therefore, in the case of an ordinary endorsement, the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu law. Where the indorsement is in blank it only operates to transfer the property in the instrument and not as an assignment of debt. It is not, however, necessary for us to examine this argument. The reason is that the endorsement in the present case made by the 8th defendant in favour of the 9th defendant is not a mere endorsement but it has been so worded as to transfer the debt also. The indorsement reads as follows:

"As the principal and interest as per this promissory note is received in cash today to (my) satisfaction from Ramachandra Iyer, son of Subbarama Iyer, Thekkegramam, Chittur, the above principal and interest together with the future interest thereon is to be paid to the above Ramachandra Iyer or to his Order.

Dated 24th Thulam 1107,
Somasundara Swamiyar."

It is apparent that the endorsement is so worded as to convey the transfer of the debt as well and it follows that Ramachandra Iyer, defendant No. 4 was entitled to bring a suit against the non-executant coparceners on the ground of their liability under the Hindu law. We

accordingly reject the argument of the appellant on this aspect of the case.

10. Finally counsel on behalf of the appellant contended that the sale in execution proceedings in O. S. 213 of 1107 ME was vitiated by fraud. The Subordinate Judge took the view that defendants 4 to 7 had committed fraud and the decree in execution in O. S. 211 of 1107 ME was void and liable to be set aside. But the High Court has upon a review of the facts found that the 4th defendant and 6th defendant and P. W. 23 Srilala Iyer had actively assisted the 5th defendant to get possession of the property as quickly as possible but there was no proof that defendants 4 to 7 either collectively or individually transgressed the limits of law or were guilty of fraud. Upon the evidence adduced in the case we are satisfied that the finding of the High Court is correct.

11. For these reasons we hold that this appeal fails and must be dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 228 (V 57 C 49)

(From Calcutta: AIR 1967 Cal 355)

M. HIDAYATULLAH, C. J., J. M.

SHELAT, V. BHARGAVA, K. S.

HEGDE AND A. N. GROVER, JJ.

Indu Bhusan Bose, Appellant v. Rama Sundari Debi and another, Respondents.
Attorney-General for India (By Notice).
Civil Appeal No. 882 of 1968, D/- 29-4-1969.

(A) Constitution of India, Sch. VII, List 1, Entry 3, Art. 246 — Scope and effect — Entry 3 is not restricted to houses acquired, requisitioned or allotted for military purposes and includes even private letting out of houses in cantonment areas — Expression 'regulation of house accommodation' includes regulation in all its aspects and is not confined to allotment only — Effect of Entry 3 is that Parliament alone can legislate and not State Legislatures notwithstanding fact that similar power may be found in any entry in List II or List III. AIR 1954 Bom 204 & AIR 1954 Bom 254 & AIR 1956 Nag 268 & AIR 1961 Pat 207. Overruled.

In Entry 3 in List I of the Constitution, when power is granted to Parliament to

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make laws for the regulation of house accommodation in cantonment areas, there are no qualifying words to indicate that the house accommodation, which is to be subject to such legislation, must be accommodation required for military purposes, or must be accommodation that has already been acquired, requisitioned or allotted to the military. (Para 3)

The word 'regulation' cannot be so narrowly interpreted as to be confined to allotment only and not to other incidents, such as termination of existing tenancies and eviction of persons in possession of the house accommodation. This entry, thus, gives the power to Parliament to pass legislation for the purpose of directing or controlling all house accommodation in cantonment areas. Clearly, this power to direct or control will include within it all aspects as to who is to make the constructions, under what conditions the constructions can be altered, who is to occupy the accommodation and for how long, on what terms it is to be occupied, when and under what circumstances the occupant is to cease to occupy it, and the manner in which the accommodation is to be utilised. All these are ingredients of regulation of house accommodation and there is no reason to hold that this word "regulation" has not been used in this wide sense in this entry. (1924) 2 K. B. 736 & (1948) 1 K. B. 630 & (1948) 2 All ER 189, Ref. (Para 5)

In the Constitution, the effect of Entry 3 of List I is that Parliament has exclusive power to make laws with respect to the matters contained in that Entry, notwithstanding the fact that a similar power may also be found in any Entry in List II or List III. Article 246 of the Constitution confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I, notwithstanding the concurrent power of Parliament and the State Legislature, or the exclusive power of the State Legislature in Lists III and II respectively. The general power of legislating in respect of relationship between landlord and tenant exercisable by a State Legislature either under Entry 18 of List II or Entries 6 and 7 of List III is subject to the overriding power of Parliament in respect of matters in List I, so that the effect of Entry 3 of List I is that, on the subject of relationship between landlord and tenant insofar as it arises in respect of house accommodation situated in cantonment areas, Parliament alone can legis-

late and not the State Legislatures. AIR 1962 Raj 190 Approved. AIR 1967 Cal 355 Affirmed. AIR 1954 Bom 204 & AIR 1954 Bom 254 & AIR 1956 Nag 268 & AIR 1961 Pat 207, Overruled.

(Para 12)

(B) Constitution of India, Sch. VII, List II, Entry 18 — Government of India Act (1935) Sch VII, List II, Entry 21 — Expression 'land tenures' — It would not appropriately cover tenancy of buildings or of house accommodation (Obiter).

Entry 21 of List II of the Seventh Schedule to the Government of India Act, or the corresponding Entry 18 of List II of the Seventh Schedule to the Constitution permit legislation in respect of land and explain the scope by equating it with rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents. The relation of landlord and tenant is mentioned as being included in land tenures and the expression "land tenures" would not, appropriately cover tenancy of buildings or of house accommodation. That expression is only used with reference to relationship between landlord and tenant in respect of vacant lands. In fact, leases in respect of non-agricultural property are dealt with in the Transfer of Property Act and would much more appropriately fall within the scope of Entry 8 of List III in the Seventh Schedule to the Government of India Act read with Entry 10 in the same List, or within the scope of Entry 6 of List III in the Seventh Schedule to the Constitution read with Entry 7 in the same List. Leases and all rights governed by leases, including the termination of leases and eviction from property leased, would be covered by the field of transfer of property and contracts relating thereto. (Obiter) (Para 12)

Cases Referred: Chronological Paras

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| (1962) AIR 1962 Raj 190 (V 49)= | |
| ILR (1961) 11 Raj 421, Nawal Mal v. Nathu Lal | 13 |
| (1961) AIR 1961 Pat 207 (V 48)= | |
| ILR 40 Pat 625, Babu Jagtanand v. Sri Satyanarayanji and Lakshmiji | 13 |
| (1956) AIR 1956 Nag 268 (V 43)= | |
| ILR (1956) Nag 618, Kewalchand v. Dashrathlal | 13 |
| (1954) AIR 1954 Bom 204 (V 41)= | |
| ILR (1954) Bom 434, A. C. Patel v. Vishwanath Chada | 12, 13 |
| (1954) AIR 1954 Bom 254 (V 41)= | |
| ILR (1954) Bom 544, F. E. Darukhanawala v. Khemchand Lalchand | 12, 13 |

- (1948) 1948-1 KB 630=1948-1 All ER 165, Property Holding Co., Ltd. v. Clark 8
 (1948) 1948-2 All ER 189=1948 LJR 1756, Curl v. Angelo 9
 (1931) 1931-2 KB 546=100 LJKB 718, Skinner v. Geary 9
 (1924) 1924-2 KB 736=93 LJKB 993, Prout v. Hunter 7

M/s. D. N. Mukherjee and Sunil Kumar Ghosh, Advocates, for Appellant; Mr. A. K. Sen, Senior Advocate (Mr. Sukumar Ghose and Miss Krishna Sen, Advocates, with him), for Respondent No. 1; Mr. B. Sen, Senior Advocate (M/s. Sukumar Basu and P. K. Chakravarti, Advocates, with him), for Respondent No. 2; Mr. Niren De, Attorney-General for India and Dr. V. A. Seyid Muhamad, Senior Advocate (M/s. R. H. Dhebar and S. P. Nayar, Advocates, with them), for Attorney-General for India.

The following Judgment of the Court was delivered by

BHARGAVA, J.— Rama Sundari Debi, the first respondent in this appeal by special leave, instituted a suit for the ejectment of Indu Bhusan Bose appellant who was a tenant in premises No. 18, Riverside Road, owned by respondent No. 1, situated within the cantonment area of Barrackpore. The agreed rent was Rs. 250 per mensem; but there was a dispute as to whether the owner or the tenant was liable to pay rates and taxes. On an application presented by the appellant, the Rent Controller fixed fair rent under Section 10 of the West Bengal Premises Tenancy Act No. XII of 1956 (hereinafter referred to as "the Act") at Rs. 170 per month inclusive of all cantonment taxes, and, in appeal, the amount was enhanced to Rs. 188 per month inclusive of all cantonment taxes. Respondent No. 1, in December, 1960, served a notice on the appellant to quit and, on failing to get vacant possession, filed a suit in the Court of the Munsif. In the plaint, respondent No. 1 claimed that, regulation of house accommodation including control of rents being a subject in Entry No. 3 of List I of the Seventh Schedule to the Constitution, the State Legislature could not competently enact a law on the same subject for cantonment areas, so that the appellant was not entitled to protection under the Act which had been extended to that area by the State Government. It was urged that the extension of that State Act to the cantonment area was ultra vires and void. The

Munsif, thereupon, made a reference under Section 113 of the Code of Civil Procedure to the High Court of Calcutta for decision of this constitutional question raised in the suit before him. The High Court decided the reference by making a declaration that the notification, whereby the State Government had extended the provisions of the Act to the Barrackpore cantonment area, was ultra vires and void. This is the decision of the High Court that has been challenged in this appeal.

2. It has been contended on behalf of the appellant that the High Court is not correct in holding that the field of Legislation covered by the Act, which is primarily concerned with control of rents and eviction of tenants, is included within the expression "regulation of house accommodation in cantonment areas" used in entry No. 3 of List I. That entry is as follows:—

"3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas". The submission made is that regulation of house accommodation will not include within it laws or rules on the subject of relationship of landlord and tenant of building situated in the cantonment areas. On the other hand, according to the appellant, legislation on this subject can be made either under entry No. 18 of List II, or entries Nos. 6, 7 and 13 of List III, so that a State Legislature is competent to legislate and regulate relationship between landlord and tenant even in cantonment areas. These relevant entries are reproduced below:—

"List II

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

"List III

6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

13. Civil procedure, including all matters included in the Code of Civil Proce-

ture at the commencement of this Constitution, limitation and arbitration."

3. On the scope of Entry 3 of List I, the argument advanced is that Parliament is empowered to legislate in respect of house accommodation situated in cantonment areas only to the extent that that house accommodation is needed for military purposes and laws are required for requisitioning or otherwise obtaining possession of that accommodation for such purposes. In the alternative, the submission made is that regulation of house accommodation by parliamentary law should be confined to houses acquired, requisitioned or allotted for military purposes. This Entry 3, according to the appellant, should not be read as giving Parliament the power to legislate on the relationship of landlord and tenant in respect of houses situated in cantonment areas if such houses are let out privately by a private owner to his tenant and have nothing at all to do with the requirements of the military. We are unable to accept this submission. The language of the entry itself does not justify any such interpretation. In the entry when power is granted to Parliament to make laws for the regulation of house accommodation in cantonment areas, there are no qualifying words to indicate that the house accommodation, which is to be subject to such legislation, must be accommodation required for military purposes, or must be accommodation that has already been acquired, requisitioned or allotted to the military. In fact, if a legislation in respect of any cantonment was to be undertaken by Parliament for the first time under this entry, there would be, at the time of that legislation, no house in the cantonment already acquired, requisitioned or allotted for military purposes; and, if the interpretation sought to be put on behalf of the appellant were accepted, the power of Parliament to pass laws cannot be exercised by Parliament at all. It is also significant that, in the entry, various items, which can be the subject-matter of legislation by Parliament, are mentioned separately, and these are:—

- (i) Delimitation of cantonment areas;
- (ii) local self-government in such areas;
- (iii) the constitution and powers within such areas of cantonment authorities; and
- (iv) the regulation of house accommodation (including the control of rents) in such areas.

4. In none of these clauses there is any specification that the legislation is to be confined to areas or accommodation required for military purposes. When legislating in respect of local self-government in cantonment areas, it is obvious that Parliament will have to legislate for the entire cantonment area including portions of it which may be in possession of civilians and not military authorities or military officers. Similarly, the powers of the cantonment authorities, which could be granted by legislation by Parliament, cannot be confined to those areas or buildings which are in actual possession of military authorities or officers and must be in respect of the entire cantonment area including those buildings and lands which may be in actual ownership as well as occupation of civilians. In these circumstances, there is no reason to narrow down the scope of legislation on regulation of house accommodation and confine it to houses which are required or are actually in possession of military authorities or military officers. The power to regulate house accommodation by law must extend to all house accommodation in the cantonment area irrespective of its being owned by, or in the possession of, civilians. In fact, if a law were to be made for the first time under this entry, all the houses would be either vacant or occupied by owners or occupied by tenants of owners under private agreements and the law, when first made, will have to govern such houses. The scope of the expression "regulation of house accommodation" in this entry cannot, therefore, be confined as urged on behalf of the appellant.

5. It is, in the alternative, contended that, even if the expression "regulation of house accommodation" in this entry includes regulation of houses in private occupation, it should not be interpreted as giving Parliament the power even to legislate for eviction of tenants who may have occupied the houses under private arrangement with the owners. It should be confined to legislation for the purpose of obtaining possession and allotment of such accommodation to military authorities or military officers. We cannot accept that the word "regulation" can be so narrowly interpreted as to be confined to allotment only and not to other incidents, such as termination of existing tenancies and eviction of persons in possession of the house accommodation. The dictionary meaning of the word "regulation" in the

Shorter Oxford Dictionary is "the act of regulating" and the word "regulate" is given the meaning "to control, govern or direct by rule or regulation". This entry, thus, gives the power to Parliament to pass legislation for the purpose of directing or controlling all house accommodation in cantonment areas. Clearly, this power to direct or control will include within it all aspects as to who is to make the constructions under what conditions the constructions can be altered, who is to occupy the accommodation and for how long, on what terms it is to be occupied, when and under what circumstances the occupant is to cease to occupy it, and the manner in which the accommodation is to be utilised. All these are ingredients of regulation of house accommodation and we see no reason to hold that this word "regulation" has not been used in this wide sense in this entry.

6. It appears that, in the Government of India Act, 1935, the corresponding entry No. 2 in List I of the Seventh Schedule to that Act was similar to this entry No. 3 of List I of the Seventh Schedule to the Constitution, but the expression "including control of rents" which is now in Entry No. 3 of List I within brackets did not exist. An argument was sought to be built on it that regulation of house accommodation was not intended to cover control of rents when that expression was used in the corresponding entry in the Government of India Act, and that this expression used in the Constitution should also be interpreted to cover the same field, so that, but for the addition made within brackets, Parliament could not have legislated for control of rents of house accommodation within cantonment areas. It is further urged that, if the expression "regulation of house accommodation" is interpreted as not including within it regulation or control of rents, it should also be held that it will not include regulation of eviction of private tenants. This argument is based on the premise that the words "including control of rents" was introduced in entry 3 of List I of the Seventh Schedule to the Constitution for the purpose of enlarging the scope of the legislative authority of Parliament and making it wider than that of the Federal Legislature under the Government of India Act. Such an assumption is not necessarily justified. It may be that the words "including the control of rents" were introduced by way of abundant caution or to clarify that the regula-

tion of house accommodation is wide enough to include control of rents. The addition may have been made so as to concentrate attention on the fact that legislation was needed for control of rents in the situation that existed at the time when the Constitution was passed by the Constituent Assembly. It has to be remembered that cantonments are intended to be and are, in fact, military enclaves and regulation of occupation of house accommodation in the cantonment areas by Parliamentary law is necessary from the point of view of security of military installations in cantonments and requirements of military authorities and personnel for accommodation in such areas. Such a purpose could only be served by ensuring that Parliament could legislate in respect of house accommodation in cantonment areas in all its aspects, including regulation of grant of leases, ejectment of lessees, and ensuring that the accommodation is available on proper terms as to rents. On an interpretation of the contents of the entry itself, therefore, we are led to the conclusion that Parliament was given the exclusive power to legislate in respect of house accommodation in cantonment areas for regulating the accommodation in all its aspects.

7. In this connection, we may refer to three decisions which explain the object of legislation on the subject of rent control. In *Prout v. Hunter*, 1924-2 KB 786 Scrutton, L. J., dealing with the legislation during the war in England, held:

"Great public feeling was aroused by the exorbitant demands for rent that were made and the ejectments for non-payment of it, with the result that Parliament passed the Rent Restriction Acts with the two-fold object, (1) of preventing the rent from being raised above the pre-war standard, and (2) of preventing tenants from being turned out of their houses even if the term for which they had originally taken them had expired."

8. In *Property Holding Co., Ltd. v. Clark*, 1948-1 KB 630, it was held:—

"There are certain fundamental features of all the Rent Restriction legislation, or at any rate of the legislation from 1920 to 1939. The two most important objects of policy expressed in it are: (1) to protect the tenant from eviction from the house where he is living, except for defined reasons and on defined conditions; (2) to

protect him from having to pay more than a fair rent. The latter object is achieved by the provisions for standard rent with (a) only permitted increases, (b) the provisions about furniture and attendance, and (c) the provisions about transfers of burdens and liabilities from the landlord to the tenant which would undermine or nullify the standard rent provisions. The result has been held to be that the Acts operate in rent upon the house and confer on the house itself the quality of ensuring to the tenant a status of irremovability. In this description of the distinguishing characteristics conferred by statute upon the house, the most salient is the tenant's security of tenure — his protection against eviction; although the scope of the statutory policy about a fair rent must also be borne in mind, especially in connexion with the provisions relating to furniture, attendance, services and board."

9. In *Curl v. Angelo*, 1948-2 All ER 189, Lord Greene, M. R., dealing with Rent Restriction Act, held:—

"The Courts have had to consider what the overriding purpose and intention of the Acts are, and I cannot put it in a more clear or authoritative way than by using the words of Scrutton, L. J., in *Skinner v. Geary*, (1931) 2 KB 546, 560, that the object was to protect the person residing in a dwelling-house from being turned out of his home".

All these three cases clearly show that whenever any legislation is passed relating to control of rents, that legislation can be effective and can serve its purpose only if it also regulates eviction of tenants. Consequently, when in Entry 3 of List I the power is granted to Parliament specifically to legislate on control of rents, that power cannot be effectively exercised unless it is held that Parliament also has the power to regulate eviction of tenants whose rents are to be controlled. Such power must, therefore, be necessarily read in the expression "regulation of house accommodation". Of course, it has to be remembered that this power reserved for Parliament is to be exercised in respect of house accommodation situated in cantonment areas only and not other areas the legislative power in respect of which is governed by entries either in List II or in List III.

10. This view that we are taking is

also borne out by the historical background provided by the legislation relating to cantonments and house accommodation in cantonments in India. Carnaduff in his book on "Military and Cantonment Law in India" has indicated how the need for legislating with the object of overcoming difficulties experienced by military officers in obtaining suitable accommodation in cantonments came under consideration, and has stated:

"In the early days of the British dominion in India, the camps, stations, and posts of the field army gradually developed into cantonments, where troops were regularly garrisoned. The areas so occupied were at first set apart exclusively for the military and intended for occupation by them only; but, by degrees, non-military persons were admitted, land was taken possession of by them, and houses were built under conditions laid down by the Government from time to time. These conditions were undoubtedly framed with the main object of rendering accommodation always primarily available for the military officers whose duties necessitated their residence within cantonment limits." (p. clxii).

He goes on to relate that a Bill which ultimately became the Cantonments Act, 1889, originally contained a set of provisions on the subject, insisting on the prior claim of military officers to occupy houses in cantonments and proposing that disputes as to the rent to be paid and the repairs to be executed should be referred to, and settled by committees of arbitration. That part of the Bill was, however, omitted as it evoked considerable opposition and a separate measure was, consequently, taken up, but not till after many years of discussion. The new Bill was introduced in the Governor-General's Council in 1898, and was passed into law as the Cantonments (House-Accommodation) Act II of 1902. The main provision in this Act was that, on the Act being applied to any cantonment, every house situated therein became liable to appropriation at any time for occupation by a military officer. It recognised the paramount claim of the military authorities to insist upon houses in cantonments being, where necessary, made primarily available for occupation by the military officers stationed therein. In addition, a provision was made in Section 10 that no house in any cantonment or part of a cantonment was to be occupied for the pur-

poses of a hospital, bank, hotel, shop or school, or by a railway administration, without the previous sanction of the General Officer of the Command, given with the concurrence of the Local Government. This provision, thus, clearly regulated the letting out of houses in a cantonment even for some of the civilian purposes, such as hospital, bank, etc. The reason obviously was that it was considered inappropriate that a house occupied for such a purpose should be required to be vacated in order to make the house available for military officers. Keeping the primary object of facilitating availability of house accommodation for military officers in view, even private letting out was, thus, regulated at that earliest stage. Subsequently came the Cantonments (House-Accommodation) Act VI of 1923 which was in force when the Government of India Act was enacted, as well as at the time when the Constitution came into force. This Act also contained similar provisions which permitted military authorities to direct an owner to lease out a house to the Central Government, to require the existing occupier to vacate the house and to refrain from letting out any house for purposes of a hospital, school hostel, bank, hotel, or shop, or by a railway administration, a company or firm engaged in trade or business or a club, without the previous sanction of the Officer Commanding the District given with the concurrence of the Commissioner or, in a Province where there are no Commissioners, of the Collector. This Act also, thus, interfered with and regulated letting out of house accommodation by owners for civilian purposes even though, at the time of letting, the house was not required for any military purpose. It was in the background of this legislative history that provision was made in the Government of India Act in Entry 2 of List I of the Seventh Schedule reserving for the Federal Legislature the power to legislate so as to regulate house accommodation in cantonment areas, and the same power with further clarification was reserved for Parliament in Entry 3 of List I of the Seventh Schedule to the Constitution. Obviously, it could not be intended that Parliament should not be able to pass a law containing provisions similar to the provisions in these earlier Acts which did interfere with private letting out of house accommodation in cantonment areas by owners for certain purposes.

11. Another aspect that strengthens our view is that if we were to accept the interpretation sought to be put on behalf of the appellant that the power of Parliament is confined to legislation for the purpose of obtaining house accommodation in cantonment areas for military purposes and excludes legislation in respect of house accommodation not immediately required for military purposes, all that Parliament will be able to do will be to make provision for acquisition or requisition of house accommodation. On the house accommodation being acquired or requisitioned, it will be available for use by military authorities. Such power, obviously, could not be intended to be conferred by Entry 3 in List I when the same power is specifically granted concurrently to both Parliament and the State Legislatures under Entry 42 of the List III of the Seventh Schedule to the Constitution.

12. On behalf of the appellant, reliance was placed on some decisions of some of the High Courts in support of the proposition that the power of Parliament under Entry 3 of List I does not extend to regulating the relationship between landlord and tenant which power vests in the State Legislature under Entry 18 of List II. The first of these cases is *A. C. Patel v. Vishwanath Chada*, ILR (1954) Bom 434 = (AIR 1954 Bom 204) where the Bombay High Court was dealing with Entry 2 of List I of the Seventh Schedule to the Government of India Act, 1935 and Entry 21 of List II of that Act. The Court was concerned with the applicability of the Bombay Rent Restriction Act No. 57 of 1947 to cantonment areas. Opinion was first expressed that the Rent Restriction Act had been passed by the Provincial Legislature under Entry 21 of List II and reliance was placed on the English Interpretation Act to hold that land in that entry would include buildings so as to confer jurisdiction on the Provincial Legislature to legislate in respect of house accommodation. Then in considering the effect of Act 57 of 1947, the Court said:—

“As the preamble of the Act sets out, the Act was passed with a view to the control of rents and repairs of certain premises, of rates of hotels and lodging houses, and of evictions. Therefore, the pith and substance of Act LVII of 1947 is to regulate the relation between landlord and tenant by controlling rents which

the tenant has got to pay to the landlord and by controlling the right of the landlord to evict his tenant. Can it be said that when the Provincial Legislature was dealing with these relations between landlord and tenant, it was regulating house accommodation in cantonment areas? In our opinion, the regulation contemplated by Entry 2 in List I is regulation by the State or by Government. Requisitioning of property, acquiring of property, allocation of property, all that would be regulation of house accommodation, but when the Legislature merely deals with relations of landlord and tenant, it is not in any way legislating with regard to house accommodation. The house accommodation remains the same, but the tenant is protected quae his landlord."

We have felt considerable doubt whether the power of legislating on relationship between landlord and tenant in respect of house accommodation or buildings would appropriately fall in Entry 21 of List II of the Seventh Schedule to the Government of India Act, or in the corresponding Entry 18 of List II of the Seventh Schedule to the Constitution. These Entries permit legislation in respect of land and explain the scope by equating it with rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents. It is to be noted that the relation of landlord and tenant is mentioned as being included in land tenures and the expression "land tenures" would not, in our opinion, appropriately cover tenancy of buildings or of house accommodation. That expression is only used with reference to relationship between landlord and tenant in respect of vacant lands. In fact, leases in respect of non-agricultural property are dealt with in the Transfer of Property Act and would much more appropriately fall within the scope of Entry 8 of List III in the Seventh Schedule to the Government of India Act read with Entry 10 in the same List, or within the scope of Entry 6 of List III in the Seventh Schedule to the Constitution read with Entry 7 in the same List. Leases and all rights governed by leases, including the termination of leases and eviction from property leased, would be covered by the field of transfer of property and contracts relating thereto. However, it is not necessary for us to express any definite opinion in this case on this point because of our view that the relationship of land-

lord and tenant in respect of house accommodation situated in cantonment areas is clearly covered by the Entries in List I. In the Constitution, the effect of Entry 3 of List I is that Parliament has exclusive power to make laws with respect to the matters contained in that Entry, notwithstanding the fact that a similar power may also be found in any Entry in List II or List III. Article 246 of the Constitution confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I, notwithstanding the concurrent power of Parliament and the State Legislature, or the exclusive power of the State Legislature in Lists III and II respectively. The general power of legislating in respect of relationship between landlord and tenant exercisable by a State Legislature either under Entry 18 of List II or Entries 6 and 7 of List III is subject to the overriding power of Parliament in respect of matters in List I, so that the effect of Entry 3 of List I is that, on the subject of relationship between landlord and tenant insofar as it arises in respect of house accommodation situated in cantonment areas, Parliament alone can legislate and not the State Legislatures. The submission made that this interpretation will lead to a conflict between the powers conferred on the various Legislatures in Lists I, II and III has also no force, because the reservation of power for Parliament for the limited purpose of legislating in respect of cantonment areas only amounts to exclusion of this part of the legislative power from the general powers conferred on State Legislatures in the other two Lists. This kind of exclusion is not confined only to legislation in respect of house accommodation in cantonment areas. The same Entry gives Parliament jurisdiction to make provision by legislation for local self-government in cantonment areas which is clearly a curtailment of the general power of the State Legislatures to make provision for local self-government in all areas of the State under Entry 5 of List II. That Entry 5 does not specifically exclude cantonment areas and, but for Entry 3 of List I, the State Legislature would be competent to make provision for local government even in cantonment areas. Similarly, power of the State Legislature to legislate in respect of: (i) education, including universities, under Entry 11 of List II is made subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of

List III; (ii) regulation of mines and mineral development in Entry 23 of List II is made subject to the provisions of List I with respect to regulation and development under the control of the Union; (iii) industries in Entry 24 of List II is made subject to the provisions of Entries 7 and 52 of List I; (iv) trade and commerce within the State in Entry 26 of List II is made subject to the provisions of Entry 33 of List III; (v) production, supply and distribution of goods under Entry 27 of List II is made subject to the provisions of Entry 33 of List III; and (vi) theatres and dramatic performances; cinemas in Entry 33 of List II is made subject to the provisions of Entry 60 of List I. Thus, the Constitution itself has specifically put down entries in List II in which the power is expressed in general terms but is made subject to the provisions of entries in either List I or List III. In these circumstances, no anomaly arises in holding that the exclusive power of Parliament for regulation of house accommodation including control of rents in cantonment areas has the effect of making the legislative powers conferred by Lists II and III subject to this power of Parliament. In this view, we are unable to affirm the decision of the Bombay High Court in *A. C. Patel's case*, ILR (1954) Bom 434=(AIR 1954 Bom 204) (supra) which is based on the interpretation that Entry 2 in List I of the Seventh Schedule to the Government of India Act only permitted laws to be made for requisitioning of property, acquiring of property and allocation of property only. The same High Court, in a subsequent case in *F. E. Darukhanawalla v. Khemchand Lalchand*, ILR (1954) Bom 544=(AIR 1954 Bom 254), placed the same interpretation on Entry 3 of List I of the Seventh Schedule to the Constitution. That decision was also based on the same interpretation of the scope of regulation of house accommodation as was accepted by that Court in the earlier case.

13. The Nagpur High Court in *Kewalchand v. Dashrathlal*, ILR (1956) Nag 618=(AIR 1956 Nag 268) proceeded on the assumption that the decision in the case of ILR (1954) Bom 434=(AIR 1954 Bom 204) (supra) correctly defined the scope of Entry 2 in List I of the Seventh Schedule to the Government of India Act, and considered the narrow question whether the relationship of landlord and tenant specially mentioned in Entry 21 in

List II of that Act which covered the requirement of permission to serve a notice for eviction in regulating the relation of landlord and tenant and fell within the scope of Entry 21 in List II or in Entry 2 in List I of that Act. The Court held that it substantially fell in Entry 21 in List II and not in Entry 2 in List I. That Court did not consider it necessary to express any opinion on the question whether the expression "regulating of house accommodation" included something besides what Chagla, C. J., had said was its ambit in the case of ILR (1954) Bom 434=(AIR 1954 Bom 204) (supra), but expressed the opinion that the expression could not be stretched to include the aspect of the relation of landlord and tenant involved in that particular case. It is clear that, in that case also, a narrow interpretation of the expression "regulation of house accommodation" was accepted, because it appears that there was no detailed discussion of the full scope of that expression. Similar is the decision of the Patna High Court in *Babu Jagtanand v. Sri Satyanarayanji and Lakshmiji*, ILR 40 Pat 625=(AIR 1961 Pat 207). In fact, this last case merely followed the decision of the Bombay High Court in the case of ILR (1954) Bom 544=(AIR 1954 Bom 254) (supra). On the other hand, the Rajasthan High Court in *Nawal Mal v. Nathu Lal*, ILR (1961) 11 Raj 421=(AIR 1962 Raj 190) held that the power of the State Legislature to legislate in respect of landlord and tenant of buildings is to be found in Entries 6, 7 and 13 of List III of the Seventh Schedule to the Constitution and not in Entry 18 of List II, and that that power was circumscribed by the exclusive power of Parliament to legislate on the same subject under Entry 3 of List I. That is also the view which the Calcutta High Court has taken in the judgment in appeal before us. We think that the decision given by the Calcutta High Court is correct and must be upheld.

14. The appeal fails and is dismissed with costs payable to plaintiff respondent only.

Appeal dismissed.

AIR 1970 SUPREME COURT 237

(V 57 C 50)

(From Labour Court (II), U. P., Lucknow)*

J. C. SHAH AND G. K. MITTER, JJ.

U. P. Electric Supply Co. Ltd. (In Voluntary liquidation), Appellant v. R. K. Shukla and others, Respondents.

Attorney-General for India (By notice) (In C. As. Nos. 585 to 1026 and 1027 to 1082 of 1969).

Civil Appeals Nos. 1567 of 1968, 585 to 1026 and 1027 to 1082 of 1969 D/- 30-4-1969.

(A) U. P. Industrial Disputes Act (28 of 1947), Section 6-R (2) (Incorporated by U. P. Act 1 of 1957) — U. P. Act 1 of 1957 having received assent of President Section 6-R (2) would prevail over Section 25-J(2) of Industrial Disputes Act, 1947 by virtue of Art. 254(2) of Constitution. AIR 1966 SC 1471 Explained.

(Para 9)

(B) U. P. Industrial Disputes Act (28 of 1947), S. 6-H (1) and (2) — Powers of Labour Court — Question whether there has been retrenchment cannot be decided by Labour Court — Labour Court can only compute compensation claimed to be payable to workmen when retrenchment is conceded — (Industrial Disputes Act (1947), Ss. 33-C (1) and 33-C (2).)

The legislative intention disclosed by Ss. 33-C (1) and 33-C (2) of the Industrial Disputes Act, 1947 (which are substantially in the same terms as sub-secs. (1) and (2) of Sec. 6-H, U. P. Industrial Disputes Act) is fairly clear. Under Section 33-C (1) where any money is due to a workman from an employer under a settlement or an award or under the provisions of Ch. V-A, the workman himself, or any other person authorised by him in writing in that behalf, may make an application to the appropriate Government to recover the money due to him. Where the workman entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money, applies in that behalf, the Labour Court may under S. 33-C (2) decide the questions arising as to the amount of money due or as to the amount at which such benefit shall be computed. Section 33-C (2) is wider than S. 33-C (1). Matters which do not fall within the terms of Sec. 33-C (1) may, if the workman is

* (Misc. Cases Nos. 102 of 1965, etc., D/- 28-3-1968, & 20-7-1968 — Labour Court (II), U. P., Lucknow.)

shown to be entitled to receive the benefits, fall within the terms of Sec. 33-C (2). If the liability arises from an award, settlement or under the provisions of Ch. V-A, or by virtue of a statute or a scheme made thereunder, mere denial by the employer may not be sufficient to negative the claim under Sec. 33C (2) before the Labour Court. Where, however, the right to retrenchment compensation which is the foundation of the claim is itself a matter which is exclusively within the competence of the Industrial Tribunal to be adjudicated upon on a reference, it would be straining the language of Section 33-C (2) to hold that the question whether there has been retrenchment may be decided by the Labour Court. The power of the Labour Court is to compute the compensation claimed to be payable to the workmen on the footing that there has been retrenchment of the workmen. Where retrenchment is conceded, and the only matter in dispute is that by virtue of Sec. 25-FF no liability to pay compensation has arisen the Labour Court will be competent to decide the question. In such a case the question is one of computation and not of determination, of the conditions precedent to the accrual of liability. Where, however, the dispute is whether workmen have been retrenched and computation of the amount is subsidiary or incidental, the Labour Court will have no authority to trespass upon the powers of the Tribunal with which it is statutorily invested.

(Para 15)

(C) U. P. Industrial Disputes Act (28 of 1947), S. 6-O — Scope — Order awarding retrenchment compensation cannot be made without recording finding that there was retrenchment and compensation was payable — Labour Court cannot award compensation without determining whether conditions of proviso to S. 6-O have been fulfilled.

(Paras 17, 18)

(D) Electricity Act (1910), Ss. 6, 7 — Purchase of undertaking by Board — Liability to pay retrenchment compensation arising on transfer — It attaches to purchase money payable to company in substitution for the undertaking and is not enforceable against the Board — Ss. 57 and 57-A of Electricity (Supply) Act, 1948 would make no difference — Under Cl. V, sub-cl. (2) proviso, compensation payable to employees of company would be charged upon Contingencies Reserve of the Company and balance alone would be handed over to Board — (Electricity (Sup-

ply) Act (1948), Ss. 57, 57-A, Sixth Schedule, Cl. V (2) proviso). (Paras 20, 21)

(E) Electricity (Supply) Act (1948), Sch. VI, Cl. V (2) Proviso — Contingencies Reserve out of which retrenchment compensation is payable to employees of company handed over to Board — Charge for payment of compensation amount may attach to that amount. (Para 22)

(F) U. P. Industrial Disputes Act (28 of 1947), Ss. 6-H (2) and 6-O — Earned leave not availed of, by workmen before closure or transfer of undertaking — Compensation is not payable in absence of any provision in statute governing right to such compensation — (Industrial Disputes Act (1947), Ss. 25FF and 33-C (2).) (Para 23)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 218 (V 55)=

1968-1 SCR 140, Chief Mining Engineer, East India Coal Co., Ltd. v. Rameshwar 13, 14

(1968) 1968-1 Lab LJ 589=33 Com Cas 400 (SC), State Bank of Bikaner and Jaipur v. B. L. Khandedwal 13

(1966) AIR 1966 SC 1471 (V 53)= 1966-2 Lab LJ 330, Rohtak & Hisar Districts Electric Supply Co., Ltd. v. State of U. P. 9

(1966) C. As. Nos. 2455 & 2540 of 1966, D/- 25-11-1966 (SC), Board of Directors of the South Arcot Electricity Distribution Co., Ltd. v. N. K. Mohammad Khan 13, 15, 20

(1964) AIR 1964 SC 743 (V 51)= 1964-3 SCR 140, Central Bank of India Ltd. v. Rajagopalan 12, 13, 14

(1964) AIR 1964 SC 752 (V 51)= 1964-3 SCR 709, Bombay Gas Co., Ltd. v. Gopal Bhiva 12, 13

(1963) AIR 1963 SC 487 (V 50)= (1962) Supp 2 SCR 977, Punjab National Bank Ltd. v. K. L. Kharbanda 13

Mr. M. C. Chagla, Senior Advocate (M/s. Harish Chandra, H. K. Puri and Bishamber Lal, Advocates, with him), for Appellant, (In all the Appeals); M/s. J. P. Goyal and V. C. Parashar, Advocates, for Respondent No. 1 (In all the Appeals); Mr. S. P. Nayar, Advocate, for Attorney-General for India (In C. As. Nos. 585 to 1026 and 1027 to 1082 of 1969).

The following Judgment of the Court was delivered by

SHAH, J. — These three groups of appeals arise out of orders made by the Presiding Officer, Labour Court (II), U. P.,

Lucknow awarding retrenchment compensation to certain employees of the U. P. Electric Supply Company Ltd. (in liquidation). In the last group of appeals orders of the Labour Court awarding in addition thereto compensation for earned leave not enjoyed by the employees are also challenged.

(2) The U. P. Electricity Supply Company Ltd. — hereinafter called the Company — held the licences issued in 1914 by the Government of U. P. for generating and distributing electricity within the towns of Allahabad and Lucknow. The periods of the licences expired in 1964. Pursuant to the provisions of paragraph 12 (i) in each of the said licences and in exercise of the power under Section 6 of the Indian Electricity Act, 1910, the State Electricity Board, U. P. — hereinafter referred to as “the Board” — took over the undertaking of the Company at Allahabad and Lucknow from the mid-night of September 16, 1964. The Company accordingly ceased to carry on the business of generation and distribution of electricity in the areas covered by the original licences. All the workmen of the undertakings at Allahabad and Lucknow were taken over in the employment of the Board with effect from September 17, 1964, without any break in the continuity of employment.

3. On December 22, 1964, 443 workmen employed in the Allahabad undertaking filed before the Labour Court, applications under Section 6-H (2) of the U. P. Industrial Disputes Act, 1947, for payment of retrenchment compensation and salary in lieu of notice. The workmen submitted that fresh letters of appointment were issued by the Board on September 16, 1964, taking them in the employment of the board with effect from September 17, 1964 “in the posts and positions which they previously held”, but without giving credit for their past services with the Company. The workmen contended that they were entitled to retrenchment compensation and salary in lieu of notice, and prayed for computation of those benefits in terms of money and for directions to the Company to pay them the amount so computed.

4. A group of 56 workmen employed at the Company’s undertaking at Lucknow also submitted applications under Section 6-H (2) of the U. P. Industrial Disputes Act, for payment of retrenchment compensation and salary in lieu of notice and also for compensation for ac-

cumulated earned leave not enjoyed by them till September 16, 1964.

5. In the applications filed by the workmen of the Allahabad undertaking, the Labour Court awarded to each workman retrenchment compensation at the rates specified in the order and also one month's salary and costs. To each workman of the Lucknow undertaking the Labour Court awarded retrenchment compensation at the rate specified, salary in lieu of one month's notice, and also wages for 30 days for earned leave not enjoyed by the workman before the closure of the undertaking, and costs. The Company has appealed to this Court against the orders with special leave.

6. The orders for payment of retrenchment compensation are resisted by the Company on two grounds—

(i) that the Labour Court was incompetent to entertain and decide the applications for awarding retrenchment compensation; and

(ii) that the workmen were not in fact retrenched, and in any event since the workmen were admitted to the service of the Board without break in continuity, and on terms not less favourable than the terms enjoyed by them with the Company, the Company was under no liability to pay retrenchment compensation.

7. Some argument was advanced before us that in determining matters relating to the award of retrenchment compensation, the provisions of the Industrial Disputes Act, 1947, and not the U. P. Industrial Disputes Act, 1947, apply. The question is academic, because on the points in controversy between the parties, the statutory provisions of the Industrial Disputes Act, 1947, and the U. P. Industrial Disputes Act, 1947, are substantially the same. We may, however, briefly refer to this argument since, relying upon a judgment of this Court to be presently noticed, counsel for the workmen insisted that S. 33-C (2) of Industrial Disputes Act alone may apply.

8. After the enactment of the Industrial Disputes Act, 1947, by the Dominion Parliament, the U. P. Industrial Disputes Act, 1947, was enacted by the Provincial Legislature. The scheme of the two Acts is substantially the same. Chapter V-A relating to lay-off and retrenchment was added in the Industrial Disputes Act by Act 43 of 1953 with effect from October 24, 1953. From time to time amendments were made in the provisions of the Act. By Section 25-J (2) it was provided:

"For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the "settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter." After this sub-section was incorporated in the Industrial Disputes Act, 1947, a group of sections including Section 6-R were incorporated in the U. P. Industrial Disputes Act by U. P. Act 1 of 1957. Section 6-R (2) provided:

"For the removal of doubts, it is hereby declared that nothing contained in Sections 6-H to 6-R shall be deemed to affect the provision of any other law for the time being in force so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of Sections 6-H to 6-Q."

By virtue of S. 6-R (2) the provisions of the U. P. Industrial Disputes Act, *prima facie*, apply in the matters of lay-off and retrenchment, because under the Seventh Schedule to the Constitution legislation in respect of "Trade Unions, Industrial and Labour Disputes" falls within Entry 22 of the Concurrent List and both the State and the Union are competent to legislate in respect of that field of legislation. Whereas by adding Section 25-J (2) it was enacted that under the Industrial Disputes Act, 1947, the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of Ch. V-A of that Act, by the U. P. Act as amended by Act 1 of 1957, S. 6-R (2) enacts that the rights and liabilities of employers and workmen relating to lay-off and retrenchment shall be determined in accordance with the provisions of Sections 6-J to 6-Q.

9. Competence of the State Legislature to enact Section 6-R (2) is not denied. Act 1 of 1957 received the assent of the President and by virtue of Article 254 (2) of the Constitution Section 6-R (2) of the U. P. Act prevails, notwithstanding any prior law made by the Parliament. The provisions of the U. P. Act including Section 6-R (2) therefore apply in determin-

ing the rights and obligations of the parties in respect of retrenchment compensation. The observations to the contrary made by this Court in Rohtak & Hissar Districts Electric Supply Co. Ltd. v. State of U. P., 1966-2 Lab LJ 330=(AIR 1966 SC 1471) which primarily raised a dispute relating to the validity of certain model standing orders proceeded upon a concession made at the Bar, and cannot be regarded as decision. Since the relevant provisions of the two Acts on the matter in controversy in these groups of appeals are not materially different, we do not think it necessary in this case to refer the question to a larger Bench.

10. We, accordingly, propose to refer only to the provisions of the U. P. Industrial Disputes Act, 1947. Section 4-A of the U. P. Act authorises the State Government to constitute one or more Labour Courts for the adjudication of industrial disputes relating to any matter specified in the First Schedule and for performing such other functions as may be assigned to them under the Act. The items specified in the First Schedule are —

"1. The propriety or legality of an order passed by an employer under the Standing Orders;

2. The application and interpretation of Standing Orders;

3. Discharge or dismissal of workmen including reinstatement of, or grant of relief to, workmen wrongfully dismissed;

4. Withdrawal of any customary concession or privilege;

5. Illegality or otherwise of a strike or lock-out; and

6. All matters other than those specified in the Second Schedule."

Section 4-B authorises the State Government to constitute one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter whether specified in the First Schedule or the Second Schedule. Item 10 of the Second Schedule relates to "Retrenchment of workmen and closure of establishment". Prima facie, disputes relating to retrenchment of workmen and closure of establishment fall within the exclusive competence of the Industrial Tribunal, and not within the competence of the Labour Court constituted under Section 4-A. The Company had expressly raised a contention that they had not retrenched the workmen and that the workmen had voluntarily abandoned the Company's service

by seeking employment with the Board even before the Company closed its undertaking.

11. The workmen contended by their petitions filed before the Labour Courts that they were retrenched, the Company contended that the workmen had voluntarily abandoned the employment under the Company because they found it more profitable to take up employment under the Board without any break in the same post and on the same terms and conditions on which they were employed by the Company. This clearly raises the question whether there was retrenchment of workmen, which gave rise to liability to pay retrenchment compensation. A dispute relating to retrenchment is exclusively within the competence of the Industrial Tribunal by virtue of Item 10 of the Second Schedule to the U. P. Industrial Disputes Act, and is not within the competence of the Labour Court. Section 6-H of the U. P. Act provides:

"(1) Where any money is due to a workman from an employer under the provisions of Sections 6-J to 6-R or under a settlement or award, or under an award given by an adjudicator or the State Industrial Tribunal appointed or constituted under this Act, before the commencement of the Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, the workman may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government is satisfied that any amount is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same as if it were an arrear of land revenue.

(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the State Government, and the amount so determined may be recovered as provided for in sub-section (1).

(3) * * * * *
Under Section 6-H (2) the Labour Court was competent to determine what each workman was entitled to receive from the employer by way of retrenchment compensation payable in terms of money, and

the denial of liability by the Company did not affect the jurisdiction of the Labour Court.

12. In several decisions of this Court the inter-relation between sub-secs. (1) and (2) of Section 33-C (which are substantially in the same terms as sub-ss. (1) and (2) of Section 6-H of the U. P. Industrial Disputes Act) was examined. It was held by this Court in *Central Bank of India Ltd. v. Rajagopalan etc.*, 1964-3 SCR 140 = (AIR 1964 SC 743) that the scope of Section 33-C (2) is wider than that of Section 33-C (1). Claims made under Section 33-C (1) can only be those which are referable to settlement, award or the relevant provisions of Ch. V-A, but those limitations are not to be found in Section 33-C (2). The three categories of claims mentioned in Section 33-C (1) fall under Section 33-C (2) and in that sense Section 33-C (2) can itself be deemed to be a kind of execution proceeding, but it is possible that claims not based on settlements, awards or made under the provisions of Ch. V-A may also be competent under Section 33-C (2). Elaborating this thesis, *Gajendragadkar, J.*, who delivered the judgment of the Court observed (pp. 155-156):

"There is no doubt that the three categories of claims mentioned in Section 33-C (1) fall under Section 33-C (2) and in that sense, Section 33-C (2) can itself be deemed to be a kind of execution proceeding; but it is possible that claims not based on settlements, awards or made under the provisions of Ch. V-A, may also be competent under S. 33-C(2) and that may illustrate its wider scope. We would, however, like to indicate some of the claims which would not fall under Section 33-C(2), because they formed the subject-matter of the appeals which have been grouped together for our decision along with the appeals with which we are dealing at present. If an employee is dismissed or demoted and it is his case that the dismissal or demotion is wrongful, it would not be open to him to make a claim for the recovery of his salary or wages under Section 33-C (2). His demotion or dismissal may give rise to an industrial dispute which may be appropriately tried, but once it is shown that the employer has dismissed or demoted him, a claim that the dismissal or demotion is unlawful and, therefore, the employee continues to be the workman of the employer and is entitled to the benefits due to him under a pre-existing

contract, cannot be made under Section 33-C (2)."

The same view was reiterated in *Bombay Gas Co. Ltd. v. Gopal Bhiva*, 1964-3 SCR 709 = (AIR 1964 SC 752).

13. Mr. Goyal on behalf of the workman however, contended that in a recent judgment of this Court a different view has been expressed. He invited our attention to Board of Directors of the South Arcot Electricity Distribution Co. Ltd. v. N. K. Mohammad Khan, etc., C. As. Nos. 2455 and 2540 of 1966, D/- 25-11-1966 (SC). In that case the Electricity undertaking was taken over by the Government of Madras in exercise of the powers conferred by the Madras Electricity Supply Undertakings (Acquisition) Act, 1954, and the employees of the undertaking were taken over by the new employer. The employees claimed retrenchment compensation from the old employer under Section 25-FF of the Industrial Disputes Act, 1947. It was urged before this Court that the Labour Court was incompetent to decide the claim for retrenchment compensation. This Court observed that Section 25-FF (b) applied as the terms of service under the new employer were less favourable than those under the old employer, and under the terms of Section 15 (1) and (2) of the Acquisition Act and Sections 9-A and 10 of the Industrial Employment (Standing Orders) Act, 1946, liability to pay retrenchment compensation rested upon the previous employer and on that account the Labour Court was competent to entertain the petitions under Section 33-C (2). The language of Section 25-FF in the view of the Court made it perfectly clear that if the right to compensation accrued under the Act, the workmen became entitled to receive retrenchment compensation, when under the Madras Act the undertaking stood transferred to the State Government from the Company. Referring to the contention that the Labour Court was not competent to determine the liability to pay retrenchment compensation, where the liability itself was denied, the Court referred to the judgments of this Court in *Chief Mining Engineer, East India Coal Co. Ltd. v. Rameswar*, 1968-1 SCR 140 = (AIR 1968 SC 218); *State Bank of Bikaner and Jaipur v. B. L. Khandelwal*, 1968-1 Lab LJ 589 (SC); *Punjab National Bank Ltd. v. K. L. Kharbanda*, (1962) Supp 2 SCR 977 = (AIR 1963 SC 487); 1964-3 SCR 140 = (AIR 1964 SC 743); and 1964-3 SCR 709 = (AIR 1964 SC 752), and proceeded to observe that the right

which has been claimed by the workmen in their applications under S. 33-C (2) of the Act was a right which accrued to them under Section 25-FF of the Act and was an existing right at the time when those applications were made, and the Labour Court had jurisdiction to decide, in dealing with the applications under that provision, whether such a right did or did not exist. The mere denial of that right by the Company, it was said, could not take away its jurisdiction and that the order of the Labour Court was competently made.

14. The decision in 1964-3 SCR 140 = (AIR 1964 SC 743), to which we have already referred, makes it clear that all disputes relating to claims which may be computed in terms of money are not necessarily within the terms of S. 33-C (2). Again in 1968-1 SCR 140 = (AIR 1968 SC 218), Shelat, J., observed:

".....that the right to the benefit which is sought to be computed [under Section 33-C (2)] must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer. Since the scope of sub-section (2) is wider than that of sub-section (1) and the sub-section is not confined to cases arising under an award, settlement or under the provisions of Chapter V-A, there is no reason to hold that a benefit provided for under a statute or a scheme made thereunder, without there being anything contrary under such statute or Section 33-C (2), cannot fall within sub-section (2). Consequently, the benefit provided in the bonus scheme made under the Coal Mines Provident Fund and Bonus Schemes Act, 1948 which remains to be computed must fall under sub-section (2) and the Labour Court therefore had jurisdiction to entertain and try such a claim, it being a claim in respect of an existing right arising from the relationship of an industrial workman and his employer."

That judgment clearly indicates that in order that a claim may be adjudicated upon under Section 33-C (2), there must be an existing right and the right must arise under an award, settlement or under the provisions of Ch. V-A, or it must be a benefit provided by a statute or a scheme made thereunder and there must be nothing contrary under such statute or Sec. 33-C (2). But the possibility of a

mere claim arising under Ch. V-A is not envisaged by the Court in that case as conferring jurisdiction upon the Labour Court to decide matters which are essentially within the jurisdiction of the Industrial Tribunal.

15. The legislative intention disclosed by Sections 33-C (1) and 33-C (2) is fairly clear. Under Section 33-C (1) where any money is due to a workman from an employer under a settlement or an award or under the provisions of Ch. V-A, the workman himself, or any other person authorised by him in writing in that behalf, may make an application to the appropriate Government to recover the money due to him. Where the workman entitled to receive from the employer any benefit which is capable of being computed in terms of money, applies in that behalf, the Labour Court may under Section 33-C (2) decide the questions arising as to the amount of money due or as to the amount at which such benefit shall be computed. Section 33-C (2) is wider than Section 33-C (1). Matters which do not fall within the terms of S. 33-C (1) may, if the workman is shown to be entitled to receive the benefits, fall within the terms of Section 33-C (2). If the liability arises from an award, settlement or under the provisions of Ch. V-A, or by virtue of a statute or a scheme made thereunder, mere denial by the employer may not be sufficient to negative the claim under Section 33-C (2) before the Labour Court. Where however the right to retrenchment compensation which is the foundation of the claim is itself a matter which is exclusively within the competence of the Industrial Tribunal to be adjudicated upon on a reference, it would be straining the language of Section 33-C (2) to hold that the question whether there has been retrenchment may be decided by the Labour Court. The power of the Labour Court is to compute the compensation claimed to be payable to the workmen on the footing that there has been retrenchment of the workmen. Where retrenchment is conceded, and the only matter in dispute is that by virtue of Section 25-FF no liability to pay compensation has arisen the Labour Court will be competent to decide the question. In such a case the question is one of computation and not of determination, of the conditions precedent to the accrual of liability. Where, however, the dispute is whether workmen have been retrenched and computation of the amount

is subsidiary or incidental, in our judgment, the Labour Court will have no authority to trespass upon the powers of the Tribunal with which it is statutorily invested. In the unreported judgment of this Court in C. As. Nos. 2455 and 2540 of 1966, D/- 25-11-1966 (SC) apparently the only argument advanced before this Court was that Section 25-FF applied to that case having regard to the fact that the terms of employment under the new employer were not less favourable than those immediately applicable to them before the transfer, and the Court proceeded to hold that the Labour Court was competent to determine the compensation.

16. The finding that the Labour Court was incompetent to decide the applications of the workmen is sufficient to dispose of the appeals before us. But other arguments were advanced before us, and which have an important bearing on the claims made: we propose briefly to deal with these arguments.

17. Assuming that the Labour Court had jurisdiction to determine the liability of the Company to pay retrenchment compensation no order awarding retrenchment compensation could still be made without recording a finding that there was retrenchment of the workmen and compensation was payable for retrenchment. Section 6-O of the U. P. Industrial Disputes Act (which in its phraseology is somewhat different from S. 25-FF of the Industrial Disputes Act) provides:

"Notwithstanding anything contained in Section 6-N no workman shall be entitled to compensation under that Section by reason merely of the fact that there has been a change of employers in any case where the ownership or management of the undertaking in which he is employed is transferred, whether by agreement or by operation of law, from one employer to another:

Provided that—

(a) the service of the workman has not been interrupted by reason of the transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable than those applicable to him immediately before the transfer; and

(c) the employer to whom the ownership or management of the undertaking is so transferred is, under the terms of the transfer or otherwise, legally liable

to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

18. In the present groups of appeals it is common ground that there was no interruption resulting from the undertaking being taken over by the Board. The agreements between the Board and the workmen to admit the workmen into employment of the Board were reached before the undertakings of the Company were taken over. The Company contended that the terms and conditions of service applicable to workmen after the transfer were not in any way less favourable to the workmen than those applicable to them immediately before the undertakings were taken over, and that the employer to whom the ownership or management of the undertakings were so transferred was, under the terms of the transfer or otherwise, legally liable to pay to the workmen, in the event of their retrenchment, compensation on the basis that their services had been continuous and had not been interrupted by the taking over. The workmen denied that claim. The Labour Court could award compensation only if it determined the matter in controversy in favour of the workmen; it could not assume that the conditions of the proviso to Section 6-O were fulfilled. Section 6-O is in terms negative. It deprives the workmen of the right to retrenchment compensation in the conditions mentioned therein. The Company asserted that the conditions precedent to the exercise of jurisdiction did not exist. The workmen asserted the existence of the conditions. Without deciding the issue, the Labour Court could not compute the amount of compensation payable to the workmen on the assumption that the workmen had been retrenched and their claim fell within the proviso to Section 6-O.

19. It was urged by Mr. Goyal on behalf of the workmen that this plea was not raised or argued before the Labour Court, and it cannot be permitted to be raised in this Court. But this contention was raised in the reply filed by the Company, and the judgment of the Labour Court does indicate that its authority to decide that question was disputed. We are unable to hold that the objection though raised was not urged before the Labour Court, and on that account to confirm the decision of the Labour

Court which until the matter in controversy was decided could not be rendered. Even if, therefore, the Labour Court was competent to entertain the dispute relating to award of retrenchment compensation, the order made by the Labour Court must be set aside.

20. One more contention raised at the Bar by Mr. Chagla for the Company may be considered. It was urged that the obligation to pay retrenchment compensation in the event of liability arising must in law be deemed to be taken over by the Board. In C. As. Nos. 2455 and 2540 of 1966, D/- 25-11-1966 (SC) to which we have already made a reference it was contended on behalf of the Electricity Company that the liability to pay retrenchment compensation did not "fall on the licensee", but on the Madras Government. This Court held, having regard to the scheme of the Act that if retrenchment compensation is payable, it is the original undertaking which remains liable, and not the undertaking which takes over the business. Counsel however relied upon Sections 6 and 7 of the Indian Electricity Act, 1910, in support of his plea that the liability to pay retrenchment compensation rests upon the undertaking which takes over the undertaking. Section 6 of the Indian Electricity Act, 1910, provides:

"(1) Where a license has been granted to pay person, not being a local authority, the State Electricity Board shall,—

(a) in the case of a license granted before the commencement of the Indian Electricity (Amendment) Act, 1959, on the expiration of each such period as is specified in the license; and

(b) * * * * *
have the option of purchasing the undertaking and such option shall be exercised by the State Electricity Board serving upon the licensee a notice in writing of not less than one year requiring the licensee to sell the undertaking to it at the expiry of the relevant period referred to in this sub-section.
* * * * *

In the present case notice was given of termination of the license after the expiry of the period of the original license and the Board took over the undertaking of the Company. Section 7 of the Indian Electricity Act provides:

"Where an undertaking is sold under Section * * 6, then upon the completion of the sale or on the date on which the undertaking is delivered to the intend-

ing purchaser under **** sub-section (6) of Section 6,*****

(i) the undertaking shall vest in the purchaser * * * free from any debt, mortgage or similar obligation of the licensee or attaching to the undertaking:

"Provided that any such debt, mortgage or similar obligation shall attach to the purchase money in substitution for the undertaking;

(ii) the rights, powers, authorities, duties and obligations of the licensee under his license shall stand transferred to the purchaser and such purchaser shall be deemed to be the licensee:

Provided that where the undertaking is sold or delivered to a State Electricity Board or the State Government, the license shall cease to have further operation."

It is clear that when the undertaking vests in the purchaser, any debt, mortgage or similar obligation attaches to the purchase money in substitution of the undertaking. The liability to pay retrenchment compensation is a debt: if it arises on transfer it will attach to the purchase money payable to the Company "in substitution for the undertaking". Sections 6 and 7 of the Indian Electricity Act do not support the case of the Company that the liability is enforceable against the Board after it takes over the undertakings.

21. The provisions of Sections 57 and 57-A of the Indian Electricity (Supply) Act, 1948, also do not assist the case of the Company. Sections 57 and 57-A of the Electricity (Supply) Act, 1948, deal with the licensee's charges to consumers and the Rating Committees. By the Sixth Schedule dealing with financial principles and their application, it is provided by Clause IV that certain amount shall be appropriated towards Contingencies Reserve from the revenues of each year of account. By Clause V of the Sixth Schedule it is provided:

"(1) The Contingencies Reserve shall not be drawn upon during the currency of the licence except to meet such charges as the State Government may approve as being—

(a) expenses or loss of profits arising out of accidents, strikes or circumstances which the management could not have prevented;

(b) expenses on replacement or removal of plant or works other than expenses requisite for normal maintenance or renewal;

(c) compensation payable under any law for the time being in force and for which no other provision is made.

(2) On the purchase of the undertaking the Contingencies Reserve, after deduction of the amounts drawn under subparagraph (1), shall be handed over to the purchaser and maintained as such Contingencies Reserve:

Provided that where the undertaking is purchased by the Board or the State Government, the amount of the Reserve computed as above shall, after further deduction of the amount of compensation, if any, payable to the employees of the outgoing licensee under any law for the time being in force, be handed over to the Board or the State Government, as the case may be."

Clause V only provides for the appropriation of the Contingencies Reserve: it requires an undertaking to hand over the Contingencies Reserve to the purchaser. If any amount of compensation is payable to the employees of the outgoing licensee under any law for the time being in force, it is chargeable to the Contingencies Reserve. If the retrenchment compensation becomes properly due to the employees of the Company, it would, by virtue of Clause V, sub-clause (2) proviso, be charged upon the Contingencies Reserve and the balance alone would be handed over to the purchaser.

22. It was urged that the Contingencies Reserve has been paid over to the purchaser. There is, however, no finding by the Labour Court in that behalf. If it be found in appropriate proceedings that retrenchment compensation is payable to the workmen and the Contingencies Reserve out of which it is payable has been handed over to the Board, the charge for payment of that amount may attach to that amount. On that matter we need express no opinion at this stage.

23. Finally it was contended—and that contention relates only to the cases of 56 workmen in the Lucknow undertaking—that the workmen who had not availed themselves of earned leave were entitled to compensation equal to thirty days wages. But we do not think that any such compensation is statutorily payable. So long as the Company was carrying on its business, it was obliged to give facility for enjoying earned leave to its workmen. But after the Company closed its business, it could not obviously give any earned leave to those workmen, nor could

the workmen claim any compensation for not availing themselves of the leave. In the absence of any provision in the statute governing the right to compensation for earned leave not availed of by the workmen before closure or transfer of an undertaking, we do not think that any such compensation is payable.

24. On the view taken by us that the Labour Court was incompetent to determine the question as to liability to pay retrenchment compensation, these appeals must be allowed and the petitions under Section 6-H (2) filed by the respondents must be dismissed. There will be no order as to costs throughout.

Appeals allowed.

AIR 1970 SUPREME COURT 245 (V 57 C 51)

(From Andhra Pradesh)*

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

Co-operative Central Bank Ltd. and others etc., Appellants v. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad and others etc., Respondents.

Civil Appeals Nos. 2093 and 2094 of 1968, D/- 3-4-1969.

(A) Co-operative Societies — Andhra Pradesh Co-operative Societies Act (7 of 1964), Section 61 — Dispute capable of being resolved by Registrar under Section 61 — Jurisdiction of Industrial Tribunal under Industrial Disputes Act, 1947 is barred. (Para 2)

(B) Co-operative Societies — Andhra Pradesh Co-operative Societies Act (7 of 1964), Sections 61, 16 — 'Dispute touching business of society' — Dispute relating to alterations of conditions of service — It cannot be held to be dispute touching "business" of society — Such dispute is not contemplated to be dealt with under Section 62 and is, therefore, outside scope of Section 61; it could only be dealt with by Industrial Tribunal under Industrial Disputes Act, 1947 — Provisions of Section 16 (5) are irrelevant when considering scope of jurisdiction of Registrar under Section 61. (Paras 7, 10, 11)

(C) Co-operative Societies — Andhra Pradesh Co-operative Societies Act (7 of 1964) — Bye-laws of co-operative society

*(W. Ps. Nos. 2339 and 2742 of 1968, D/- 5-8-1968—A. P.)

framed in pursuance of provisions of the Act — They cannot be held to have force of law — (Companies Act (1956), Section 36) — (Industrial Employment (Standing Orders) Act (1946), Sec. 2 (g)).

The bye-laws of a co-operative society framed in pursuance of the provisions of the Act cannot be held to be law or to have the force of law. It has no doubt been held that, if a statute gives power to a Government or other authority to make rules, the rules so framed have the force of Statute and are to be deemed to be incorporated as a part of the statute. That principle, however, does not apply to bye-laws of the nature that a co-operative society is empowered by the Act to make. The bye-laws that are contemplated by the Act can be merely those which govern the internal management, business or administration of a society. They are of the nature of the Articles of Association of a company incorporated under the Companies Act. They may be binding between the persons affected by them, but they do not have the force of a statute. (Para 10)

(D) Industrial Disputes Act (1947), Section 15 — Jurisdiction of Industrial Tribunal — Jurisdiction is not limited to merely administering existing laws and enforcing existing contracts — Industrial Tribunal can even vary contracts of service between employer and employees.

(Para 10)

(E) Co-operative Societies — Andhra Pradesh Co-operative Societies Act (7 of 1964), Section 16 (5) — Amendments in bye-laws — They are not contemplated in interests of workmen or for purpose of resolving industrial disputes, but in the interest of the Society or the co-operative movement.

(Para 11)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 1320 (V 56) = Civil Appeal No. 358 of 1967, D/- 29-8-1968, Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalichand Jugraj Jain 6, 7
- (1969) AIR 1969 Madh Pra 46 (V 56) = 18 Fac LR 27, Sagar Motor Transport Karamchari Union, Sagar v. Amar Kamgar Passenger Transport Co. Co-operative Society, Sagar 4
- (1967) AIR 1967 SC 209 (V 54) = 1961-2 Lab LJ 130, Dalmia Cement (Bharat) Ltd., New Delhi v. Their Workmen 9
- (1964) 1964-2 Lab LJ 128 = 1964-9 Fac LR 4 (SC), Cinema Theatres v. Their Workmen 9

- (1963) AIR 1963 SC 1332 (V 50) = 1964-1 SCR 234, Hindustan Times Ltd., New Delhi v. Their Workmen 9
- (1962) AIR 1962 SC 1258 (V 49) = 1962-3 SCR 1, Management of Marina Hotel v. The Workmen 9
- (1962) AIR 1962 Bom 162 (V 49) = 1962-1 Lab LJ 51 (FB), Farkhundali Nannhay v. V. B. Potdar 4, 6
- (1961) AIR 1961 Mad 217 (V 48) = 1960-2 Lab LJ 693, South Arcot Co-operative Motor Transport Society Ltd. v. Syed Batcha 8
- (1958) AIR 1958 Cal 373 (V 45) = 1958-2 Lab LJ 61, Co-operative Milk Societies Union Ltd. v. State of West Bengal 5
- (1954) AIR 1954 Mad 103 (V 41) = ILR (1953) Mad 1047 (FB), M. S. Madhava Rao v. D. V. K. Surya Rao 4
- (1943) AIR 1943 Bom 341 (V 30) = ILR (1943) Bom 320, G. I. P. Rly. Employees Co-operative Bank Ltd. v. Bhikaji Merwanji Karanjia Employee 4

Mr. C. B. Agarwala, Senior Advocate, (M/s. K. Srinivasa Murthy, B. P. Singh and Naunit Lal, Advocates with him), for Appellants (In both the Appeals); M/s. A. S. R. Chari and M. K. Ramamurthi, Senior Advocates (Mrs. S. Pappu, M/s. Madan Mohan, J. Ramamurthi, Vineet Kumar, P. S. Khera and Miss Bindra Thakur, Advocates with them), for Respondent No. 2 (In both the Appeals).

The following Judgment of the Court was delivered by

BHARGAVA, J.: An industrial dispute arose between 25 Co-operative Central Banks in the State of Andhra Pradesh and their workmen represented by the Andhra Pradesh Bank Employees Federation, Hyderabad, which was referred by the Government of Andhra Pradesh to the Industrial Tribunal, Hyderabad, under Section 10 (1) (d) of the Industrial Disputes Act No. 14 of 1947. The subject-matter of the dispute was divided into three issues. The first issue comprised a number of service conditions, viz., (1) Salary, Scales and Adjustments, (2) Dearness Allowance, (3) Special Allowances, (4) other Allowances, (5) Uniforms and Washing Allowances for subordinate staff, (6) Conveyance Charges, (7) Provident Fund and Gratuity, (8) Leave Rules, (9) Joining Time on Transfer, (10) Rules relating to departmental enquiry against

employees for misconduct, (11) Probationary Period and Confirmation, (12) Working Hours and Overtime Allowance, (13) Age of Retirement, (14) Security, (15) Common Good Fund, (16) Service Conditions and (17) Promotions. The second and the third issues both related to the question whether the transfers of some employees of two of the Banks, The Vijayawada Co-operative Central Bank Ltd., Vijayawada, and The Vizianagaram Co-operative Central Bank Ltd., Vizianagaram, were justified and, if not, to what reliefs were the employees entitled. Before the Industrial Tribunal, one of the grounds raised on behalf of the Banks was that the reference of the disputes to the Tribunal was invalid, because such disputes were required to be referred for decision to the Registrar of the Co-operative Societies under Section 61 of the Andhra Pradesh Co-operative Societies Act No. 7 of 1964 (hereinafter referred to as 'the Act'), and the effect of the provisions of the Act was to exclude the jurisdiction of the Industrial Tribunals to deal with the same disputes under the Industrial Disputes Act. Various other pleas were also taken by the Banks in resisting the claims of the workmen, but, in these appeals, we are not concerned with them, because the Tribunal dealt with the point, mentioned by us above, as a preliminary issue and rejected the contention of the Banks. Twenty-four of the Banks thereupon challenged the preliminary decision of the Tribunal on this question, treating it as a preliminary award, by filing two Writ Petitions Nos. 2339 and 2742 of 1968 under Article 226 of the Constitution in the High Court of Andhra Pradesh. The High Court also rejected the plea of the Banks. These two appeals have been brought up before us by certificate against the orders of the High Court dismissing the two writ petitions. In Civil Appeal No. 2093/1968, the appellants are 10 Banks who were petitioners before the High Court in Writ Petition No. 2339 of 1968, while 2 of the petitioner-Banks in that writ petition have been impleaded as respondents. In Civil Appeal No. 2094 of 1968, the appellants are also 10 Banks who had joined in filing the other Writ Petition No. 2742/1968 in the High Court, while one of the petitioner-Banks in that writ petition has been impleaded as respondent, and another has not joined the appeal as a party. In these appeals, therefore, we are only concerned with one single question as to whether the

jurisdiction of the Industrial Tribunal to adjudicate on the industrial dispute referred to it under Section 10 (1) (d) of the Industrial Disputes Act was barred by the provisions of Section 61 of the Act.

2. The Tribunal, and the High Court, in rejecting the plea taken on behalf of the Banks, expressed the view that the disputes actually referred to the Tribunal were not capable of being decided by the Registrar of the Co-operative Societies under Section 61 of the Act, and, consequently, the reference to the Industrial Tribunal under the Industrial Disputes Act was competent. Learned counsel appearing on behalf of the Banks took us through the provisions of the Act to indicate that, besides being a local and special Act, it is a self-contained Act enacted for the purpose of successful working of Co-operative Societies, including Co-operative Banks, and there are provisions in the Act which clearly exclude the applicability of other laws if they happen to be in conflict with the provisions of the Act. It is no doubt true that the Act is an enactment passed by State Legislature which received the assent of the President, so that, if any provision of a Central Act, including the Industrial Disputes Act, is repugnant to any provision of the Act, the provision of the Act will prevail and not the provision of the Central Industrial Disputes Act. The general proposition urged that the jurisdiction of the Industrial Tribunal under the Industrial Disputes Act will be barred if the disputes in question can be competently decided by the Registrar under Section 61 of the Act is, therefore, correct and has to be accepted. The question, however, that has to be examined is whether the industrial dispute referred to the Tribunal in the present cases was such as was required to be referred to the Registrar and to be decided by him under Section 61 of the Act.

3. In order to properly appreciate the submissions which have been made on behalf of the Banks by their counsel, it is necessary to set out the provisions of Sections 16, 61, 62 and 133 of the Act which are as follows:—

“16. Amendment of bye-laws of a society (1) No amendment of any bye-law of a society shall be valid unless such amendment has been registered under this Act. Where such an amendment is not expressed to come into operation on a particular day, then, it shall come into force on the day on which it is registered.

(2) Every proposal for such amendment shall be forwarded to the Registrar who shall, if he is satisfied that the proposed amendment fulfils the conditions specified in sub-section (1) of Section 7, register the amendment within a period of sixty days from the date of receipt of such proposals;

Provided that the Government may, for sufficient cause which shall be recorded in writing, extend the said period for a further period of sixty days.

(3) The Registrar shall forward to the society a copy of the registered amendment together with a certificate signed and sealed by him, and such certificate shall be conclusive evidence that the amendment has been duly registered.

(4) Where the Registrar is not so satisfied, he shall communicate by registered post the order of refusal together with the reasons therefor, to the society within the period specified in sub-section (2).

(5) If in the opinion of the Registrar, an amendment of the bye-laws of a society is necessary or desirable in the interest of such society or of the co-operative movement, he may, in the manner prescribed, call upon the society, to make any amendment within such time as he may specify. If the society fails to make such an amendment within the time so specified the Registrar may, after giving the society an opportunity of making its representation, register such amendment and forward to the society by registered post a copy of the amendment together with a certificate signed by him; such a certificate shall be conclusive evidence that the amendment has been duly registered; and such an amendment shall have the same effect as an amendment of any bye-law made by the society.

* * * * *

61. Disputes which may be referred to the Registrar:—

(1) Notwithstanding anything in any law for the time being in force, if any dispute touching the constitution, management or the business of a society, other than a dispute regarding disciplinary action taken by the society or its committee against a paid employee of the society, arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between a member, past member or person claiming through a member,

past member or deceased member and the society, its committee or any officer, agent or employee of the society; or

(c) between the society or its committee and any past committee, any officer, agent or employee, or any past officer, past agent or past employee or the nominee, heir or legal representative of any deceased officer, deceased agent, or deceased employee of the society; or

(d) between the society and any other society;

such dispute shall be referred to the Registrar for decision.

Explanation:— For the purposes of this sub-section a dispute shall include—

(i) a claim by a society for any debt or other amount due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or other amount be admitted or not;

(ii) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or other amount due to it from the principal debtor as a result of the default of the principal debtor whether such debt or other amount due be admitted or not;

(iii) a claim by a society against a member, past member or the nominee, heir or legal representative of a deceased member for the delivery of possession to the society of land or other immovable property resumed by it for breach of the conditions of assignment or allotment of such land or other immovable property.

(2) If any question arises whether a dispute referred to the Registrar under this section is a dispute touching the constitution, management or the business of a society, such question shall be decided by the Registrar.

(3) (a) Every dispute relating to, or in connection with, any election to a committee of a society referred to in Cl. (a) of sub-section (3) of Section 31, shall be referred for decision to a Subordinate Judge or where there is no Subordinate Judge, to the District Judge having jurisdiction over the place where the main office of the society is situated, whose decision thereon shall be final.

(b) Every dispute relating to or in connection with any election to a committee of such class of societies as may, by notification in the Andhra Pradesh Gazette, be specified by the Government in this behalf and referred to in Clause (b) of sub-section (3) of Section 31, shall be re-

ferred for decision to a District Munsiff having jurisdiction over the place where the main office of the society is situated, and his decision thereon shall be final.

(4) Every dispute relating to, or in connection with, any election to a committee shall be referred under sub-section (1) or sub-section (3) only after the date of declaration of the result of such election.

62. Action to be taken by the Registrar on such reference:—

(1) The Registrar may, on receipt of the reference of a dispute under Section 61—

(a) elect to decide the dispute himself; or

(b) transfer it for disposal to any person who has been invested by the Government with powers in that behalf; or

(c) refer it for disposal to an arbitrator.

(2) Where the reference relates to any dispute involving immovable property, the Registrar or such person or arbitrator, may order that any person be joined as a party who has acquired any interest in such property subsequent to the acquisition of interest therein by a party to the reference and any decision that may be passed on the reference by the Registrar, or the person or the arbitrator aforesaid, shall be binding on the party so joined as if he were an original party to the reference.

(3) The Registrar may, by order for reasons to be recorded therein, withdraw any reference transferred under Cl. (b) of sub-section (1) or referred under Cl. (c) of that sub-section and may elect to decide the dispute himself or transfer it to any other person under Clause (b) of sub-section (1) or refer it to any other arbitrator under Clause (c) of that sub-section.

(4) The Registrar, such person or arbitrator shall decide the dispute in accordance with the provisions of this Act and the rules and bye-laws and such decision shall, subject to the provisions of Section 76, be final. Pending final decision on the dispute, the Registrar, such person or arbitrator, as the case may be, may make such interlocutory orders as he may deem necessary in the interests of justice.

133. Act to override other laws:—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law."

4. Reliance was placed on the non obstante clause "Notwithstanding anything in any law for the time being in

force" occurring in Section 61 of the Act which has the effect that a dispute covered by this section must necessarily be referred to the Registrar for decision so that it cannot be referred to any other authority under any other law. Further strength is sought in support of this proposition from the provisions of Sec. 133 of the Act which clearly lays down that the provisions of the Act have overriding effect if there be any provision in any other law inconsistent with the provisions of the Act. Then, it was argued that the language of Section 61 of the Act is wide enough to cover the disputes referred to the Tribunal in these cases, because the disputes are between co-operative societies and their employees and they touch the business of the co-operative societies. In support of this submission, learned counsel referred us to a number of decisions of various High Courts in which the scope of the provisions contained in Section 61 of the Act or of similar provisions in other local enactments was considered. Most of those decisions were concerned with laying down the meaning of the expression "touching the business of the society" so as to include within its scope disputes of different nature between the co-operative societies and their employees. The cases which have been brought to our notice are:

(1) a decision of a learned single Judge of the Bombay High Court in *G. I. P. Railway Employees Co-operative Bank Ltd. v. Bhikaji Merwanji Karanjia Employee*, AIR 1943 Bom 341 in which a similar provision contained in Section 54 of the Bombay Co-operative Societies Act No. 7 of 1925 was interpreted;

(2) a decision in *Sagar Motor Transport Karamchari Union, Sagar v. Amar Kamgar Passenger Transport Company Co-operative Society, Sagar*, 18 Fac LR 27 = (AIR 1969 Madh Pra 46), where the Madhya Pradesh High Court interpreted Section 55 (2) of the Madhya Pradesh Co-operative Societies Act, 1960 which required a dispute regarding terms of employment, working conditions and disciplinary action taken by a society, arising between a society and its employees, to be decided by the Registrar or any officer appointed by him;

(3) a decision of a Full Bench of the Madras High Court in *M. S. Madhva Rao v. D. V. K. Surya Rao*, AIR 1954 Mad 103, in which section 51 of the Madras Co-operative Societies Act No. 6 of 1932,

which was very similar to Section 61 of the Act, was interpreted; and

(4) a decision of a Full Bench of the Bombay High Court in *Farkhundali Nannhay v. V. B. Potdar*, 1962-1 Lab LJ 51 = (AIR 1962 Bom 162 (FB)) in which also Section 54 of the Bombay Co-operative Societies Act No. 7 of 1925 came up for interpretation.

5. Learned counsel for the appellants also brought to our notice a decision of a single Judge of the Calcutta High Court in *Co-operative Milk Societies Union, Ltd. v. State of West Bengal*, (1958) 2 Lab LJ 61 = (AIR 1958 Cal 373), where a dispute as to wages, wage-scales and dearness allowance was held not to be a dispute within the meaning of that word as defined in the Bengal Co-operative Societies Act, 1940, and sought to distinguish it on the ground that the decision in that case turned on the meaning specially given in that Act to the word "dispute".

6. It appears to us that it is not necessary to examine in detail the reasons given by the High Courts in the above-cited cases for the interpretation placed by them on provisions similar to Sec. 61 of the Act in view of a very recent decision of this Court in *Deccan Merchants Co-operative Bank Ltd. v. Messrs. Dalchand Jugraj Jain*, Civil Appeal No. 358 of 1967, D/- 29-8-1968 = (AIR 1969 SC 1320). In that case, this Court had to interpret Section 91 of the Maharashtra Co-operative Societies Act, 1960 (Maharashtra Act 32 of 1961), the relevant provision of which is reproduced below:—

"91. (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the office-bearers, conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated, or by a creditor of the society, to the Registrar, if both the parties thereto are one or other of the following:—

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society;

One of the questions which the Court formulated as requiring an answer was: what is the meaning of the expression "touching the business of the society"? In order to decide this question, the Court analysed the provisions of Section 91 (1) and held:—

"Five kinds of disputes are mentioned in sub-section (1); first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society; and fifthly, disputes touching the business of a society. It is clear that the word "business" in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word "business" has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws."

In that case, this Court was concerned with the question whether a dispute touching the assets of a society was a dispute touching the business of the society, and it was in that context that the interpretation mentioned above was given by this Court. In considering the full scope of Section 91 (1) of the Maharashtra Act 32 of 1961, the Court further proceeded to hold:—

"While we agree that the nature of business which a society does can be ascertained from the objects of the society, it is difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its object can be said to be part of its business. We, however, agree that the word "touching" is very wide and would include any matter which relates to or concerns the business of a society, but we are doubtful whether the word "affects" should also be used in defining the scope of the word "touching".

This comment was made when taking notice of the decision of the Full Bench of the Bombay High Court in 1962-1 Lab LJ 51 = (AIR 1962 Bom 162) (FB) (supra). The Court also held:—

"One other limitation on the word "dispute" may also be placed and that is.

that the word "dispute" covers only those disputes which are capable of being resolved by the Registrar or his nominee." Considering the similarity between Section 61 of the Act and Section 91(1) of the Maharashtra Act 32 of 1961, we are of the opinion that the interpretation already placed by this Court on the provisions of Section 91(1) of the Maharashtra Act 32 of 1961 is fully applicable to the provisions of Section 61 of the Act with which we are concerned. Consequently, in deciding these appeals, we must proceed on the basis that Section 61 of the Act requires reference of a dispute to the Registrar only if the dispute is capable of being resolved by the Registrar or his nominee, and further, the dispute between the co-operative society and the employee touches the business of the society in the sense explained by this Court in that case.

7. Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred for decision to the Registrar under S. 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that Section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society; but the meaning given to the expression "touching the business of the society", in our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word "business" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of

the society. Further, the position is clarified by the provisions of sub-section (4) of Section 62 of the Act which limit the power to be exercised by the Registrar, when dealing with a dispute referred to him under Section 61, by a mandate that he shall decide the dispute in accordance with the provisions of the Act and the Rules and bye-laws. On the face of it, the provisions of the Act, the rules and the bye-laws could not possibly permit the Registrar to change conditions of service of the workmen employed by the society. For the purpose of bringing facts to our notice in the present appeals, the Rules framed by the Andhra Pradesh Government under the Act, and the bye-laws of one of the appellant Banks have been placed on the Paper-books of the appeals before us. It appears from them that the conditions of service of the employees of the Bank have all been laid down by framing special bye-laws. Most of the conditions of service, which the workmen want to be altered to their benefit, have thus been laid down by the bye-laws, so that any alteration in those conditions of service will necessarily require a change in the bye-laws. Such a change could not possibly be directed by the Registrar when, under Section 62 (4) of the Act, he is specifically required to decide the dispute referred to him in accordance with the provisions of the bye-laws. It may also be noticed that a dispute referred to the Registrar under Section 61 of the Act can even be transferred for disposal to a person who may have been invested by the Government with powers in that behalf, or may be referred for disposal to an arbitrator by the Registrar. Such person or arbitrator, when deciding the dispute, will also be governed by the mandate in Section 62 (4) of the Act, so that he will also be bound to reject the claim of the workmen which is nothing else than a request for alteration of conditions of service contained in the bye-laws. It is thus clear that, in respect of the dispute relating to alteration of various conditions of service, the Registrar or other person dealing with it under Section 62 of the Act is not competent to grant the relief claimed by the workmen at all. On the principle laid down by this Court in the case of the Deccan Merchants Co-operative Bank Ltd., Civil Appeal No. 358 of 1967, D/- 29-8-1968 = (AIR 1969 SC 1320) (supra) therefore, it must be held that this dispute is not a

(A) Sales Tax — Orissa Sales Tax Act (14 of 1947), Sec. 2 (g) (as it stood prior to amendment of 1959) — 'Sale' — Supply of building materials by company at agreed rates to contractors working for the Company — Held, amounted to 'sale'.

The assessee company was erecting factory buildings and residential buildings for its employees. Some constructions were done departmentally and the rest through contractors. The Company supplied building materials to the contractors for consideration and adjusted the value of the goods supplied at the rates specified in the tender.

Held that the supply of building materials to the contractors at agreed rate, constituted a 'sale'. (Para 6)

There was concurrence of the four elements which constitute a sale: (1) the parties were competent to contract; (2) they had mutually assented to the terms of contract; (3) absolute property in building materials was agreed to be transferred to the contractors; and (4) price was agreed to be adjusted against the dues under the contract. (Para 6)

(B) Sales Tax — Orissa Sales Tax Act (14 of 1947), Ss. 9 (1), 12 (5) and 25 (1) (a) — Failure to register as a dealer — Imposition of penalty — Considerations — Persons in charge of affairs of a Company failing to register it as a dealer in honest and genuine belief that it was not a dealer — Imposition of penalties, held, not justified: (1964) 6 OJD 345, Reversed.

The liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where

the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

(Para 7)

Where a company which was erecting factory buildings and residential buildings for its employees, supplied building materials at agreed rates to the contractors working for the company but the company was not registered as a 'dealer';

Held that, the failure of the persons who were in charge of the affairs of the company was in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out. (1964) 6 OJD 345, Reversed.

(Para 7)

(C) Sales Tax — Orissa Sales Tax Act (14 of 1947), Section 2 (c) (as stood prior to amendment of 1959) — 'Dealer' — Person to be a dealer must carry on business of selling or supplying goods in Orissa — "Business", meaning of — (Words and Phrases — "Business"). (1964) 6 OJD 345, Reversed.

A person to be a dealer within the meaning of the Orissa Sales Tax Act must carry on the business of selling or supplying goods in Orissa. The expression "business" is not defined in the Act. The expression "business" though extensively used is a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. AIR 1965 SC 531, Foll.

(Para 9)

Where a company, which was erecting factory buildings, purchased bricks manufactured by its own contractors and sold them to the building contractors at a certain per cent premium over the purchase price but the company did not maintain separate accounts relating to the expenditure incurred by it for overhead and other charges in respect of those materials and there was also nothing in the statement of facts in the light of relevant evidence as to whether the excess charged over and above the price was intended to be profit:

Held that if the Company agreed to charge a fixed percentage above the cost

price, for storage, insurance and rental charges, it may be reasonably inferred that the Company did not carry on business of supplying materials as a part of business activity with a view to making profit. [The Tribunal was called upon to submit a supplementary statement of the case on the questions whether the Company charged any profit apart from the storage charges for supplying cement and structural steel, and whether the difference between the price charged to the contractors and the price paid by the Company to its suppliers for bricks was not in respect of storage and other incidental charges.] (1964) 6 OJD 345, Reversed. (Paras 14, 15)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 531 (V 52)=

1964-7 SCR 664, State of A. P. v.

Abdul Bakhi

9

In all the Appeals:—

C. K. Daphtary, Sr. Advocate (D. N. Mukherjee, Advocate, with him), for the Appellant; D. Narasaraaju, Sr. Advocate (R. N. Sachthey, Advocate, with him), for the Respondent.

The following Judgment of the Court was delivered by

SHAH, Ag. C. J.:— M/s. Hindustan Steel Ltd., a Company incorporated under the Indian Companies Act, 1913 is a Government of India undertaking in the public sector. The Company is registered as a dealer under the Orissa Sales Tax Act (14 of 1947), from the last quarter ending March 1959.

2. Between 1954 and 1959 Company was erecting factory buildings for the steel plant, residential buildings for its employees and ancillary works such as roads, water supply, drainage. Some constructions were done departmentally and the rest through contractors. The Company supplied to the contractors for use in construction, bricks, coal, cement, steel, etc., for consideration and adjusted the value of the goods supplied at the rates specified in the tender.

3. In proceedings for assessment of tax under the Orissa Sales Tax Act, 1947, the Sales Tax Officer held that the Company was a dealer in building material, and had sold the material to contractors and was on that account liable to pay tax at the appropriate rates under the Orissa Sales Tax Act. The Sales Tax Officer directed the Company to pay tax due for ten quarters ending December 31, 1958, and penalty in addition to the tax for fail-

ure to register itself as a dealer. The Appellate Assistant Commissioner confirmed the order of the Sales Tax Officer. In second appeal the Tribunal agreed with the tax authorities and held that the Company was liable to pay tax on its turnover from bricks, cement and steel supplied to the contractors. The Tribunal however substantially reduced the penalty imposed upon the Company.

4. At the instance of the Company the Tribunal referred six questions to the High Court of Orissa under Section 24 (1) of the Orissa Sales Tax Act, 1947. The questions were:

“A. Whether in the facts and circumstances of the case Messrs. Hindustan Steel Ltd., can be held to be a ‘dealer’ within the meaning of Section 2 (c) of the Orissa Sales Tax Act?

B. Whether the sale of materials by the Company to different contractors working for the company for which sales tax is sought to be assessed amounts to ‘sale’ within the meaning of Section 2 (g) of the Act?

C. Whether the accrual of some profit in the absence of any motive to make such profit can make the assessee a ‘dealer’ under the Act and whether in the circumstances of the case, the Tribunal was justified in coming to a finding that there was profit-making motive on the part of the Company?

D. Whether in view of the definition contained in Section 2, Clause (h) as it stood prior to the amendment of the provision by Act 18 of 1959, the supplies of materials can be treated as ‘sale price’ in the hands of the assessee?

E. Whether in the facts and circumstances of the case, the amount received by the assessee in respect of tender forms can be said to be “sale price”?

F. Whether the Tribunal is right in holding that penalties under Section 12 (5) of the Act had been rightly levied and whether in view of the serious dispute of liability it cannot be said that there was sufficient cause for not applying for registration?”

The High Court answered the questions, A, B, C, D and F in the affirmative and question E in the negative.

5. In these appeals filed with special leave substantially three matters fall to be determined:

1. Whether the Company sold building material to the contractors during the quarters in question?

2. Whether the Company was a dealer in respect of building material within the meaning of the Orissa Sales Tax Act?

3. Whether imposition of penalties for failure to register as a dealer was justified?

Solution of the first and third matters does not present much difficulty. At the relevant time 'sale' was defined by S. 2 (g) of the Orissa Sales Tax Act as follows:—

"Sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuation consideration, including a transfer of property in goods involved in the execution of contract, but does not include a mortgage, hypothecation, charge or pledge:

6. The Company supplied building material to the contractors at agreed rates. There was concurrence of the four elements which constitute a sale — (1) the parties were competent to contract; (2) they had mutually assented to the terms of contract; (3) absolute property in building materials was agreed to be transferred to the contractors; and (4) price was agreed to be adjusted against the dues under the contract. No serious argument was advanced before us that the supply of building material belonging to the Company for an agreed price did not constitute a sale.

7. Under the Act penalty may be imposed for failure to register as a dealer: Section 9 (1) read with Section 25 (1) (a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where

the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

8. Liability to pay sales tax is imposed by Section 4 of the Act. Every dealer whose gross annual turnover exceeds Rs. 10,000/- is liable to pay tax during the ten quarters in question. The expression "dealer" was defined at the relevant time as meaning:

"Dealer" means any person who executes any contract or carries on the business of selling or supplying goods in Orissa whether for commission, remuneration or otherwise and includes any firm or Hindu Joint Family, and any society, club or association which sells or supplies goods to its members.

Explanation * * *

9. A person to be a dealer within the meaning of the Act must carry on the business of selling or supplying goods in Orissa. The expression "business" is not defined in the Act. But as observed by this Court in *State of Andhra Pradesh v. Abdul Bakhi*, 1964-7 SCR 664=(AIR 1965 SC 531):

"The expression 'business' though extensively used is a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure." The sales tax authorities and the Tribunal have held that the Company was carrying on business of selling or supplying materials to the contractors and with that view the High Court agreed. The Company purchased bricks manufactured by its own contractors and sold the bricks to the building contractors at a flat 30 per cent. premium over the purchase price in the case of "second class bricks" and 25 per cent. premium in the case of "first class bricks". Steel, cement and other materials were initially supplied at 3½ per cent. premium over the purchase price paid by the Company. It was con-

tended on behalf of the Company that merely because the price charged to the contractors exceeded the price paid by the Company for acquiring the materials, motive of the Company to carry on business in building materials for profit, cannot be inferred. The Company, it is true, maintained no separate accounts relating to the expenditure incurred by it for overhead and other charges in respect of those materials. Before the sales tax authorities, counsel for the Company also conceded that the Company had not maintained separate accounts from which it could be proved that the transactions of supply of bricks, cement, steel and other commodities resulted in no profit. The High Court observed:

"It is the Stores Department of the company as a whole which deals with the purchase, storage and sale of all the goods required both for acquisition and issue of materials to be used for the construction and operation work of the Company. * * * the Company had to construct not only the buildings but also roads, railways, etc., acquire machinery and perform other multifarious activities connected with the establishment of steel plants and construction of the township. There is nothing in the statement to show that the Company had at any time even contemplated the allocation of the total expenditure incurred for the maintenance of its Stores Department between the expenditure incurred in respect of the goods namely bricks, cement, steel etc., and other goods. If such allocation was not even contemplated it will be unreasonable to say that when these goods were sold to the building contractors at the prices mentioned above, the intention of the Company was merely to utilise the difference in price to meet the overhead charges in respect of these articles and that there was no profit making motive."

10. It is unfortunate that in submitting the statement of case the Tribunal stated no facts at all, and merely submitted the question which was submitted by the Company and the question which, in the view of the Tribunal, arose out of the order. Even in the order deciding the appeal, the facts found on which the conclusion was based were not clearly set out. The Tribunal observed that though the primary object of the Company was to establish a steel plant, the Memorandum authorised the Company to carry on "any trade or business" that it

thought would be conducive to its interest. Observed the Tribunal:

"Judged in this light one cannot find anything wrong if in the initial stages when construction works were going on, the Company thought it prudent that instead of keeping its employees idle and bearing the cost of maintenance without any return, utilised them in some subsidiary business which would promote the interest of the Company and bring some return. With that end in view the company could as well have brought contractors to manufacture brick in its lands, purchased the same from them, purchased cement, coal and other materials from dealers, opened a stores department and kept those materials so procured in its stores and thereafter effected sales of the materials to outsiders including its contractors. The Company knew that for speedy construction of its buildings and factory the contractors would require these materials and so the Company would not lose if it entered into such business. Rather that business would be in the interest of the Company. If the Company had no idea to enter into any business, there was no reason why it should have brought contractors to manufacture bricks, purchased the entire stock from them, stocked the same and thereafter sell the same to its building contractors."

But in so observing a very important piece of evidence appears to have been ignored by the Tribunal. Annexed to the form of the tender submitted by the contractors there are certain "general rules and directions for the guidance of contractors." Paragraph 8 stated:

"The memorandum of work tendered for, and the schedule of materials to be supplied by the H. S. Ltd., and their issue rates, shall be filled in and completed in the office of the Divisional Officer before the tender form is issued. If a form is issued to an intending tenderer without having been so filled in as completed he shall request the office to have this done before he completes and delivers his tender."

Then following the conditions of contract of which condition No. 10 is material, it states—

"If the specification or estimates of the work provides for the use of any special description of materials to be supplied from the Engineer-in-Charge's store, or if it is required that the contractor shall use

certain stores to be provided by the Engineer-in-Charge (such materials or stores, and the prices to be charged therefor as hereinafter mentioned being so far as practicable for the convenience of the contractor, but not so as in any way to control the meaning or effect of this contract specified in the schedule or memorandum hereto annexed), the contractor shall be supplied with such materials and stores as required from time to time to be used by him for the purpose of the contract only, and the value of the full quantity of materials and stores so supplied at the rates specified in the said schedule or memorandum may be set off or deducted from any sums then due, or thereafter to become due to the contractor under the contract, or otherwise or against or from the security deposit. All materials supplied to the contractor shall remain the absolute property of the Company, and shall not on any account be removed from the site of the work, and shall at all times be open to inspection by the Engineer-in-Charge. Any such materials unused and in perfectly good condition at the time of the completion or determination of the contract shall be returned to the Engineer-in-Charge's store, if by a notice in writing under his hand he shall so require; * * * Attached to the tender form is the schedule which recites:

"Recovery of rates of materials to be supplied by H. S. L., for the work of:

(1) Construction of brick masonry compound wall around plant area. Northern section, Length 2.4 miles.

(2) Construction of brick masonry compound wall around plant area. Southern section, Length 2.30 miles.

(3) Construction of brick masonry compound wall round plant area. Marshalling yard section, Length 4.15 miles."

11. It is followed by a table which sets out the Serial No. of the articles to be specified, description of materials unit, rate and place of delivery.

12. It is clear from the terms of the tender and the schedule annexed thereto that the Company was to charge certain rates for the materials to be supplied by it. One of the contracts which has been produced before this Court states under the head "Rate": Rs. 5.94 + $3\frac{1}{2}$ per cent storage charges against "cement in bags", Rs. 800.00 + $3\frac{1}{2}$ per cent storage charges against "structural steel and M. S. rods" and "Rs. 41.25 for 1000 bricks" against "first class bricks". Apparently $3\frac{1}{2}$ per

cent over the specified rate was agreed to be paid by the contractors as storage charges in respect of cement and structural steel and M. S. rods. No specific percentage was set out in respect of the bricks and an inclusive price was made chargeable:

13. Relying upon the terms of the schedule, counsel for the Company contends that the contractors and the Company expressly agreed that $3\frac{1}{2}$ per cent. over the agreed price of the goods was chargeable as storage charges. It is common ground that the rate mentioned against cement and structural steel is the price at which the goods were purchased by the Company. If the Company was charging a fixed percentage on the price paid by it for procuring such goods for storage and other incidental charges, it would be difficult to resist the conclusion that the Company was not carrying on the business of selling cement and structural steel. There is of course no statement in the schedule that the price charged by the Company in excess of the price paid by the Company of its contractors for bricks was in respect of storage charges.

14. But neither the Tribunal nor the High Court has referred to this important piece of evidence and we are unable to decide these appeals unless we have an additional statement of facts in the light of the relevant evidence as to whether the excess charged over and above the price which the Company paid for procuring Cement and Steel (expressly called storage charge) and bricks was intended to be profit. If the Company agreed to charge a fixed percentage above the cost price, for storage, insurance and rental charges, it may be reasonably inferred that the Company did not carry on business of supplying materials as a part of business activity with a view to making profit.

15. The Tribunal's statement of case is bald and in recording its findings the Tribunal has ignored a very important piece of evidence. To enable us to answer the questions referred, it is necessary that the Tribunal should be called upon to submit a supplementary statement of the case on the questions whether the Company charged any profit apart from the storage charges for supplying cement and structural steel, and whether the difference between the price charged to the contractors and the price paid by the

Company to its suppliers for bricks was not in respect of storage and other incidental charges. The Tribunal to submit the supplementary statement of case to this Court, within three months from the date on which the papers reach the Tribunal.

Order accordingly.

AIR 1970 SUPREME COURT 259
(V 57 C 53)

(From Patna: AIR 1969 Pat 394)

**M. HIDAYATULLAH, C. J., J. C. SHAH,
V. RAMASWAMI, G. K. MITTER,
AND A. N. GROVER, JJ.**

In Civil Appeal No. 2346 of 1968: The Rt. Reve. Bishop S. K. Patro and others, Appellants v. State of Bihar and others, Respondents.

In Writ Petns. Nos. 430 and 431 of 1968 (1) S. V. Qadir and others, (In W. P. No. 430 of 1968), (2) Rev. M. P. Hembrom, (in W. P. No. 431 of 1968), Petitioners v. The State of Bihar and others, (in both the Petns.), Respondents.

Civil Appeal No. 2346 of 1968 and Writ Petns. Nos. 430 and 431 of 1968, D/- 2-4-1969.

(A) Constitution of India, Art. 30 (1) — Protection of Article 30 (1) extends both to pre-constitution as well as post-constitution educational institutions provided they are continued to be administered by minorities either based on religion or language.

The guarantee of protection under Article 30 is not restricted to educational institutions established after the Constitution: institutions which had been established before the Constitution and continued to be administered by minorities either based on religion or language qualify for the protection of the right of minorities declared by Article 30 of the Constitution. AIR 1958 SC 956, Foll.

(Para 8)

(B) Constitution of India, Article 30 (1) — Minority — Right to set up educational institution of their choice — Persons must be residents in India and must form well-defined religious or linguistic minority — Right cannot be claimed by non-resident foreigners.

Prior to the enactment of the Constitution there was no settled concept of Indian citizenship, and it cannot be said

that Christian Missionaries who had settled in India and the local Christian residents of Bhagalpur did not form a minority community. It is true that the minority competent to claim the protection of Article 30 (1) and on that account the privilege of establishing and maintaining educational institutions of its choice must be a minority of persons residing in India. It does not confer upon foreigners not residents in India the right to set up educational institutions of their choice. Persons setting up educational institutions must be resident in India and they must form a well-defined religious or linguistic minority. It is not however predicated that protection of the right guaranteed under Art. 30 may be availed of only in respect of an institution established before the Constitution by persons born and resident in British India. (Para 19)

(C) Constitution of India, Articles 30 and 29 — Unlike Article 29, citizenship is not a necessary qualification for claiming protection under Article 30 — AIR 1969 Pat 394, Reversed.

The protection of the rights under Article 29 may be claimed only by Indian citizens. Article 30 guarantees the right of minorities to establish and administer educational institutions; the article does not expressly refer to citizenship as a qualification for the members of the minorities. AIR 1969 SC 465 & AIR 1963 SC 540, Ref. to; AIR 1969 Pat 394, Reversed. (Para 20)

(D) Constitution of India, Article 30 (1) — Primary school established in 1854 by Christian missionaries and local Christian residents of Bhagalpur with aid of funds partly contributed by them and partly by Christian Missionary Society of London—School subsequently converted into Christian Missionary Society Higher Secondary School managed by the National Christian Council of India — Held that the school was entitled to protection of Article 30 (1) and that the order interfering with its management was invalid. AIR 1969 Pat 394, Reversed.

A primary school started in 1854 at Bhagalpur was converted into Church Missionary Society Higher Secondary School and was managed by the National Christian Council of India. By an order dated 22-5-1967 the Education Department authorities had set aside the election of the President and the Secretary of the school and had directed the school to constitute a Managing Committee in

accordance with that order. The question in dispute was whether the school could claim protection under Article 30 (1). The extracts from the Record Book clearly showed that the local residents of Bhagalpur had taken a leading role in establishing and maintaining the school. Assistance was undoubtedly obtained from other bodies including the Church Missionary Society, London. But the School was set up by the Christian Missionaries and the local Christian residents of Bhagalpur with the aid of funds part of which was contributed by them.

Held that (i) the conclusion reached by the High Court that the School was established not by the local Christians of Bhagalpur, but by the Church Missionary Society, London was not justified on the evidence. The fact that funds were obtained from the United Kingdom for assisting in setting up and developing the School or that the management of the institution was carried on by some persons who may not have been born in India was not a ground for denying the protection of Article 30 (1). (Paras 18 & 20)

(ii) the High Court was also in error in holding that before any protection can be claimed under Article 30 (1) in respect of the Church Missionary Society Higher Secondary School, it was required to be proved that all the persons or a majority of them who established the institution were "Indian citizens" in the year 1854. There being no Indian citizenship in the year 1854 independently of the citizenship of the British Empire, to incorporate in the interpretation of Art. 30 in respect of an institution established by a minority the condition that it must in addition be proved to have been established by persons who would, if the institution had been set up after the Constitution, have claimed Indian citizenship, is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution. (Para 21)

(iii) that the order passed by the educational authorities should be declared as invalid. AIR 1969 Pat 394, Reversed.

(Para 22)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 465 (V 56)=

W. P. No. 1 of 1968, D/- 13-9-68

Rev. Father W. Proost v. State of Bihar

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(1963) AIR 1963 SC 540 (V 50)=

1963-3 SCR 837, Rev. Sidhajbhai

v. State of Bombay

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(1958) AIR 1958 SC 956 (V 45)=
1959 SCR 995. In re, The Kerala
Education Bill, 1957

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Mr. M. C. Setalwad Sr. Advocate, (Mr. R. Gopalakrishnan Advocate with him), for Appellants, (in C. A. No. 2346 of 1968); Mr. R. Gopalakrishnan, Advocate, for Petitioners, (in W. Ps. Nos. 430 and 431 of 1968); Mr. D. Goburdhun, Advocate, for Respondents (in C. A. No. 2346 of 1968); B. P. Jha, Advocate, for Respondents (in W. Ps. Nos. 430 and 431 of 1968).

The following Judgment of the Court was delivered by

SHAH, J.:— A primary school started in 1854 at Bhagalpur was later converted into a Higher Secondary School.

2. The Legislature of the State of Bihar enacted the Bihar High Schools (Control and Regulation of Administration) Act 13 of 1960 which by Section 8 invested the State Government with power to frame rules. Section 8 (1) provides:

"The State Government may, after previous publication and subject to the provisions of Articles 29, 30 and 337 of the Constitution of India, make rules not inconsistent with this Act for carrying out the purposes of this Act."

In 1964 rules were framed under the Act by the State Government of Bihar. Rule 41 provides:

"These rules shall not apply to the schools established and administered by the minorities whether based on religion or language."

3. By order dated September 4, 1963, the President of the Board of Secondary Education approved the election of Bishop Parmar as President and Rev. Chest as Secretary of the Church Missionary Society Higher Secondary School. This order was set aside by the Secretary to the Government, Education Department, by order dated May 22, 1967. On June 21, 1967, the Regional Deputy Director of Education, Bhagalpur, addressed a letter to the Secretary, Church Missionary Society School, Bhagalpur, inviting his attention to the order dated May 22, 1967, and requested him to take steps to constitute a Managing Committee of the School "in accordance with that order".

4. A petition was then filed in the High Court of Patna by four petitioners (who are appellants in Appeal No. 2346 of 1968) for a writ quashing the order dated May 22, 1967, and for an order restraining the respondents — the State of Bihar, the Secretary to the Government

of Bihar, Department of Education and the educational authorities of the State — from interfering with the right of the petitioners to control, administer and manage the affairs of the School. The High Court of Patna dismissed the petition. The High Court held that the primary School at Bhagalpur was established by the Church Missionary Society of London; that the School had developed into the present Church Missionary Society Higher Secondary School; and that the School was administered in recent times by the Church Missionary Society of the Bhagalpur Diocese; and that the School not being an educational institution established by a minority, protection was not afforded thereto by Article 30 of the Constitution. Against the order dismissing the petition, Civil Appeal No. 2346 of 1968 has been filed in this Court.

5. Two other petitions are filed in this Court claiming relief on the footing that by the order dated May 22, 1967, of the Government of Bihar the fundamental right of the Christian minority to maintain an educational institution of its choice and guaranteed by Article 30 (1) is infringed. Writ Petition No. 430 of 1968 is filed by the Principal, Church Missionary Society Higher Secondary School, Bhagalpur, the Secretary, Bihar Christian Council, Gaya, the Secretary, Santhalia Christian Council, Bhagalpur, and the Secretary National Christian Council of India, Nagpur. Writ Petition No. 431 of 1968 has been filed by Rev. M. P. Hem-brom, Parish Priest, Church Missionary Society, Bhagalpur, two of whose children are being educated at the School. These petitions are heard with Civil Appeal No. 2346 of 1968.

6. The High Court found on a consideration of the evidence that the Church Missionary Society Higher Secondary School is a "denominational institution", that "scripture classes are held in the School and lessons on the life and teaching of Lord Jesus Christ are taught" and examinations are held in the subject for all students, that every morning, before the classes begin, the prayers from the prescribed Church Books are offered by the students and the members of the staff, and each meeting of the Managing Committee of the School begins and closes with prayers from the "Book of Common Prayer". Correctness of the finding recorded by the High Court is not challenged before us. The finding recorded by the High Court that the School ori-

ginally started in the year 1854 as a primary school had since developed into the present Church Missionary Society Higher Secondary School is also not challenged before us.

7. The only question which falls to be determined is whether the petitioners in the two writ petitions and the appellants in Appeal No. 2346 of 1968 are entitled to claim the protection of Article 30 of the Constitution on the ground that the Church Missionary Society Higher Secondary School at Bhagalpur is an educational institution of their choice established by a minority.

8. Article 30 of the Constitution by clause (1) provides:

"All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

The guarantee of protection under Article 30 is not restricted to educational institutions established after the Constitution: institutions which had been established before the Constitution and continued to be administered by minorities, either based on religion or language qualify for the protection of the right of minorities declared by Article 30 of the Constitution. In *In Re. The Kerala Education Bill, 1957*, 1959 SCR 995=(AIR 1958 SC 956), Das, C. J., observed at p. 1051 (of SCR)=(at p. 978 of AIR):

"There is no reason why the benefit of Article 30 (1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30 (1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Article 30 (1) gives the minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-Constitution schools just as Article 26 covers the right to maintain pre-Constitution religious institutions."

9. It was the case of the State and the parties intervening in the writ petition before the High Court that the School was established by the Church Missionary Society, London, which they claimed was a Corporation with an alien domicile and "such a Society was not a minority based on religion or language" within the meaning of Article 30 of the Constitution. On behalf of the appellants in the appeal and the petitioners in the

two writ petitions filed in this Court it is claimed that the School was started in 1854 by the local Christian residents of Bhagalpur. They concede that the Church Missionary Society of London did extend financial aid in the establishment of the School, but they contend that on that account, the School did not cease to be an educational institution established by a religious minority in India.

10. There is on the record important evidence about establishment in 1854 of the Lower Primary School at Bhagalpur. It is unfortunate that sufficient attention was not directed to that part of the evidence in the High Court. The "Record Book" of the Church Missionary Association at Bhagalpur which is Annexure 'D' to writ Petition No. 430 of 1968 furnishes evidence of vital importance having a bearing on the establishment of the School. It contains copies of letters written from Bhagalpur and minutes of meetings held and the resolutions passed by the Local Council of Bhagalpur. On June 1, 1848, Rev. Vaux informed the Calcutta Corresponding Committee of the Church Missionary Society by a letter that if the Calcutta society were to establish a School at Champanagar, "local assistance shall not be wanting to the extent of 1000 or 1200 rupees a year, besides providing a school house and residence for the master", and that "At first, for breaking up the fallow ground and setting the school agoing the presence of a Missionary of tact and experience may be necessary". On June 26, 1848, Rev. Vaux by another letter informed the Calcutta Corresponding Committee that a special service was held in the Church on June 22, 1848 and thereafter on Friday June 23, 1848, a meeting was held and contributions were invited from persons present including Indian residents, that monthly subscriptions of Rs. 202 for the "salary of masters" and other expenses were promised, and that an amount of Rs. 1,647 was donated for building the school and residence for the master; that the general impression made was so favourable to the cause that he felt justified in assuring the Calcutta Committee that the local Committee were in a position to guarantee certain requisites for making a commencement such as payment of the salary of the School Master and Mistress and the building of a house for their accommodation which may afterwards be enlarged so as to form a suitable residence for a Mission.

11. By letter dated July 10, 1848 the Secretary, Calcutta Corresponding Committee, informed Rev. Vaux that they were looking out for a prominent person to commence missionary operations by opening a School "which is indeed a common way of beginning a Mission". In a letter dated December 22, 1848, written from Bhagalpur it was stated:

"The Society will provide for the Missionary's salary and trust that local funds will provide a residence for him of a suitable kind. All other Mission requirements, such as school teachers etc., should be left to be provided on the spot."

12. Then there are minutes of the resolutions passed at a meeting held on October 24, 1849 by the Parent Committee and another resolution dated October 25, 1851, of the Local Committee, to raise funds, and to determine upon disbursements with the advice of the Missionary to promote the objects of the Mission. In the minutes of the meeting dated October 25, 1851, it is recorded that a statement of account of receipts and disbursements up to September 30, 1851 including expenses of a boys school and salary of masters, "hire of school rooms and furniture" and expenses of a girls' school "including cost of working materials up to date" was submitted.

13. In a letter from the Treasurer of the Committee dated May 10, 1852, it was stated:

"One of the conditions on which the Church Missionary Society consented to send a Missionary to this station was that he should be provided by local friends with a suitable residence. As this appeared to be a sine qua non, subscriptions were raised for the purpose of building a Mission house; * * * To this end I propose, that as soon as the balance in hand amounts to Rs. 11,000 that sum be transferred by me as your Treasurer to the Calcutta Corresponding Committee of the C. M. S.; to be held by them in trust as the "Bhagalpur Mission Fund". The interest of this sum will be more than sufficient to pay the rent of the present Mission premises, viz., Rs. 45 per month; and accordingly, as soon as the transfer is effected responsibility (sic). The whole of our remaining local funds and future collections can then be devoted to the support of schools; orphanage etc; and we shall be better able to regulate our expenditure by our means, and increase our efforts in proportion to our wants."

14. At a meeting of the Local Committee held on March 22, 1853, it was resolved that the Committee expresses their satisfaction at the progress made by Mr. Droese in building the Bungalow and that the Treasurer be authorised to pay to Mr. Droese out of the Reserve Fund the further sum of Rs. 3,500/- required to complete the building.

15. At a meeting of the Local Committee held on August 23, 1856, it was recorded that on an area of 21 bighas of land for which a perpetual lease was obtained on November 26, 1853, the Association had built a Bungalow and offices for the Missionary, houses for native Christians and an orphanage. At a meeting held on October 17, 1856, it was resolved that the Committee desired sincerely to thank Mr. Brown for "kind, active and liberal interest he had taken in the Mission from the first and particularly for making over to the Society mission property which his own exertions had in great measure secured".

16. It appears from this correspondence and the resolutions and the discussions at the meetings that a permanent home for the Boys' School was set up in 1854 on property acquired by local Christians and in buildings erected from funds collected by them. The institution along with the land on which it was built and the balance of money from the local fund were handed over to the Church Missionary Society in 1856. It is also true that substantial assistance was obtained from the Church Missionary Society, London. But on that account it cannot be said that the School was not established by the local Christians with their own efforts and was not an educational institution established by a minority.

17. The Church Missionary Society Higher Secondary School is an educational institution administered by a minority; that was so found by the High Court and is not now in controversy.

18. The High Court held that the primary school started in the year 1854 was started by the Church Missionary Society, London, and such a Society cannot be said to be a citizen of India and that in any event the persons who constituted the Society were aliens and on that account it cannot be said that the Church Missionary Society Higher Secondary School is an educational institution established by a minority. It is unnecessary to dilate upon these matters at length,

for, in our judgment, the conclusion that the School was established not by the local Christians of Bhagalpur, but by the Church Missionary Society, London, is not justified on the evidence. The extracts from the Record Book clearly show that the local residents of Bhagalpur had taken a leading role in establishing and maintaining the school. Assistance was undoubtedly obtained from other bodies including the Church Missionary Society, London. But the School was set up by the Christian Missionaries and the local residents of Bhagalpur with the aid of funds part of which was contributed by them.

19. It is unnecessary to enter upon an enquiry whether all the persons who took part in establishing the School in 1854 were "Indian Citizens". Prior to the enactment of the Constitution there was no settled concept of Indian citizenship, and it cannot be said that Christian Missionaries who had settled in India and the local Christian residents of Bhagalpur did not form a minority community. It is true that the minority competent to claim the protection of Article 30 (1) and on that account the privilege of establishing and maintaining educational institutions of its choice must be a minority of persons residing in India. It does not confer upon foreigners not resident in India the right to set up educational institutions of their choice. Persons setting up educational institutions must be resident in India and they must form a well-defined religious or linguistic minority. It is not however predicated that protection of the right guaranteed under Article 30 may be availed of only in respect of an institution established before the Constitution by persons born and resident in British India.

20. It is necessary to bear in mind the difference in the phraseology used in Articles 29 and 30 of the Constitution. By Article 29 (1) any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same, and Cl. (2) guarantees that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. The protection of the rights under Article 29 may be claimed only by Indian citizens. Art. 30 guarantees the right of minorities to

establish and administer educational institutions: the article does not expressly refer to citizenship as a qualification for the members of the minorities. In *Rev. Father W. Proost v. State of Bihar*, W. P. No. 1 of 1968, D/- 13-9-1968 = (AIR 1969 SC 465), this Court observed:

"In our opinion the width of Article 30 (1) cannot be cut down by introducing in it considerations on which Article 29 (1) is based. The latter article is a general protection which is given to minorities to conserve their language, script or culture. * * * The two articles created two separate rights, although it is possible that they may meet in a given case."

The Court then observed, after referring to the judgment in *Rev. Sidhajibhai Sabhai v. State of Bombay*, (1963) 3 SCR 837 = (AIR 1963 SC 540) that:

"..... the language of Article 30 (1) is wide and must receive full meaning. We are dealing with protection of minorities and attempts to whittle down the protection cannot be allowed. We need not enlarge the protection but we may not reduce a protection naturally flowing from the words. Here the protection clearly flows from the words and there is nothing on the basis of which aid can be sought from Article 29 (1)."

The fact that funds were obtained from the United Kingdom for assisting in setting up and developing the School or that the management of the institution was carried on by some persons who may not have been born in India is not a ground for denying the protection of Art. 30 (1).

21. We are also unable to agree with the High Court that before any protection can be claimed under Article 30 (1) in respect of the Church Missionary Society Higher Secondary School it was required to be proved that all persons or a majority of them who established the institution were "Indian citizens" in the year 1854. There being no Indian citizenship in the year 1854 independently of the citizenship of the British Empire, to incorporate in the interpretation of Article 30 in respect of an institution established by a minority the condition that it must in addition be proved to have been established by persons who would, if the institution had been set up after the Constitution, have claimed Indian citizenship, is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution.

22. The order passed by the Educational authorities requiring the Secretary of the Church Missionary Society Higher Secondary School to take steps to constitute a Managing Committee in accordance with the order dated May 22, 1967, is declared invalid.

23. The appeal is allowed and the rule in the two writ petitions is made absolute. There will be no order as to costs in the two writ petitions. Since it appears that all the requisite materials were not placed prominently before the High Court in the writ petition out of which Appeal No. 2346 of 1968 has arisen, we direct that in the appeal the parties shall bear their own costs throughout.

Appeal allowed and Rules made absolute.

AIR 1970 SUPREME COURT 264 (V 57 C 54)

(From Kerala: ILR (1965) 2 Ker 639)

J. C. SHAH, S. M. SIKRI AND
V. RAMASWAMI, JJ.

Jothi Timber Mart, etc., Appellants v. The Corporation of Calicut and another, (In all the Appeals), Respondents.

Civil Appeals Nos. 1079 to 1086 and 1088 to 1099 of 1966, D/- 18-7-1969.

(A) Municipalities — Calicut City Municipal Act (Kerala Act 30 of 1961), Section 126 — Section is not ultra vires Entry 52, List II of Sch. 7 of Constitution — Proviso to Section 126 — Interpretation of — Constitution of India, Sch. VII, List II, Entry 52, Articles 246 and 245 — Civil P. C. (1908), Preamble.

Section 126 is not ultra vires Entry 52 of List II, Sch. VII and it does not violate the restrictions imposed upon State Legislature by the Constitution. (Para 6)

Entry of goods within the local area for consumption, use or sale therein is made taxable by the State Legislature. No authority to impose a general levy of tax on entry of goods into a local area is conferred on the State Legislature by Item 52 of List II of Schedule VII of the Constitution. The Municipality derives its power to tax from the State Legislature and can obviously not have authority more extensive than the authority of the State Legislature. If the State Legislature is competent to levy a tax only on the entry of goods for con-

sumption, use or sale into a local area, the Municipality cannot under a legislation enacted in exercise of the power conferred by Item 52, List II have power to levy tax in respect of goods brought into the local area for purposes other than consumption, use or sale. The authority of the State Legislature itself being subject to a restriction in that behalf, Section 126 may reasonably be read as subject to the same limitations. When the power of the Legislature with limited authority is exercised in respect of a subject-matter, but words of wide and general import are used, it may reasonably be presumed that the Legislature was using the words in regard to that activity in respect of which it is competent to legislate and to no other; and that the Legislature did not intend to transgress the limits imposed by the Constitution. To interpret the expression "brought into the city" used in Section 126 (1) as meaning "brought into the city for any purpose and without any limitations" would amount to attributing to the Legislature an intention to ignore the constitutional limitations. The expression "brought into the city" in Section 126 must therefore be interpreted as meaning "brought into the municipal limits for purposes of consumption, use or sale and not for any other purpose. AIR 1941 FC 72, Relied on. (Para 6)

(B) Municipalities — Calicut City Municipal Act (Kerala Act 30 of 1961), Section 126, Proviso — Interpretation — Does not exempt from taxation timber brought into city in course of transit even when it is not directly removed out of city. ILR (1965) 2 Ker 639, Reversed.

It cannot, be assumed that the entry of goods into the City may be only for the four purposes, namely, for consumption, use, sale or transit. Consequently, it cannot be said that the proviso exempts from taxation timber brought into the city in the course of transit even when it is not directly removed out of the city by rail, road or water. The proviso has a limited operation. It merely provides that the municipality shall not be entitled to levy a tax on timber brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water. But on that account it cannot be said that the proviso is enacted with the object of bringing to tax all entry of timber which is not brought into the city in the course of transit to any place outside the city and

directly removed out of the city by rail, road or water. ILR (1965) 2 Ker 639, Reversed. (Para 7)

Cases Referred: Chronological Paras (1941) AIR 1941 FC 72 (V 28)=

1941 FCR 12, In re, Hindu

Women's Rights to Property Act,

1937

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Mr. H. R. Gokhale, Senior Advocate (Mr. B. Datta, Advocate, and M/s. J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co., with him), for Appellants (In all the Appeals); Mr. C. K. Daphtary, Senior Advocate (Mr. A. S. Nambiar and Miss Lily Thomas, Advocates, with him), for Respondent No. 1 (In all the Appeals); M/s. D. P. Singh and M. R. K. Pillai, Advocates, for Respondent No. 2 (In all the Appeals).

The following Judgment of the Court was delivered by

SHAH, J.:— In a group of petitions presented before the High Court of Kerala the appellants challenged the validity of the levy of "timber-tax" by the Corporation of Calicut on the grounds, inter alia, that the State Legislature is incompetent to impose that tax under the Kerala Act 30 of 1961. Govindan Nair, J., declared that the Legislature was incompetent to enact Section 126 of the Calicut City Municipal Act, 1961 (30 of 1961). The decision of Govindan Nair, J., was reversed in appeal by a Division Bench of the High Court and the petitions were dismissed.

2. By virtue of Article 246 read with Schedule VII, Item 52, List II of the Constitution, the State may legislate in the matter of "tax on the entry of goods into a local area for consumption, use or sale therein". The appellants contend that Section 126 conferring authority to impose timber tax violates the restrictions upon the legislative power imposed by the Constitution and on that account is void.

3. Section 98 of the Act enumerates the taxes and duties which the Municipality may levy and one of the taxes described in clause (e) is "tax on timber brought into the city". Section 126 declares a charge of tax on timber brought into the city: it provides, (insofar as it is material):

(1) If the Council by a resolution determine that a tax shall be levied on timber brought into the city, such tax shall be levied at such rates, not exceeding five rupees per ton, and in such manner as may be determined by the Council:

Provided that no tax shall be levied on any timber brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water.

(2) No timber shall, except in the case referred to in the proviso to sub-sec. (1) be brought into the city unless the tax due thereon has been paid.

(3) The tax shall be levied on timber kept within the city for sale if the commissioner has reason to believe that the tax, if any, due thereon has not been paid:

* * * *

4. Power to make bye-laws for sale and seizure of timber in respect of which tax is not paid and for carrying out the provisions relating to the levy of tax is conferred by Section 126 (6) and Section 369 (1) of the Act. The Corporation of Calicut has framed bye-laws relating to the levy and collection of timber tax. It is provided by Clause 3 that the tax on timber shall be paid immediately on timber being brought into the City. Bye-law 7 provides:

“(1) If timber is brought into the city and it is claimed that it is in the course of transit to a place outside the city and not for consumption, use or sale within the city and if in the opinion of the authority or officer authorised to collect the tax on timber, such timber brought into the city is not for the purpose of transit but for the purpose of consumption, use or sale therein, such authority or officer may demand from the person claiming exemption an amount equal to the tax leviable for such timber as security.

(2) If the person, who has paid the security satisfies the Commissioner within 14 days from the date of payment that the timber in respect of which the amount was paid was brought into the city in the course of transit and not for consumption, use or sale therein the Commissioner shall refund the amount to such person. Otherwise the same shall be appropriated towards tax due on such timber.

(3) * * *

(4) * * *

The High Court held that timber may be imported within the limits of the Corporation for four purposes — (1) for consumption in the city (2) for use in the city; (3) for sale in the city; and (4) for transit through the city, and since all the four purposes were within the enacting part of the section and the proviso to

Section 126 (1) having eliminated the right of the Municipality to levy tax for transit through the city, “the taxing power conferred by Entry 52, List II of the Seventh Schedule was ensured and its constitutional strength and validity upheld” thereby.

5. Counsel for the appellants contends that the High Court was in error in holding that entry of timber into the Municipal area may be only for consumption, use, or sale within the Municipality or in the course of transit through the limits of the municipality. He says that the entry may for instance be merely for storage of the goods within the limits of the municipality and a provision levying tax on goods entering the limits of the municipality without specification of the purpose is beyond the legislative power of the State.

6. Entry of goods within the local area for consumption, use or sale therein is made taxable by the State Legislature: authority to impose a general levy of tax on entry of goods into a local area is not conferred on the State Legislature by Item 52 of List II of Schedule VII of the Constitution. The Municipality derives its power to tax from the State Legislature and can obviously not have authority more extensive than the authority of the State Legislature. If the State Legislature is competent to levy a tax only on the entry of goods for consumption, use or sale into a local area, the Municipality cannot under a legislation enacted in exercise of the power conferred by Item 52, List II have power to levy tax in respect of goods brought into the local area for purposes other than consumption, use or sale. The authority of the State Legislature itself being subject to a restriction in that behalf, Section 126 may reasonably be read as subject to the same limitations. When the power of the Legislature with limited authority is exercised in respect of a subject-matter, but words of wide and general import are used, it may reasonably be presumed that the Legislature was using the words in regard to that activity in respect of which it is competent to legislate and to no other; and that the Legislature did not intend to transgress the limits imposed by the Constitution: See *In re Hindu Women's Rights to Property Act, 1937*, 1941 FCR 12=(AIR 1941 FC 72). To interpret the expression “brought into the city” used in Section 126 (1) as meaning brought into the city for any

purpose and without any limitations would, in our judgment, amount to attributing to the Legislature an intention to ignore the constitutional limitations. The expression "brought into the city" in Section 126 was therefore rightly interpreted by the High Court as meaning brought into the municipal limits for purposes of consumption, use or sale and not for any other purpose.

7. While we agree with the ultimate conclusion of the High Court we may observe that we do not agree with the assumption made by the High Court that the entry of goods into the city may be only for the four purposes mentioned by the High Court nor do we hold that the proviso exempts from taxation timber brought into the city in the course of transit even when it is not directly removed out of the city by rail, road or water. The proviso, in our judgment, has a limited operation. It merely provides that the municipality shall not be entitled to levy a tax on timber brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water. But on that account we are unable to hold that the proviso is enacted with the object of bringing to tax all entry of timber which is not brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water.

8. The appeals fail and are dismissed. There will be no order as to costs in these appeals.

Appeals dismissed.

AIR 1970 SUPREME COURT 267 (V 57 C 55)

(From Patna: 1968 Pat LJR 179)

S. M. SIKRI, G. K. MITTER,
K. S. HEGDE, JJ.

A. K. Jain and others, Appellants v.
Union of India and others, Respondents.

Criminal Appeal No. 189 of 1966, D/-
25-7-1969.

(A) Essential Commodities Act (1955), Ss. 2 (b) and (c), 3 — Scheme of Cls. (b) and (c) of Sec. 2 and Sec. 3 — Scheme intended to bring under control cultivation and sale of food crops — Sugar-cane does come within ambit of Act and cultivation and sale of sugar-cane can be regulated under Sec. 3 — Sugar-cane

(Control) Order (1955), R. 3 (3) is valid. AIR 1956 SC 676, Rel. on. (Para 4)

(B) Essential Commodities Act (1955), Sec. 3 — Order under Sugar-cane (Control) Order (1955), R. 3 (3) — Regulation of price of sugar-cane — Provision expressly contained in Bihar Sugar Factories Control Act (1937) and also in Sugar-cane (Control) Order (1955), R. 3 (3) — Provision of Order prevails over the Act, the Act being a pre-Constitution Act.

(Para 6)

(C) Constitution of India, Sch. VII, List III, Entry 33 — Law relating to control of sugar-cane — Parliament is competent to enact law by virtue of Entry 33 of List III — Power conferred on Government under Sec. 3 of Essential Commodities Act and Sugar-cane (Control) Order (1955), cannot be challenged as invalid.

(Para 7)

(D) Criminal P. C. (1898), Sec. 4 (1) (f) — Complaint regarding offence under Sec. 7 of Essential Commodities Act — Offence punishable with three years imprisonment — Is cognizable offence within meaning of Sec. 4 (1) (f).

(Para 10)

Cases Referred: Chronological Paras
(1956) AIR 1956 SC 676 (V 43)=

1956 SCR 393, Tikuramji v. State
of U. P.

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Mr. B. R. L. Iyengar, Senior Advocate
(Mr. U. P. Singh, Advocate with him),
for Appellants; Dr. V. A. Seyid Muham-
mad, Senior Advocate (Mr. S. P. Nayar,
Advocate, with him), for Respondent
No. 1.

The following Judgment of the Court
was delivered by

HEGDE, J.:— This appeal against the decision of the High Court of Patna in Criminal W. J. C. No. 11 of 1966 was brought after obtaining special leave from this Court. The principal question raised herein is whether the investigation which is being carried on against the appellants under sub-rule (3) of Rule 3 of Sugar-cane (Control) Order, 1955 (to be hereinafter referred to as the Order) read with Section 7 of the Essential Commodities Act 1955 (to be hereinafter referred to as the Act) is in accordance with law.

2. The appellants are office bearers of M/s. S. K. G. Sugar Ltd. (Lauriya). A complaint has been registered against them under sub-rule (3) of Rule 3 of the Order read with S. 7 of the Act on the ground that they have failed to pay to the sellers the price of the sugar-cane purchased by them, within

the time prescribed. The said complaint is being investigated. The appellants are objecting to that investigation on various grounds. They unsuccessfully sought the intervention of the High Court of Patna under Article 226 of the Constitution in Cr. W. J. C. No. 11 of 1966. Hence this appeal.

3. Mr. B. R. L. Iyengar appearing for the appellants challenged the validity of the investigation in question on various grounds. We shall now proceed to deal with each one of those grounds.

4. The 1st contention of Mr. Iyengar was that sub-r. (3) of R. 3 could not have been validly issued under S. 3 of the Act. According to him the said Section 3 cannot be used for controlling the payment of the price of food crops; it can only deal with food-stuffs; food crops are outside its scope. This contention has been negated by the High Court. We agree with the High Court that there is no merit in this contention. Section 2 (a) of the Act defines "essential commodity". Sub-clause (v) of that clause brings food-stuffs within the definition of essential commodity. Clause (b) of Section 2 provides that food crops include sugar-cane. The next important provisions in the Act are clauses (b) and (c) of Section 3 (1). Section 3 (1) provides that if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub-section (2) of that section says that without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide.

(b) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for the growing thereon of food-crops generally or of specified food crops, and for otherwise maintaining or increasing the cultivation of food crops generally, or of specified food crops."

Clause (c) provides for controlling the price at which any essential commodity may be bought or sold. From the scheme of clauses (b) and (c) of Section 2 and Section 3 of the Act, it is clear that the Parliament intended to bring under control the cultivation and sale of food crops. In view of these provisions it is idle to con-

tend that sugar-cane does not come within the ambit of the Act. The question whether the cultivation and sale of sugar-cane can be regulated under Section 3 of the Act came up for the consideration of this Court in *Ch. Tika Ramji v. State of U. P.*, 1956 SCR 393=(AIR 1956 SC 676). At pages 432 and 433 (of SCR)=(at p. 703 of AIR) of the report it is observed:

"Act X of 1955 included within the definition of essential commodity food-stuffs which we have seen above would include sugar as well as sugar-cane. This Act was enacted by Parliament in exercise of the concurrent legislative power under Entry 33 of List III as amended by the Constitution Third Amendment Act, 1954. Food crops were there defined as including crops of sugar-cane and Section 3 (1) gave the Central Government powers to control the production, supply and distribution of essential commodities and trade and commerce therein for maintaining or increasing the supplies thereof or for securing their equitable distribution and availability at fair prices. Section 3 (2) (b) empowered the Central Government to provide inter alia for bringing under cultivation any waste or arable land whether appurtenant to a building or not for growing thereon of food crops generally or specified food crops and Section 3 (2) (c) gave the Central Government power for controlling the price at which any essential commodity may be brought or sold. These provisions would certainly bring within the scope of Central legislation the regulation of the production of sugar-cane as also the controlling of the price at which sugar-cane may be brought or sold, and in addition to the Sugar Control Order, 1955 which was issued by the Central Government on 27th August, 1955, it also issued the Sugar-cane Control Order, 1955, on the same date investing it with the power to fix the price of sugar-cane and direct payment thereof as also the power to regulate the movement of sugar-cane.

Parliament was well within its powers in legislating in regard to sugar-cane and the Central Government was also well within its powers in issuing the Sugar-cane Control Order, 1955 in the manner it did because all this was in exercise of the concurrent power of legislation under Entry 33 of List III."

5. It is needless to say anything more on this question.

6. It was next contended by Mr. Iyengar that the regulation of price of sugar-cane is expressly dealt with by the Bihar Sugar Factories Control Act, 1937 and therefore we should not impliedly spell out the same power from the provisions of the Order and the Act. Mr. Iyengar is not right in contending that the power that is sought to be exercised in the instant case is an implied one. Sub-rule (3) of Rule 3 specifically provides that unless there is an agreement in writing to the contrary between the parties, the purchaser shall pay to the seller the price of the sugar-cane purchased within 14 days from the date of the delivery of the sugar-cane. This is a specific mandate. If the Bihar Act provides anything to the contrary the same must be held to have been altered in view of Article 372 of the Constitution which provides that all laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority. Quite clearly the Bihar Act is a pre-Constitution Act and it could have continued to be in force only till it was altered, repealed or amended by a competent legislature or other competent authority. We shall presently see that the authority that altered or amended that law is a competent one.

7. The next contention of the learned Counsel for the appellants was that the Parliament had no competence to enact any law relating to the control of sugar-cane as that subject is within the exclusive legislative jurisdiction of the State, the same being a part of agriculture. This contention is again unsustainable in view of Entry 33 of List III of the Constitution which empowers the Parliament to legislate in respect of production, supply and distribution of food-stuffs. It is not disputed that the Parliament had declared by law that it is expedient in public interest that it should exercise control over food-stuffs. That being so it was well within the competence of Parliament to enact the Act and hence the power conferred on the Government under Sec. 3 of the Act cannot be challenged as invalid.

8. There is no substance in the contention that the impugned order contravenes the fundamental right guaranteed to the citizens under Article 19 (1). No fundamental right is conferred on a buyer not to pay the price of the goods pur-

chased by him or to pay the same whenever he pleases.

9. The contention that in view of S. 11 of the Act, no cognizance could have been taken of the offence alleged is premature. This question does not arise in this case. No Court has yet taken cognizance of the case. That stage has still to come.

10. There is no substance in the contention that the complaint made before the police does not disclose a cognizable offence and as such the police could not have taken up the investigation of that complaint. The offence complained of is punishable with three years' imprisonment and as such it falls within the 2nd Sch. of the Cr. P. C. and consequently the same is a cognizable offence as defined in Section 4 (1) (f) of the Cr. P. C. Hence it was open to the police to investigate the same.

11. For the reasons mentioned above we are unable to accept any of the contention advanced on behalf of the appellants. In the result this appeal fails and the same is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 269
(V 57 C 56)

(From: Calcutta)

S. M. SIKRI, G. K. MITTER AND
K. S. HEGDE JJ.

Shyamal Chakravarty, Petitioner v.
Commissioner of Police, Calcutta and another, Respondents.

Writ Petn. No. 102 of 1969, D/ 4-8-1969.

(A) Public Safety — Preventive Detention Act (1950), Sections 7, 10, 11 — Advisory Board already dealing with matter — Governor confirming detention — Representation subsequently by detenu and prayer to produce him before Board — Prayers held could not be acceded to — Government however asked to deal with representations.

It is obligatory on the Government to deal with the representations made by the detenu, but where the detenu did not choose to make a representation before the Advisory Board had dealt with the matter and further the State Government was in the process of dealing with the representation when the Supreme Court issued the notice and moreover in the representa-

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tion made by the detenu after the Advisory Board had dealt with the matter and the Governor had confirmed the detention barely stated that the grounds were false and that the detenu was a poor man and the family conditions were miserable and he was living peacefully in the town and had never committed any act which was manifestly prejudicial to the maintenance of public order or communal harmony and prayed that "under the circumstances I am to request you to kindly produce me before the Advisory Board and release me", since the Advisory Board had already dealt with the matter it was impossible to produce him before the Advisory Board. Under these circumstances it cannot be said there has been a breach of Section 7.

[Government was asked to deal with the representations which were under its consideration and pass suitable orders.]

(Para 4)

(B) Public Safety — Preventive Detention Act (1950), Sections 7 and 3 — Grounds for detention must have relevance to maintenance of public order — Grounds held had such relevance — Fact that acts alleged were also an offence under Penal Code is irrelevant.

The grounds for detention must have relevance to the maintenance of public order and they should not relate merely to the maintenance or order. It is true that the contravention of any law always affects order but before it can be said to affect public order it must affect the community or the public at large. Where the grounds supplied said that in each of instances, the detenu acted along with associates who were armed with lathis, iron rods, acid bulbs, etc., that he committed a riot and indiscriminately used acid bulbs, iron rods, lathis etc. endangering human lives, the ground cannot be said to have reference merely to maintenance of order because it affects the locality and everybody who lives in the locality. Similarly from the ground, that he along with his associates prevented the police constables from discharging their lawful duties and thus affected everybody living in the locality and that the whole locality was in danger as the detenu and his associates were armed with deadly weapons and these were in fact used indiscriminately endangering human lives in the locality, the object of the detenu seems to have been to terrorise the locality and bring the whole machinery of law and order to a halt. On these grounds

it could not be said that the Commissioner of Police could not come to the conclusion that the detenu was likely to act in a manner prejudicial to the maintenance of public order in the future and it was necessary to prevent him from doing so. The fact that public order is affected by an act which was also an offence under the Indian Penal Code is irrelevant. (1969) 1 SCC 1, Rel. on. (Paras 5, 6, 7)

Cases Referred: Chronological Paras
(1968) W. P. No. 179 of 1968, D/-
7-11-1968 = (1969) 1 SCC 1,
Pushkar Mukherjee v. State of
W. B. 5

Mr. Vinoo Bhagat, Advocate, amicus curiae, for Petitioner; Mr. S. P. Mitra, Advocate and Mr. G. S. Chatterjee, Advocate, for Mr. Sukumar Basu Advocate, for Respondents.

The following Judgment of the Court was delivered by

SIKRI, J.: This is a petition under Article 32 of the Constitution by Shyamal Chakraborty who has been detained under the Preventive Detention Act, 1950 (hereinafter referred to as the Act). Three grounds have been urged by the learned counsel why we should issue a writ of habeas corpus directing his release: (1) that the detenu's representation was not considered by the Government, (2) that the grounds furnished to the detenu mentioned offences under the Indian Penal Code and cannot be used for the purpose of detaining the detenu except in emergencies, and (3) that the grounds do not have any relation to the maintenance of public order. Following are the facts as they emerge from the affidavits on record.

2. The detenu was detained by an order No. 3846-D.D.(S), D/- 13th November 1968, passed by the Commissioner of Police, Calcutta in exercise of powers conferred on him by Section 3 (2) of the Act. The detenu was arrested on November 13 1968 and was served with the grounds of detention both in English and in vernacular on the same day. On 15th November, 1968, the Commissioner of Police reported the fact of such detention of the petitioner together with the grounds and other particulars having bearing on the necessity of the order to the State Government. On 19th November, 1968, the Governor was pleased to approve the said order of detention under Section 3 (3) of the Act and on the same day the Governor submitted the report to the Central Government under Section 3 (4) of the

Act together with grounds and other particulars having bearing on the necessity of the order. On 7th December, 1968, his case was placed before the Advisory Board under Section 9 of the Act. On 6th January, 1969, the Advisory Board after consideration of the materials placed before it was of the opinion that there was sufficient cause for detention of the petitioner. The petitioner had not submitted any representation to the State Government till then. By an order dated 8th January, 1969, the Governor was pleased to confirm the order of detention. It appears that on the 13th January, 1969 and 16th January, 1969, the detenu made representations. After the receipt of these representations the same were sent by the Home Department to the Commissioner of Police for his report. On 1st April, 1969 the Commissioner of Police informed the Home Department that he did not recommend the release of the petitioner. But the representations of the petitioner were not received back from the Commissioner of Police with his letter of the 1st April, 1969. Later on the Commissioner of Police sent back the representation dated 13th January, 1969 to the Home Department. This Court on 28th March, 1969 issued a notice under Article 32 of the Constitution to the Commissioner of Police and to the State Government to show cause why Rule Nisi should not be issued made returnable three weeks hence. On receipt of this notice the State Government refrained from passing any order on the representation dated 13th January, 1969. The representation dated 16th January, 1969 is untraceable, but effort is being made to trace it. According to the Commissioner of Police it was on the same lines as the representation dated 13th January, 1969.

3. It is necessary to reproduce the grounds of detention served on the detenu and they are in the following terms:

“You are being detained in pursuance of a detention order made under sub-section (2) of Section 3 of the Preventive Detention Act, 1950 (Act IV of 1950) on the following grounds:

You have been acting in a manner prejudicial to the maintenance of public order by the commission of offences of rioting, assault etc., as detailed below:

(1) That on 28th June, 1968, at about 6 P. M. you along with your associates being armed with lathis, iron rods, acid bulbs, etc., committed a riot in Kumartuli Park in course of which you severely as-

saulted Shri Amal Krishna Roy of 20A, Abhoy Mitra Street and iron rods, acid bulbs etc., were indiscriminately used endangering human lives.

(2) That on 23rd July, 1968, at about 6.10 P. M. you along with your associates being armed with lathis, iron rod, hockey sticks, etc., attacked constables Sankar Lal Bose and Jagdish Singh both of Shyam-pukur P. S. on Kaliprosad Chakraborty Street near the Gaudiya Math who went there to discharge their lawful duties, as a result of which constable Sankar Lal Bose sustained bleeding injuries on his person.

(3) That in the night of 3rd October, 1968, between 11.50 P. M. and 1.30 A. M. you along with your associates being armed with deadly weapons took part in a riot at Rabindra Sarani from Bug Bazar Street crossing to Kumartuli Street crossing in course of which bombs, brickbats and soda water bottles were indiscriminately hurled endangering human lives.

You are hereby informed that you may make a representation to the State Government against the detention order and that such representation should be addressed to the Assistant Secretary to the Government of West Bengal, Home Department, Special Section, Writers' Buildings, Calcutta and forwarded through the Superintendent of the Jail in which you are detained as early as possible.

You are also informed that under Section 10 of the Preventive Detention Act, 1950 (Act IV of 1950) the Advisory Board, shall, if you desire to be heard, hear you in person and that if you desire to be so heard by the Advisory Board you should intimate such desire in your representation to the State Government.”

4. Coming now to the first point raised by the learned counsel it seems to us that there has been no breach of the provisions of the Act. This Court has held that it is obligatory on the Government to deal with the representations made by the detenu, but the facts recited above show that the detenu did not choose to make a representation before the Advisory Board dealt with the matter, and further the State Government was in the process of dealing with the representation when this Court issued the notice. Moreover, in the representation dated 13th January, 1969, the detenu barely stated that the grounds were false and that the detenu was a poor man and the family conditions were miserable and

he was living peacefully in the town and had never committed any act which was manifestly prejudicial to the maintenance of public order or communal harmony. He prayed that "under the circumstances, I am to request you to kindly produce me before the Advisory Board and release me." At that stage it was impossible to produce him before the Advisory Board. The Advisory Board had already dealt with the matter. Under these circumstances we are unable to say that there has been a breach of Section 7. We trust that the State Government will now immediately deal with the representation or representations and pass a suitable order.

5. It will be convenient to deal with the points 2 and 3 mentioned above together. It is true, as urged by the learned counsel for the petitioner that this Court has consistently held that the grounds must have relevance to the maintenance of public order, and that they should not relate merely to the maintenance of order. It is true, as laid down by this Court, that the contravention of any law always affects order but before it can be said to affect public order it must affect the community or the public at large. As Ramaswami, J., put it in *Pushkar Mukherjee v. State of West Bengal*, W. P. No. 179 of 1968, D/- 7-11-1968 = (reported in (1969) 1 SCC 1) "in this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest."

6. The question which arises is this, do the grounds reproduced above relate merely to maintenance of order or do they relate to the maintenance of public order? It will be noticed that the detenu in each of these cases acted along with associates who were armed with lathis, iron rods, acid bulbs, etc. It is clearly said in ground No. 1 that he committed a riot and indiscriminately used acid bulbs, iron rods, lathis, etc., endangering human lives. This ground cannot be said to have reference merely to maintenance of order because it affects the locality and everybody who lives in the locality. Similarly, in the second ground, he along with his associates prevented the police constables from discharging their

lawful duties and thus affected everybody living in the locality.

7. In ground No. 3, again the whole locality was in danger as the detenu and his associates were armed with deadly weapons and these were in fact used indiscriminately endangering human lives in the locality. The object of the detenu seems to have been to terrorise the locality and bring the whole machinery of law and order to a halt. We are unable to say that the Commissioner of Police could not in view of these grounds come to the conclusion that the detenu was likely to act in a manner prejudicial to the maintenance of public order in the future and it was necessary to prevent him from doing so. The fact that public order is affected by an act which was also an offence under the Indian Penal Code seems to us to be irrelevant.

8. In the result the petition fails and is dismissed.

Petition dismissed.

AIR 1970 SUPREME COURT 272 (V 57 C 57)

(From: AIR 1968 Orissa 26)

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

Khetra Basi Samal and another etc.,
Appellants v. The State of Orissa etc.,
Respondents.

Criminal Appeals Nos. 160 and 171 of
1967, D/- 14-8-1969.

(A) Criminal P. C. (1898), Sections 417 (3), 417 (1), 239, 439 — Accused charged of offences committed in the course of same transaction — Case instituted against some of the accused upon complaint — Case clubbed under Section 239 along with case instituted against other accused upon police report — Acquittal of all accused — Appeal against acquittal of accused against whom cognizance is taken on police report, maintainable only at the instance of the State and not at the instance of complaint — Remedy of complainant is under Section 439. AIR 1968 Orissa 26, Reversed.

Where, in respect of offences committed by several accused persons in the course of the same transaction two cases — one instituted against some accused initially upon a police report and the other instituted against remaining accused upon a complaint — are clubbed under Sec-

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tion 239 and all accused are acquitted then an appeal against the acquittal of accused, against whom cognizance was taken upon the police report, will not lie at the instance of the complainant under Section 417 (3) but will only be maintainable if preferred by State Government under Section 417 (1). The two cases retain their individuality except for the convenience of the trial. The cases being separate cases of which cognizance was taken separately, the mere clubbing of the two cases together for the purpose of trial will not alter the nature of the cases so as to affect their appealability under Section 417. If appeal is not preferred by the State the complainant may invoke the powers of High Court under Section 439 if proper grounds for revision are present. AIR 1968 Ori 26, Reversed. (Para 7)

(B) Criminal P. C. (1898), Section 439 — Acquittal of accused — Revision at the instance of private complainant — Revisional jurisdiction of High Court — High Court cannot re-appraise the evidence and upset the findings of Magistrate.

The revisional jurisdiction conferred on the High Court under Section 439 is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under Section 417. This jurisdiction should be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. It is not possible to lay down the criteria for determining such exceptional cases which will cover all contingencies. However some cases of this kind, which will justify the High Court in interfering with a finding of acquittal in revision may be where the trial court has no jurisdiction to try the case but has still acquitted the accused or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law. AIR 1951 SC 196 and AIR 1951 SC 316 and AIR 1962 SC 1788, Rel. on.

(Paras 10, 11)

So where it is not evident that the trial court shut out any evidence which the prosecution wanted to produce or admitted any inadmissible evidence or overlooked any material evidence but the Magistrate after examining the evidence produced by the prosecution acquitted the accused as according to him there was no proof beyond reasonable doubt that it was the accused who committed the crime then it is not permissible under Section 439 for the High Court to proceed to re-appraise the evidence of the witnesses and set aside the order of acquittal on the ground that Magistrate had not taken the trouble of sifting the grain from the chaff nor in such cases retrial can be ordered by High Court.

(Para 12)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 1788 (V 49) =

1963-3 SCR 412, K. Chinnaswamy

Reddy v. State of A. P.

11

(1951) AIR 1951 SC 196 (V 38) =

1951 SCR 284, D. Stephens v.

Nosibolla

10

(1951) AIR 1951 SC 316 (V 38) =

1951 SCR 676, Logendranath Jha

v. Polailal Biswas

10

Mr. S. N. Anand, Advocate, for Appellants (In Cr. As. No. 160 of 1967); M/s R. K. Garg, S. C. Agarwal and D. P. Singh, Advocates of M/s. Ramamurthi and Co. and Miss Sumitra Chakravarty, Mr. Uma Dutt, Advocates, for Appellants (In Cr. A. No. 171 of 1967); M/s. V. C. Mahajan and R. N. Sachthey, Advocates, for Respondent (In Cr. A. No. 160 of 1967).

The following Judgment of the Court was delivered by

MITTER, J.: These two appeals by special leave are from one judgment of the High Court of Orissa hearing an appeal from an order of acquittal of 31 persons accused on charges under Sections 147, 323 and 325 of the Indian Penal Code for being members of an unlawful assembly and having voluntarily caused hurt and inter alia a grievous one by dislocating a tooth by means of a knife-like thing of one Jagabandhu Behera, the appellant before the High Court.

2. The incident is alleged to have happened on October 4, 1963 at about 11 A. M. in village Anantpur in course of which the accused persons are said to have assaulted Jaganbandhu Behera with lathis and sharp instruments. The motive for the crime was said to be enmity arising out of Gram Panchayat election and

previous litigation between Jagabandhu Behera and Khetrabasi Samal, one of the said 31 persons. The first information report was lodged at 5 p. m. by one Maguni Charan Biswal who however was not examined at the trial. In this report ten persons were stated to have taken part in assaulting and hurting Jagabandhu. More than six weeks thereafter Jagabandhu filed a complaint before a Magistrate in which he named 31 persons including those against whom the first information report had been lodged as his assailants. The complainant stated therein that he had been assaulted so mercilessly as to render him unconscious and he recovered consciousness in Anantapur Dispensary where he was treated by a doctor. From there he was taken to a hospital in Cuttack and was lodged there till November 18, 1962.

3. The Magistrate examined the complainant on the same day and directed another Magistrate of the First Class to inquire and report. On January 23, 1963 after getting the report of such inquiry and hearing the person against whom the complaint was made on their protest petition, the Magistrate held "that there was a prima facie case against the accused persons under Sections 147/323 I. P. C. except the first ten accused persons as per the complaint petition since they had already been sent for trial in G. R. No. 1943 of 1962." He took cognizance against accused persons from serial Nos. 11 to 31 as per the complaint petition under Sections 147/323 I. P. C.

4. The G. R. case had already been started on the basis of the first information report. On July 12, 1963 the complainant Jagabandhu Behera filed a petition to club the complaint case along with the analogous G. R. case and after giving a hearing to both parties the Magistrate passed an order on 15th July 1963 to the effect that the two cases were to be clubbed together and provisions of Section 252 Cr. P. C. were to be followed. The proceedings went on for an inordinately long time and ultimately on August 23, 1965 the trying Magistrate delivered a judgment acquitting all the accused. Jagabandhu Behera filed an appeal to the High Court under Section 417 (3) of the Code of Criminal Procedure and the grounds urged in support of such appeal were substantially based on the alleged failure of the Magistrate to take a proper view of the evidence.

5. Before the High Court, a point was taken on behalf of the respondents challenging the maintainability of the appeal as against accused 1 to 10 against whom cognizance was taken on the police report. Among these ten persons are the appellants in the two appeals to this Court. It was urged that as these ten persons had figured as accused in G. R. Case No. 1943 of 1962 an appeal against their acquittal would not lie at the instance of the complainant under Section 417 (3) but would only be maintainable if preferred under Section 417 (1) by the State Government. It was also contended that mere clubbing together of the cases, the G. R. case and the complainant's case, for joint trial would not change the character thereof so as to convert the G. R. case into a complaint case.

6. The High Court overruled this objection mainly on the ground that Section 239 Cr. P. C. allowed the trial of a number of persons whether accused of the same offence or of different offences if these were committed in the course of the same transaction. The High Court then considered the merits of the appeal, examined the evidence of the prosecution witnesses and took the view that the testimony of prosecution witnesses 1, 2 and 5 who claimed to have witnessed the incident themselves had been discarded by the Magistrate on extraneous considerations. Sifting the evidence for itself the High Court held that seven of the accused i. e., the appellants to this Court were guilty of some of the charges framed against them and passed sentences ranging from three months to six months in different cases after setting aside the acquittal.

7. It was contended before us on behalf of the appellants that the appeal to the High Court was incompetent and in our view this contention must be accepted. There were two separate cases of which cognizance was taken separately. One was started on the basis of a police report while the other was on the complaint of Jagabandhu Behera. As the accused in both the cases were said to have committed the offences in the course of the same transaction, the cases were clubbed together for the purpose of trial and such a course was clearly permissible under Section 239, Cr. P. C. That did not however alter the nature of the cases so as to affect their appealability under Section 417. The two cases retained their individuality except for the convenience

of the trial. If the cases had ended in conviction they would have had to be separately recorded. The first ten accused would have had to appeal from their conviction and sentence in the G. R. case and similarly the remaining accused from the complaint case. If the State did not think it proper to direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal in the G. R. case it might have been open to the complainant to invoke the powers of the High Court under Section 439 of the Code if proper grounds for revision were present.

8. Counsel for the respondents argued that this was a case where we should not allow the appeal on the ground that the High Court had gone wrong in exercising its powers under Section 417 (3) of the Code but should send the matter back to the High Court for disposal according to law including the powers under Section 439 of the Code. It was said that Jagabandhu Behera had been beaten up by a number of persons in a public place in broad day light and although there might be infirmities in the evidence adduced on behalf of the prosecution and contradictory statements made by some of the prosecution witnesses, we should not put an end to the proceedings here but send the matter back to the High Court for proper disposal.

9. In our view, the law does not permit such a course to be adopted on the facts of this case. The powers of the High Court under Section 439, Cr. P. C. although wide are subject to certain limitations. Section 439 (4) expressly provides that the section shall not be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.

10. This Court has had to examine the jurisdiction of the High Court under this section on several occasions. In *D. Stephens v. Nosibolla*, 1951 SCR 284 = (AIR 1951 SC 196) it was pointed out (see at p. 291 (of SCR) = (at p. 199 of AIR)) that:

"The revisional jurisdiction conferred on the High Court under Section 439 of Code of Criminal Procedure is not to be lightly exercised, when it is invoked by a private complaint against an order of acquittal, against which the Government has a right of appeal under Section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the

correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or misappreciated the evidence on record."

Again in *Logendranath Jha v. Polailal Biswas*, 1951 SCR 676 = (AIR 1951 SC 316) where the High Court had set aside an order of acquittal of the appellants by the Sessions Judge and directed their re-trial, this Court, see at p. 681 (of SCR) = (at p. 318 of AIR), said:

"Though sub-section (1) of Section 439 authorises the High Court to exercise, in its discretion, any of the powers conferred on a court of appeal by Section 423, sub-section (4) specifically excludes the power to convert a finding of acquittal into one of conviction." This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High Court could in the absence of any error on a point of law re-appraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stopped short of finding the accused guilty and passing sentence on him. By merely characterising the judgment of the trial court as "perverse" and lacking in perspective" the High Court cannot reverse pure findings of fact based on the trial court's appreciation of the evidence in the case."

11. In *K. Chinnaaswamy Reddy v. State of Andhra Pradesh*, 1963-3 SCR 412 at p. 418 = (AIR 1962 SC 1788 at p. 1791) the court proceeded to define the limits of the jurisdiction of the High Court under Section 439 of the Criminal Procedure Code while setting aside an order of acquittal. It was said:

".... this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence

which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court or where the acquittal is based on a compounding of the offence, which is invalid under the law."

12. It may be that a case not covered by any of the contingencies mentioned above may still arise. But, where, as here, the appeal court (the High Court in this case) has set aside the order of acquittal almost entirely on the ground that the Magistrate should not have disbelieved the three eye witnesses, viz., P. Ws. 1, 2 and 5, the case clearly falls within the contingencies mentioned in the above decision of this Court. The High Court judgment does not show that the trial court shut out any evidence which the prosecution wanted to produce or admitted any inadmissible evidence or overlooked any material evidence. The Magistrate examined the evidence produced by the prosecution. According to him, there was strong enmity between the two parties of Jagabandhu Behera and Khetrabasi Samal and although the incident was supposed to have taken place in front of a large number of shops and before a large gathering, only one person from those shops, P. W. 5 who was a chance witness occasionally going to the place for the purpose of carrying on his business in fish, was examined by the prosecution and there was no explanation for not examining the other witnesses named in the complaint petition. P. W. 1, one of the witnesses mentioned in the judgment of the High Court and relied on by it was the complainant's father-in-law and as such a person interested in the success of the prosecution. Relying on the testimony of the doctor who had examined Jagabandhu Behera, the Magistrate found himself unable to accept the evidence of the prosecution witness to the effect that the injury to the tooth was caused by a sharp-cutting instrument in which case other external injuries could not have been avoided. The Magistrate was doubtful as to whether the accused persons had any hand in the commission of the crime and although the assault on Jagabandhu was a brutal one there was, according to the Magistrate, no proof beyond reasonable doubt that it was the accused persons who had committed it. The High Court proceeded to re-appraise

the evidence of the witnesses and upset the finding of the Magistrate thereon on the ground that he "had not taken the trouble of sifting the grain from the chaff." Clearly such a course is not permissible under Section 439 of the Criminal Procedure Code. Nor in our opinion the facts and circumstances of this case warrant the ordering of a re-trial by the High Court if it felt disposed to exercise powers under Section 423 Cr. P. C. expressly included in Section 439. Sending the case back to the High Court can serve no useful purpose.

13. As the appeal to the High Court was incompetent, we allow the appeals and direct the cancellation of their bail bonds.

Appeals allowed.

AIR 1970 SUPREME COURT 276
(V 57 C 58)

(From: Allahabad)*

K. S. HEGDE AND A. N. RAY JJ.

Jitendra Bahadur Singh, Appellant v. Krishna Behari and others, Respondents.

Civil Appeal No. 1483 of 1968 D/- 13-8-1969.

Representation of the People Act (1951), Section 92 — Inspection of ballot boxes — Requirements to be satisfied before Tribunal can permit inspection — Scrutiny of ballot papers sought on basis of assertions neither accompanied by statement of material facts nor supported by any evidence — Scrutiny should not be ordered — Conduct of Election Rules (1961), R. 93 — Civil Misc. Appln. Nos. 41 (E) and 42 (E) of 1968 in Election Petition No. 7 of 1967 D/- 21-5-1968 (All — Lucknow Bench) Reversed.

The basic requirements to be satisfied before an election tribunal can permit the inspection of ballot papers, are (1) that the petition for setting aside the election must contain an adequate statement of the material facts on which the petitioner relies in support of his case and (2) the tribunal must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. The material facts required to be stated are those facts which can be con-

(*Civil Misc. Appln. Nos. 41 (E) and 42 (E) of 1968 in Ele. Petn. No. 7 of 1967, D/- 21-5-1968 — All — Lucknow Bench.)

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sidered as materials supporting the allegations made. In other words they must be such facts as to afford a basis for the allegations made in the petition. If an election petitioner in his election petition gives some figures as to the rejection of valid votes and acceptance of invalid votes, the same must not be considered as an adequate statement of material facts when the petitioner has not disclosed in the petition the basis on which he arrived at those figures. His bald assertion that he got those figures from the counting agents of the unsuccessful candidate cannot afford the necessary basis. AIR 1964 SC 1249 and AIR 1966 SC 773 Rel. on. (Paras 7, 8)

Similarly, when the petitioner does not state in the election petition that any of the counting agents appointed by the unsuccessful candidate or his election agent in accordance with the rules had been refused admission to the place of counting, mere allegation that the returning officer did not permit enough number of counting agents to be appointed is an extremely vague allegation. Under S. 47 of the Representation of the People Act, 1951, a contesting candidate or his election agent may appoint in the prescribed manner one or more persons but not exceeding such number as may be prescribed by the rules, to be present as his counting agent or agents at the counting of votes and when any such appointment is made notice of the appointment shall be given in the prescribed manner to the returning officer. Rules framed under that Act prescribe the number of counting agents that a candidate may appoint. The form of the notice required to be given under Section 47 of the Act is given in the rules. The appointment of the counting agents is to be made in the prescribed form in duplicate, one copy of which is to be forwarded to the returning officer while the other copy should be made over to the counting agent. Rules also provide that no counting agent shall be admitted into the place fixed for counting unless he has delivered to the returning officer the second copy of the instrument of his appointment after duly completing and signing the declaration contained therein. Hence the mere allegation that the returning officer did not permit enough number of counting agents to be appointed cannot afford the necessary basis. (Para 9)

Similarly, as to the rejection of the votes polled in favour of the unsuccessful

candidate, under the rules before a vote is rejected the agents of the candidates must be permitted to examine the concerned ballot paper. Therefore it is quite easy for them to note down the serial number of the concerned ballot papers. Therefore if the election petition is silent as to the inspection of the ballot papers or whether the counting agents had noted down the serial numbers of those ballot papers or whether those agents raised any objection relating to the validity of those ballot papers; if so who those agents are and what are the serial numbers of the ballot papers to which each one of them advanced their objections; the material facts required to be stated, are not satisfied and hence scrutiny of ballot papers should not be ordered. Civil Misc. Applns. Nos. 41 (E) and 42 (E) of 1968, in Election Petition No. 7 of 1967, D/- 21-5-1968 (All—Lucknow Bench), Reversed. (Para 10)

Cases Referred: Chronological Paras

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| (1966) AIR 1966 SC 773 (V 53)= | |
| 1967-1 SCJ 762, Dr. Jagjit Singh v. Giani Kartar Singh | 7 |
| (1964) AIR 1964 SC 1249 (V 51)= | |
| 1964-6 SCR 238, Ram Sewak Yadav v. Hussain Kamil Kidwai | 7 |
| (1953) 3 ELR 39, Seshiah v. Koti Reddy | 13 |
| (1952) 2 ELR 51, R. Swaminatha v. Ramalingam | 13 |
| (1930) AIR 1930 Mad 195 (V 17)= | |
| 58 Mad LJ 118, Lakshumanayya v. Rajam | 13 |

Mr. C. B. Agarwala, Senior Advocate (M/s. V. P. Joshi and S. S. Khanduja, Advocates, with him), for Appellant; M/s. G. N. Dikshit, R. N. Dikshit and O. P. Saini, Advocates, for Respondents Nos. 1 and 9.

The following Judgment of the Court was delivered by

HEGDE, J.:— This appeal by special leave is directed against the order made by Sahgal, J., on May 21, 1968, permitting the 1st respondent, an elector challenging the validity of the election of the appellant to Lok Sabha from 15, Shahabad Parliamentary Constituency in the general election held in 1967, to inspect the packets of ballot papers containing the accepted as well as the rejected votes of the candidates.

2. In the election in question as many as 10 persons contested. The appellant, the Jan Sangh nominee was the successful candidate. The 9th respondent, Shri

Nevatia Rameshwar Prasad, the congress nominee was his nearest rival. In the election petition, the petitioner not only wants the appellant's election to be held void, he also wants that the 9th respondent should be declared elected. The election of the appellant has been challenged on various grounds, with most of which we are not at present concerned. We are only concerned with the allegations relating to the irregularity in the scrutinising and counting of votes. The averments relating thereto are found in paragraphs 13 and 14 of the election petition. They are as follows:

(1) only one counting agent was permitted at each table whereas three persons were doing the counting work simultaneously and it was impossible for one man to look into and detect the wrong acts of three persons at the same time.

Under this head it was further mentioned that the counting staff was from amongst the government servants who had gone on two months strike before the election and during the elections they had adopted hostile attitude towards the congress candidates and had made efforts to bring about their defeat;

(2) the bundles of votes of either candidates were neither properly made nor properly scrutinised;

(3) about 5,000 votes of the congress candidates were improperly rejected ignoring the protests of Mr. Malhotra, the election agent of the congress nominee;

(4) invalid votes were counted in favour of the returned candidate. The votes of the congress candidates were counted for the returned candidate.

3. In Sch. 'E' certain figures showing the alleged improperly rejected as well as accepted votes pertaining to certain booths are mentioned. It also shows the number of votes of the congress nominee counted as the votes of the returned candidate. Neither the petition nor the Schedule discloses the basis for arriving at those figures.

4. The election petitioner is neither the candidate nor his election agent. In the election petition, it was not stated that he was even the counting agent. In the verification appended to the election petition, it was averred that the allegations contained in paragraphs 12 to 15 of the election petition were believed by the petitioner to be true on the basis of the information received from the workers of

the congress nominee and others which means that the allegations made by him in paragraphs 13 and 14 of the election petition were based on hearsay information. He does not and he could not vouchsafe their accuracy though he claims to have believed the information given to him to be correct. Similarly in the verification appended to Sch. 'E', the election petitioner stated that he has given the information contained in that Schedule on the basis of the information received from the counting agents of the congress nominee. Neither in the election petition nor in the Schedule he mentioned that the counting agents had given him the information in question on the basis of any record made by them.

5. In the affidavit filed by the petitioner in support of his application seeking permission to inspect the ballot papers, he went one step further. Therein he averred that on one of the days when the counting was going on, he acted as one of the counting agents for the congress nominee. Hence he claims to have personal knowledge of the rejection of some valid votes and the acceptance of some invalid votes. No affidavit of either the congress nominee or his election agent or any of the persons who could have had personal knowledge of the matter was filed in support of that application. No oral evidence has been taken in the case file now. The returned candidate has denied the allegations referred to earlier. It is true that some of the defeated candidates in their written statements have lent support to the allegations made by the election petitioner. The reason for the same is obvious. But even they have not filed any affidavit in support of the concerned allegations. Solely on the basis of the averments made in the election petition and the facts sworn to in the affidavit filed by the election petitioner in support of his application seeking scrutiny of the ballot papers, the trial Court had issued the impugned direction.

6. Before proceeding to consider the material in support of the impugned order, it is necessary to mention that it is not the case of the election petitioner that any written objection had been filed during the counting either to the acceptance or to the rejection of any vote. In the petition, it is averred that "the Returning Officer on being pointed out by the election agent of respondent No. 9, Shri P. C. Malhotra, said his decision was final and can be questioned through Election

Petition." Evidently this averment relates to the objections said to have been taken by Shri Malhotra in respect of the orders made by the returning officer as to the validity of some of the votes. Apart from the fact that the allegation in question is very vague and lacking in details, not even an affidavit of Shri Malhotra has been filed in support of that allegation. Admittedly no application was made to the returning officer for recounting the votes. We have to examine the facts of this case bearing in mind these circumstances.

7. The importance of maintaining the secrecy of ballot papers and the circumstances under which that secrecy can be violated has been considered by this Court in several cases. In particular we may refer to the decisions of this Court in *Ram Sewak Yadav v. Hussain Kamil Kidwai*, 1964-6 SCR 238 = (AIR 1964 SC 1249) and *Dr. Jagjit Singh v. Giani Kartar Singh*, AIR 1966 SC 773. These and other decisions of this Court and of the High Courts have laid down certain basic requirements to be satisfied before an election tribunal can permit the inspection of ballot papers. They are: (1) that the petition for setting aside the election must contain an adequate statement of the material facts on which the petitioner relies in support of his case and (2) the tribunal must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary.

8. The trial court was of the opinion that if an election petitioner in his election petition gives some figures as to the rejection of valid votes and acceptance of invalid votes, the same must not be considered as an adequate statement of material facts. In the instant case apart from giving certain figures whether true or imaginary, the petitioner has not disclosed in the petition the basis on which he arrived at those figures. His bald assertion that he got those figures from the counting agents of the congress nominee cannot afford the necessary basis. He did not say in the petition who those workers were and what is the basis of their information. It is not his case that they maintained any notes or that he examined their notes, if there were any. The material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words they must be such facts as

to afford a basis for the allegations made in the petition. The facts stated in paragraphs 13 and 14 of the election petition and in Schedule 'E' are mere allegations and are not material facts supporting those allegations. This Court in insisting that the election petitioner should state in the petition the material facts was referring to a point of substance and not of mere form. Unfortunately the trial court has mistaken the form for the substance. The material facts disclosed by the petitioner must afford an adequate basis for the allegations made.

9. The learned trial Judge while deciding the point in issue overlooked certain important circumstances. The election petition is silent as regards certain important aspects. This omission has bearing on the point to be decided. The allegation that the returning officer did not permit the appellant more than one counting agent for each counting table is an extremely vague allegation. It is not the election petitioner's case that the congress nominee had appointed more than one counting agent for any counting table but the returning officer did not accept their appointment. Under S. 47 of the Representation of the People Act, 1951, a contesting candidate or his election agent may appoint in the prescribed manner one or more persons but not exceeding such number as may be prescribed by the rules, to be present as his counting agent or agents at the counting of votes and when any such appointment is made notice of the appointment shall be given in the prescribed manner to the returning officer. Rules framed under that Act prescribe the number of counting agents that a candidate may appoint. The form of the notice required to be given under Section 47 of the Act is given in the rules. The appointment of the counting agents is to be made in the prescribed form in duplicate, one copy of which is to be forwarded to the returning officer while the other copy should be made over to the counting agent. Rules also provide that no counting agent shall be admitted into the place fixed for counting unless he has delivered to the returning officer the second copy of the instrument of his appointment after duly completing and signing the declaration contained therein. The petitioner did not state in the election petition that any of the counting agents appointed by the congress candidate or his election agent in accordance with the rules had been refused

admission to the place of counting. Hence the allegation that the returning officer did not permit enough number of counting agents to be appointed is not supported by any statement of facts necessary to be stated. In other words the material facts relating to the allegations made have not been stated.

10. Now coming to the rejection of the votes polled in favour of the congress nominee, under the rules before a vote is rejected the agents of the candidates must be permitted to examine the concerned ballot paper. Therefore it was quite easy for them to note down the serial number of the concerned ballot papers. The election petition is silent as to the inspection of the ballot papers or whether the counting agents had noted down the serial numbers of those ballot papers or whether those agents raised any objection relating to the validity of those ballot papers; if so who those agents are and what are the serial numbers of the ballot papers to which each one of them advanced their objections. These again are the material facts required to be stated.

11. As seen earlier the allegations made in the election petition are purported to have been founded on the informations given by others. No one takes direct responsibility for those allegations. No oral evidence was given in support of them, not even affidavits were filed in support of the allegations. The scrutiny of ballot papers was sought on the basis of assertions which were neither accompanied by a statement of material facts nor supported by any evidence.

12. The trial court correctly came to the conclusion that before an order of inspection of the ballot papers can be made it must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. It did say that it was so satisfied but it gave no reasons whatsoever as to how it came to be satisfied. A judge can be satisfied only on the basis of proof and not on the basis of mere allegations. There is absolutely no proof in this case to support the allegations on the basis of which the scrutiny of the ballot papers was prayed for. The trial court did not mention in its order even a single reason in support of its satisfaction as to the need for inspecting the ballot papers. Every judicial order must be based on reasons and

those reasons must be disclosed in the order itself. Unfortunately the learned trial judge had overlooked the importance to be attached to the secrecy of the ballot papers.

13. We have earlier referred to the principles enunciated by this Court to be followed before ordering the scrutiny of ballot papers. The legal position in England is the same as in this country. In fact our election law is patterned on the basis of the English Election Law. In Halsbury's Laws of England (Vol 14 at page 310, paragraph 559), it is observed:

"The usual practice is for an application for a recount to be made by summons to a judge on the rota for the trial of parliamentary election petitions before the trial on an affidavit showing the grounds on which the application is based. A recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of the returning officer".

In Rogers on Elections (Vol. II at p. 199), it is observed that an application for recount should be made by summons supported by affidavits showing grounds. Fraser in his Law of Parliamentary Elections and Election Petitions observes at page 222:

"A strong case must be made on affidavit before an order can be obtained for inspection of ballot papers or counter-foils."

Even before the Representation of the People Act, 1951 was enacted the law in this country relating to inspection of ballot papers was as stated earlier. The election tribunals in this country have refused to permit the scrutiny of ballot papers unless there was *prima facie* evidence in support of the allegations made in the election petition — See Tanjore, N. M. R. (Hammond's Election Cases 673); Punjab North Case (Hammond's Election Cases 569). Karnal Mohammadan Constituency Case (2, Doabia 235); Karnal (South) General Constituency Case (2, Doabia 80); Chingleput Case (Hammond's Election Cases 307); See also R. Swaminath's Case, ((1952) 2 E. L. R. 51); Seshiah v. Koti Reddi, ((1953) 3 E. L. R. 39) and Lakshumanayya v. Rajam Aiyar, 58 Mad LJ 118 = (AIR 1930 Mad 195).

14. For the reasons mentioned above we allow this appeal and set aside the order made by the learned trial judge. He will now proceed with the trial of the

case in accordance with law. The 1st respondent, the election petitioner shall pay the costs of the appellant in this appeal.

Appeal allowed.

AIR 1970 SUPREME COURT 281

(V 57 C 59)

(From Allahabad: ILR (1965) 1 All 349)

J. C. SHAH, Actg. C. J., V. RAMA-SWAMI AND A. N. GROVER, JJ.

The Benaras State Bank Ltd., Appellant v. The Commissioner of Income-tax, U. P., Respondent.

Civil Appeal No. 1033 of 1966, D/- 25-7-1969.

Income-tax Act (1922), Secs. 14 (2) (c), 16 (2) and 2 (14A) (incorporated by Adaptation of Laws Order, 1950 with effect from 1-4-1950) — Dividend declared on 25-7-1949 — Assessee Bank having its registered office in State of Benaras encashing dividend warrants on 31-12-49 — Merger of State of Benaras with Dominion of India on 1-12-1949 — Effect — Dividend held was received by Bank in taxable territories on 31-12-1949 and was not exempt from liability to payment of tax even if right thereto had accrued to Bank in an Indian State.

The State of Benaras in which the assessee Bank had its registered office merged with the Indian Union on December 1, 1949. The dividend was declared on July 25, 1949 and the Bank encashed the dividends warrants on December 31, 1949. The dividend received by the Bank had been brought to tax in the assessment year 1950-51. It was urged that by virtue of Section 14 (2) (c) of the Income-tax Act, 1922, the income received by the Bank was not liable to be taxed.

Held, that the State of Benaras after merger on December 1, 1949 with the Dominion of India formed part of the State of Uttar Pradesh and was on that account part of the taxable territories by virtue of the definition contained in Section 2 (14A) incorporated by the Adaptation of Laws Order, 1950 of the Indian Income-tax Act. Assuming that the dividend accrued within an Indian State, it was received by the Bank in the taxable territories on December 31, 1949, and by the express words contained in S. 14 (2) (c) of the Indian Income-tax Act, 1922, before it was omitted by the Taxation Laws (Extension to Jammu and Kashmir)

LM/AN/E22/69/GDR/M

Act, 1954, it was not exempt from liability to payment of tax even if the right thereto had accrued to the Bank in an Indian State.

(Para 4)

Held further, that the dividend could not be deemed to have been received by the bank on July 25, 1949 — The day on which it was declared and that on that account it could not be said that on that date the Bank being a non-resident it could not be brought to tax. Under S. 16(2) of the Income-tax Act, 1922 the dividend income is taxable only in the year in which it is paid, credited or distributed. The expression "paid" in Section 16 (2) does not contemplate actual receipt of the dividend by the member in general, dividend may be said to be paid within the meaning of Section 16 (2) when the Company discharges its liability and makes the amount of dividend unconditionally available to the member entitled thereto. The Act does not make dividend income taxable in the year in which it becomes due: it is taxable only in the year in which it is paid, credited or distributed. There being no evidence that before December 31, 1949, dividend was paid, credited or distributed to the Bank, by virtue of Section 4 (1) (a) of the Income-tax Act, 1922, the income was taxable in the assessment year 1950-51. AIR 1964 SC 1866, Rel. on; ILR (1965) 1 All 349, Affirmed. (Paras 5, 6)

Cases Referred: Chronological Paras (1964) AIR 1964 SC 1866 (V 51) =

53 ITR 83, J. Dalmia v. Commr, of I.-T. Delhi

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(1948) AIR 1948 Bom 404 (V 35) = 16 ITR 248, Commr. of I.-T. v.

Laxmidas Mulrai Khatau

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Mr. S. T. Desai, Senior Advocate (Mrs. A. K. Verma, Advocate and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co. with him), for Appellant; Mr. Jagdish Swarup, Solicitor General of India, (M/s. S. K. Aiyar, R. N. Sachthey and B. D. Sharma, Advocates with him), for Respondent.

The following Judgment of the Court was delivered by

SHAH, Ag. C. J.:— By order dated August 23, 1968, we called for a supplementary statement on the issue whether dividend warrants were delivered by the Glass Works to the Bank on August 3 1949. The Tribunal has submitted a statement of the case that the only relevant facts proved are that the dividend was declared on July 25, 1949 and the Bank encashed the dividend warrants on December 31, 1949. The appeal must

therefore be decided on the footing that the dividend warrants were handed over to the Bank by the Glass Works on August 3, 1949; is not proved.

2. The material facts which have a bearing on the point in issue are these. The year of account of the Bank is the calendar year. The State of Benaras in which the Bank had its registered office merged with the Indian Union on December 1, 1949. The Glass Works declared a dividend at a General Meeting on July 25, 1949. Cheques for Rs. 69,000 issued by the Glass Works in favour of the Bank in payment of the dividend were encashed by the Bank on December 31, 1949.

3. The dividend received by the Bank has been brought to tax in the assessment year 1950-51. Counsel for the Bank urged that the Bank cannot be assessed to tax in respect of dividend accruing to it at a time when the Bank was a non-resident. It is urged that by virtue of Section 14 (2) (c) of the Income-tax Act, 1922, as then in force, the income received by the Bank was not liable to be taxed. At the relevant time Section 14 (2) (c) read as follows:

“(2) The tax shall not be payable by an assessee—

(c) in respect of any income, profits or gains accruing or arising to him within an Indian State, unless such income, profits or gains are received or deemed to be received in or are brought into the British India in the previous year by or on behalf of the assessee, or are assessable under Section 12B or Section 42.” By the Adaptation of Laws Order, 1950, the words “an Indian State” were substituted by the words “a Part B State”, and the words “British India” were substituted by the words “taxable territories” Section 2 (14A)—(which was also incorporated by the Adaptation of Laws Order, 1950, with effect from April 1, 1950) insofar as it is material provides:

“taxable territories” means—

(a)

(b) as respects any period after the 14th day of August, 1947, and before the 26th day of January, 1950, the territories for the time being comprised in the Provinces of India, but excluding the merged territory of Cooch-Behar,

Provided that the taxable territories shall be deemed to include— (a) the merged territories—

(i) as respects any period after the 31st day of March, 1949 for any of the purposes of this Act, and

4. The State of Benaras after merger on December 1, 1949 with the Dominion of India formed part of the State of Uttar Pradesh and was on that account part of the taxable territories by virtue of the definition contained in Section 2 (14A) of the Indian Income-tax Act. Assuming that the dividend accrued within an Indian State, it was received by the Bank in the taxable territories on December 31, 1949, and by the express words contained in Section 14 (2) (c) of the Indian Income-tax Act, 1922, before it was omitted by the Taxation Laws (Extension to Jammu and Kashmir) Act, 1954, it was not exempt from liability to payment of tax even if the right thereto had accrued to the Bank in an Indian State.

5. It was then urged that the dividend must be deemed to have been received by the Bank on July 25, 1949—the day on which it was declared and on that date the Bank being a non-resident it could not be brought to tax. But under Section 16 (2) of the Indian Income-tax Act, 1922, the dividend income was taxable only in the year in which it was paid, credited or distributed or was deemed to be paid, credited or distributed. This Court observed in *J. Dalmia v. Commissioner of Income-tax, Delhi*, 53 ITR 83= (AIR 1964 SC 1866) that the expression “paid” in Section 16 (2) does not contemplate actual receipt of the dividend by the member in general, dividend may be said to be paid within the meaning of Section 16 (2) when the Company discharges its liability and makes the amount of dividend unconditionally available to the member entitled thereto. It was also held that the Act does not make dividend income taxable in the year in which it becomes due: it is taxable only in the year in which it is paid, credited or distributed. The Court overruled the decision of the Bombay High Court in *Commissioner of Income-tax v. Laxmidas Mulrai Khatau*, 16 ITR 248= (AIR 1948 Bom 404) in which it was held that when dividend is declared, liability arises on the part of the Company to make that payment to the shareholder and with regard to the shareholder when the income represented by that dividend accrues or arises to him, and that the fact that the

actual payment of the income is deferred is immaterial and irrelevant.

6. In the present case there is no evidence that before December 31, 1949, dividend was paid, credited or distributed to the Bank. By virtue of S. 4 (1) (a) of the Income-tax Act, 1922, the income was held properly taxable in the assessment year 1950-51. It is unnecessary therefore to consider whether even if the Bank was a non-resident on July 25, 1949, by virtue of Section 4 (1) (b) (ii) it was liable to be taxed in respect of the dividend income in the year of assessment 1950-51.

7. The appeal fails and is dismissed with costs including the costs of the hearing at which the order calling for a supplementary statement was made.

Appeal dismissed.

AIR 1970 SUPREME COURT 283 (V 57 C 60)

(From: Bombay)*

S. M. SIKRI, R. S. BACHAWAT AND
V. RAMASWAMI, JJ.

Abdul Razak Murtaza Dafadar, Appellant v. State of Maharashtra, Respondent.

Criminal Appeal No. 245 of 1968, D/- 2-5-1949.

(A) Evidence Act (1872), Secs. 24 and 26 — Accused kept in remand for fifteen days — Then after being kept in jail custody for three days produced before executive Magistrate for recording confession — After preliminary questioning and a warning accused sent back to jail — Confession recorded on next day, held, was voluntary — Accused had spent four days in judicial custody and he was not under influence of investigating agency for at least four days — (Criminal P. C. (1898), Sec. 164.)

The accused was kept in remand for about a fortnight after his arrest. Thereafter he was kept in jail custody for three days and then on fourth day he was produced before the Executive Magistrate for recording confession. The Magistrate made the preliminary questioning of the accused, gave him a warning and sent him back to jail. On the next day the accused was produced before the Magistrate

and the confession was recorded. During the trial, the accused in answer to question regarding the confession merely said that he did not make the confession. He did not say that it was made on account of any inducement or coercion on the part of police. On the contention that the confession was not voluntary as the accused was in prolonged police custody for at least a fortnight before making the confession;

Held that the confession of the accused was voluntary. It was clear that he had spent four days in judicial custody and he was not under the influence of the investigating agency for at least four days. Again he had 24 hours to think after he was told by the Magistrate that he was not bound to make any confession and if he made one it would be used against him. Cr. App. No. 1116 of 1967 and Confirmation Case No. 15 of 1967, D/- 17-11-1967 (Bom), Affirmed, AIR 1956 SC 56 & AIR 1957 SC 637, Disting. (Para 9)

(B) Evidence Act (1872), Sec. 45 — Dog tracking evidence — Admissibility.

(Obiter) The tracker dog's evidence cannot be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever there are thought processes there is always the risk of error, deception and even self-deception. In the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight. Am. Juris 2nd Edn., Vol. 29, p. 429, para 378 and 1866 N. I. 160, Ref. to. (Para 11)

[Their Lordships however did not express any concluded opinion or lay down any general rule with regard to tracker dog evidence or its significance or its admissibility as against the accused.] (Para 12)

Cases Referred: Chronological Paras
(1957) AIR 1957 SC 637 (V 44)=
1957 Cri LJ 1014, Sarwan Singh v. State of Punjab 9
(1956) AIR 1956 SC 56 (V 43)=
1956 Cri LJ 152, Nathu v. State of U. P. 9
(1866) 1866 N. I. 160, R. v. Montgomery 11

Mr. B. D. Sharma, Advocate, Amicus Curiae, for Appellant; M/s. H. R. Khanna

*(Cri. Appeal No. 1116 of 1967 and Confirmation Case No. 15 of 1967, D/ 17-11-1967 — Bom.)

& S. P. Nayar, Advocates, for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.—The appellant was convicted under Sections 302, 307, 325 and 427, Indian Penal Code, and also under Section 126 of the Indian Railways Act by the Additional Sessions Judge of Sangli in Sessions Case No. 9 of 1967. The appellant was sentenced to death under Section 302, Indian Penal Code. No other sentence was awarded for the remaining offences. The appellant preferred an appeal to the Bombay High Court in Criminal Appeal No. 1116 of 1967 which was dismissed on the 17th November, 1967 and the sentence of death imposed on the appellant was affirmed. This appeal is brought by special leave from the judgment of the Bombay High Court.

2. The prosecution case arises out of the derailment of Poona-Wasco Express train at about 4.40 in the early morning of October 10, 1966. The derailment occurred on the Vaddi bridge which is beyond Miraj Station. As a result of this derailment, five bogies were capsized. Out of these five bogies, two went into the stream down below, two were on the slope and one on the track. In this incident ten persons died and a large number of other persons received grievous injuries. The charge against the appellant was that he had removed fish plates, nuts, bolts, etc., of the rail joint near Vaddi bridge No. 215 on Miraj Mahisal Railway track at Km. No. 743/9 and 10 between 4.05 a. m. and 4.50 a. m. in the early morning of October 10, 1966 with intent or knowledge that he was likely to endanger the safety of the persons travelling in the said train and he caused the Poona-Wasco express train No. 206 Dn. to be capsized at Vaddi and thereby committed murder knowingly causing deaths of 10 persons who were passengers in that train.

3. The appellant Abdul Rajak Murtaja Dafedar was working at Miraj railway station as gangman in gang No. 13 of which Laxman Madar was the Mukadam or Gangmate and Babu Sopana was the Keyman. The area under this gang was from Km. Nos. 741/3 to 747/5 covering a railway track of 4 miles or 6 km. Vaddi bridge falls within this area. Vaddi bridge is at $2\frac{1}{2}$ miles from the railway station of Miraj, towards Belgaum. Mhaisal gate is also towards Belgaum at $1\frac{1}{2}$ miles from the

railway station on the way to Vaddi bridge. At Bhaisal gate is the quarter of Laxman Madar the gangmate. Near the quarter of Laxman is the tool box where the tools of the gang are kept under lock and key.

4. Vaddi bridge is the biggest bridge out of the seven bridges lying between Km. Nos. 743/9 to 747/5. The height of the bridge is about 30' to 40'. There are six big arches and two small arches on each side of the bridge. The bridge is of masonry stone. The case of the prosecution is that the appellant quarrelled with Laxman who always found fault with him and did not spare him when he was absent from or late in attending duties. On two or three occasions Laxman had altercation with the appellant and Laxman had reported against him and Dastgir, a friend of the appellant. On October 9, 1966, an altercation took place between the appellant and Laxman. Laxman found the work of levelling and packing done by other gangman except the appellant satisfactory and so Laxman asked the appellant to correct the defect. The appellant got irritated and took exception to the remark of Laxman and rushed towards him with a pick axe saying that he would break his head. Laxman threatened to report the conduct of the appellant to the Permanent Way Inspector and went away towards the tool box. Laxman got a report written by Maruti about the incident and handed over the report to the Assistant Station Master at about 7 or 7.30 p. m. Train No. 204 was due to arrive and the Station Master was in a hurry and so he despatched the complaint by free service way bill slip through his office boy to the under-guard of the incoming train, namely, 204 Dn. According to prosecution case Ramchand Sadre, P. W. 37, saw the appellant going on the track at 3 or 3.15 a. m. P. W. 37 was serving as a Sainik of the Railway Protection Force at Miraj Railway Station. He was on duty at 'G' point from 9 p. m. on October 9, 1966 till 7 a. m. the next day. After the witness saw the appellant going along the track goods train No. 239 arrived at Miraj Railway Station at 4.10 or 4.15 a. m. this goods train had passed the Vaddi bridge at 4.05 a. m. The appellant let the goods train pass and approached the railway bridge at Vaddi with a spanner and removed the fish plates and the keys and jaws of the sleepers of the 18" rail of right hand side of the rail line. When the Poona-Wasco

Express Train approached the bridge there was a "thud-thud" sound as if the train was collapsing. The engine driver closed the steam and applied brakes as soon as the engine entered the bridge but before stopping, the engine had covered $\frac{3}{4}$ ths length of the bridge. The lights went off, there was screaming and wailing of the people. It was found by the engine driver, guard and others who alighted from the train that the basal wheel of the engine had derailed and the tender of the engine was tilted and to this tender was hanging the first bogie which had vertically fallen down in the stream. The second bogie had completely fallen in the stream. The third bogie had also telescoped like the first bogie resting its one end on the second bogie that had fallen in the stream and the other end at the slope. The fourth bogie had derailed and slanted whereas the front wheels of the fifth bogie had derailed. The engine driver, guard, and one police constable searched and found the affected joint near which had fallen the removed fish plates, nuts, bolts, keys and jaws scattered in undamaged condition. There was also another fish plate and one nut fallen on embankment in undamaged condition.

5. The engine driver made a complaint to the Police Sub-Inspector Bandigiri. Panchanama of the scene of offence was prepared. The things lying at the spot were not touched but were guarded and an area of half a mile was cordoned off. On October 10, 1966 at 7 a. m. all the gangmen including the appellant collected at pole No. 744/4 for daily work but were asked by the police officers to be seated below the bridge as their statements were to be recorded. Laxman and appellant were also detained for interrogation. On the same night at 8.30 p. m. near the spot of the accident the police dog Sheru of C. I. D. Poona was brought. The appellant Laxman and five other persons were made to stand in a row facing the rail line in the presence of panchas. The police dog Sheru was made to smell the affected joint. The leading strap was held by the controller of the dog. The dog after smelling the articles near the affected joint went towards the embankment where one fish plate was lying, smelt it and then went to the row of persons and smelling two persons smelt the appellant also and pounced upon him with its forelegs resting on the chest of the appellant.

6. On October 17, 1966 the appellant offered to produce the spanner from the place where he had hidden it near the railway track. A memorandum of his statement was drawn in the presence of panchas. It is said that the appellant led the panchas and the police officers to the place between pole Nos. 744/6-7 and there dug out the earth and took out the spanner and produced it. On October 29, 1966 the appellant made a confession before the executive magistrate, Ex. 130.

7. The appellant pleaded not guilty to the charges. He alleged that there was no altercation between him and Laxman and that he did not threaten Laxman with pick axe. As regards the confessional statement the appellant said that he did not understand Marathi properly and therefore did not know what was written in the statement. He also denied that he had gone to the spot to recover the spanner in the presence of panchas. As regards the police dog Sheru the appellant said that after smelling the articles on the spot the dog passed him without pouncing upon him.

8. The trial Court based the conviction of the appellant on (1) movement of the appellant on the day of the incident as stated by Ramchand Sardare (sic) P. W. 37; (2) discovery of the spanner with which the nuts and bolts were removed; (3) the confession statement of the appellant made to the Executive Magistrate and (4) the identification of the appellant by the dog Sheru. The High Court accepted the prosecution evidence on all these points and affirmed the conviction of the appellant.

9. It was contended on behalf of the appellant in the first place that the confession Ex. 130 recorded by Taluka Executive Magistrate P. W. 54 was not voluntary. It was pointed out that the appellant was arrested on October 10, 1966 at 11 p. m. and was kept in remand till October 18, 1966. On October 18 a remand application was made and time was granted for a week. On October 25, 1966 the Magistrate directed that the accused should be detained in District Jail at Sangli. The appellant was produced before the Magistrate on October 28, 1966 when there was preliminary questioning and warning given to the appellant. On the next day the appellant was produced before the Magistrate and the confession was made. The argument was stressed on behalf of the appellant that he was in prolonged police custody for at least a

fortnight before the confession was made and therefore it must be held that the confession was not voluntary. Reliance was placed on the judgment of this Court in *Nathu v. State of U. P.*, AIR 1956 SC 56 in which the appellant was kept in the custody of C. I. D. Inspector on 7th August and the confession was recorded on 21st August. It was held that prolonged custody immediately preceding the making of the confession was sufficient, unless it was properly explained, to stamp it as involuntary. No attempt was made in that case to explain the prolonged custody. In the absence of such explanation it was held by the Court that the confession was not a voluntary confession. In the present case the appellant was kept in jail custody for three days from October 25 to October 28, 1966 and on October 28, the Executive Magistrate made the preliminary questioning of the appellant, gave him a warning and sent him back to the District Jail at Sangli. On the next day the appellant was produced before the Magistrate and the confession was recorded. It is clear that the appellant had spent four days in judicial custody and he was not under the influence of the investigating agency for at least four days. Again he had 24 hours to think after he was told by the Magistrate that he was not bound to make any confession and if he made one it would be used against him. It is manifest that the material facts of the present case are not parallel to those of *Sarwan Singh v. State of Punjab*, AIR 1957 SC 637 (sic) (*Nathu v. State*, AIR 1956 SC 56?) and the ratio of that case has no application to the present case. It was also argued that the wife of the appellant used to go to the police station with her child and it was at her persuasion that the appellant had agreed to make the confession. The suggestion was that the confession was not voluntary but was made on account of some inducement. But no such suggestion was made to the police officers. The only question put to the Deputy Superintendent of Police Chavan was whether the wife of the accused used to go to the police station everyday and the witness denied it. According to Chavan, she went to the police station only on October 13 and 18 that is only on two occasions. No further suggestion was made to Chavan. Apart from this, if any coercion or inducement was used the appellant was the person who should make such a complaint. The

appellant, in answer to question No. 77 regarding the confession merely said that he did not make the confession. He did not say that the confession was made on account of any inducement or coercion on the part of the police. Both the trial Court and the High Court have upon an examination of all the circumstances reached the conclusion that the confession of the appellant was voluntary and we see no reason to take a different view.

10. The next question is regarding the discovery of the spanner. The Deputy Superintendent of Police, Chavan, P. W. 86 was questioning the appellant from the 11th to the 16th October. It was on the 17th that the appellant was prepared to point out where he had kept the spanner. Two panchas were called, one of whom is Narayandas Shedji, P. W. 46. In his presence the memorandum of what the appellant stated was made. Therein the appellant said "the same spanner while coming back, I have kept hidden in the shrub on the corner of railway line between pole Nos. 744/6 and 744/7. I will produce the same personally". The appellant then led the panchas and the police to the spot where he had kept the spanner under the shrubs about 6 inches below the earth which he dug out for taking out the spanner. The panchanama is Ex. 112. The spanner was found about 5 furlongs from the bridge towards the residence of the appellant. The evidence of the Deputy Superintendent of Police and the two panchas has been accepted both by the trial Court and the High Court. The discovery of the spanner at the instance of the appellant is an important circumstance which corroborates the confession of the appellant that he had removed the fish plates, nuts, bolts, and the keys and jaws of the sleepers from the railway line on the alleged date.

11. It was lastly urged on behalf of the appellant that the lower Courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and in Scotland it has been admitted. But in the United States there are conflicting decisions:

"There have been considerable uncertainty in the minds of the Courts as to the reliability of dogs in identifying criminals and much conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases,

however, reveals that most Courts in which the question of the admissibility of evidence of trailing by blood-hounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime. Para 378, Am. Juris. 2nd edn. Vol. 29, p. 429." There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog's human companion must go into the box and report the dog's evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value. In *R. v. Montgomery*, 1866 NI 160 a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behaviour of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog's reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument" and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic

case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog's evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight.

12. In the present case it is not, however, necessary for us to express any concluded opinion or lay down any general rule with regard to tracker dog evidence or its significance or its admissibility as against the appellant. We shall assume in favour of the appellant that the evidence of P. W. 72 and of the panchas with regard to the identification of the appellant by the tracker dog is not admissible. Even on that assumption we are of opinion that the rest of the prosecution evidence namely the confession of the appellant Ex. 130 and the discovery of the spanner conclusively proves the charges of which the appellant has been convicted.

13. For these reasons we affirm the judgment of the High Court of Bombay dated 16/17, November, 1967 in CrI. A. No. 1116 of 1967 and dismiss this appeal.
Appeal dismissed.

AIR 1970 SUPREME COURT 287
(V 57 C 61)

(From Calcutta: AIR 1966 Cal 68)
M. HIDAYATULLAH, C. J. AND
G. K. MITTER, J.

Mst. Ayesha Bibi, Appellant v. The Commissioner of Wakf, West Bengal and others, Respondents.

Civil Appeal No. 579 of 1966, D/- 15-7-1969.

Bengal Wakfs Act (13 of 1934), Ss. 70, 69 — Notice under Sec. 70 — Modes of

LM/AN/D374/69/DVT/D

— Suit for declaration of Wakf as void
 — Commissioner contesting suit as defendant but subsequently not objecting to his name being struck off — Suit declaring Wakf as void decreed on compromise between plaintiff and remaining defendants — Special notice to commissioner of compromise of decree is not necessary. AIR 1966 Cal 68, Reversed.

Notice under Section 70 to the Commissioner of Wakf can be by way of a letter from the Court giving him notice or, if he is made a party, by a summons to attend the Court. The language of the fourth sub-section of Section 70 is quite clear that the Commissioner must not have knowledge previously of the suit. When the Commissioner had knowledge of the suit he could not claim a second knowledge as the start of limitation. In other words, his presence as a party in the suit after summons to him must be treated as a notice to him under the first sub-section of Section 70.

(Paras 8, 13)

Where the Commissioner, who was joined as a defendant in a suit for declaration that certain Wakf was invalid, inoperative and void, contested the suit on ground that the plaintiff and other defendants were in collusion, but subsequently on application to strike off his name from array of defendants being made, the same was allowed and no objection was taken by his counsel though present and the suit was decreed on compromise between plaintiff and rest of the defendants on the same day, the Commissioner could not thereafter claim that he was entitled to a special notice of the petition of compromise. No special notice of compromise petition was required to be issued under the Act. He had notice of whole of the suit and of the claim made by the plaintiff in the case. He was afforded an opportunity to resist the suit and, in fact, resisted it but later gave up the fight and agreed to go out of the suit. In these circumstances, decree could not be declared as void on ground that the Commissioner was not given a notice of the compromise petition. AIR 1966 Cal 68, Reversed. (Case law discussed).

(Paras 8, 13)

It is to be noticed that S. 70 speaks of several special notices, such as, in sub-section (2) before any Wakf property is notified for sale in execution of a decree or in sub-section (3) before any wakf property is notified for sale for the recovery

of any revenue, cess, rates or taxes, but it does not provide for any special notice of a petition for compromise of a suit except the first notice that a suit had been filed in the Court. It is significant that in Sec. 69 although compromise cannot be made without the sanction of the trying Court, there is no mention of any special notice to the Commissioner.

(Para 8)

Cases Referred: Chronological Paras
 (1968) AIR 1968 Mad 79 (V 55)=
 1967-1 Mad LJ 190, State Wakf Board, Madras v. Abdul Azeez Sahib 9
 (1944) AIR 1944 Cal 40 (V 31)=
 77 Cal LJ 159, Muzaffar Ahmad v. Indra Kumar Das 10
 (1942) AIR 1942 Cal 467 (1) (V 29)=
 46 Cal WN 339, Benoy Kumar Acharjee v. Ahmmad Ali 11
 (1942) 46 Cal WN 157, Commr. of Wakfs, Bengal v. Shahbzada Mohammad Zahangir Shah 12

Mr. D. N. Mukherjee, for Appellant;
 M/s. B. C. Mitter and S. C. Majumdar, for Respondent.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.— This is an appeal by special leave from the judgment and order of the High Court of Calcutta, August 20, 1964, in an application under Section 115 of the Code of Civil Procedure, reversing the judgment of the Subordinate Judge, Howrah. The facts are as follows:

2. One Haji Abdul Karim, grandfather of respondents 2 to 4 executed a Wakf al-al-aulad on March 30, 1917. He constituted himself as the first Mutwali and named his two sons and widow as mutwalis after his own death. The Wakf provided for the benefit of the family and after the extinction of all the family a scheme for feeding the poor. On February 14, 1956 the present appellant Ayesha Bibi filed a suit claiming 1/16th of the property as a sharer after the death of her husband Abdul Hamid. This claim was made against respondents 2 to 4 who were the Mutwalis. Ayesha Bibi joined the Commissioner of Wakfs, West Bengal as a defendant to the suit. The suit was filed in the Court of Munsif, Howrah and reliefs claimed were a declaration that the Wakf was invalid, inoperative and void and that its enrolment in the Wakf Office was wrongly done and was of no avail. She also asked for a permanent injunction restraining the Commissioner of West

Bengal and other respondents from interfering with the possession of the property. The Commissioner of Wakfs appeared in answer to the notice of the suit and filed a written-statement on April 4, 1956. He contended that the properties were governed by the Wakf which was valid and also that he was entitled to a notice under Section 80 of the Code of Civil Procedure before the suit was filed. He stated that although he was entitled to a notice under Section 70 (1) of the Bengal Wakfs Act, 1934 it was not necessary to add him as a defendant and he denied collusion between himself and the other defendants. He observed that the other defendants were interested in secularising the wakf property for their own selfish ends.

3. On November 15, 1957 an application for amendment of the relief against the Wakfs Commissioner was made to which the Wakfs Commissioner objected. In his objections he stated that the suit was of a collusive nature as was apparent from the nature of the pleadings of the plaintiff and defendants other than himself. The petition, however, was allowed. No action was taken by the Commissioner to get that order set aside. On May 15, 1958 the parties to the suit, other than the Commissioner, filed an application of compromise and May 22, 1958 was fixed for decision. On the same day an application for striking off the name of the Commissioner from the array of the defendants was made. This was heard in the presence of the counsel for the Commissioner and he did not object to the name being struck off. As a result the name of the Commissioner was struck off as a defendant. The suit was also decreed the same day on compromise declaring the Wakf to be invalid and void and granting a perpetual injunction.

4. On June 20, 1958 the Commissioner made an application under Section 70 (4) of the Act for a declaration that the decree was void as no notice was given to him under Section 70 (1) of the Act. The appellant objected but on April 20, 1960 the Munsif allowed the application and declared the decree to be void. The Commissioner (Appellant?) appealed to the Court of the Subordinate Judge, Howrah and the appeal was allowed. It was held that the application under Section 70 (4) was incompetent as the Commissioner was present in the suit and the compromise decree was passed with the knowledge of the Commissioner and there

was no need for a fresh notice to him under Section 70 (1) of the Act. The Commissioner then filed a revision under Section 115, C. P. C. and a learned single Judge of the High Court by order, now under appeal, reversed the decision of the Subordinate Judge and restored the decree of the Munsif. The order is challenged in this appeal.

5. Before we consider the question whether the Commissioner's application under Section 70 (4) was proper it is necessary to examine the scheme of the Wakf Act. The Act was passed to make provision for proper administration of Wakf properties in Bengal. It applies to all wakfs whether created before or after the commencement of the Act, any property of which is situated in Bengal. By Chapter II a Wakf Board is constituted and a whole-time Officer called the Commissioner of Wakfs is appointed. Chapter III lays down the functions of the Board and the Commissioner and one of the functions under Section 34 is the protection of Wakfs-al-al-aulad. Chapter IV deals with the enrolment of the Wakfs for which purpose a register of Wakfs is maintained. Under Section 45 the Commissioner has the power to enroll wakfs and also to amend the register from time to time. Under Section 46A the decision of the Commissioner is final subject to a decision of a competent Court. Chapter V deals with wakf accounts and Chapter VI with statements of wakfs-al-al-aulad. Chapter VII creates a bar to transfer of immovable property of wakfs. Chapter VIII lays down the duties of Mutwallis with other ancillary matters. Chapter IX deals with finance and Chapter X deals with judicial proceedings. Chapters XI, XII and XIII deal with amendments and appeals, rule making power of the Provincial Government and power of the Board to make by-laws and include some miscellaneous provisions.

6. We are concerned in this case with Chapter X which deals with judicial proceedings. Section 69 in this Chapter provides as follows:

"69. Bar to compromise of suit or proceeding without sanction of Court.

No suit or proceeding by or against a mutwalli as such in any Court shall be compromised without the sanction of the trying Court."

Section 70 then provides:

"70. Notice of suits etc., to be given to the Commissioner.

(1) In every suit or proceeding in respect of any wakf property or of a mut-

walli as such except a suit or proceeding for the recovery of rent by or on behalf of the mutwalli the Court shall issue notice to the Commissioner at the cost of the party instituting such suit or proceeding.

(2) Before any wakf property is notified for sale in execution of a decree, notice shall be given by the Court to the Commissioner.

(3) Before any wakf property is notified for sale for the recovery of any revenue, cess, rates or taxes due to the Crown or to local authority notice shall be given to the Commissioner by the Court, Collector or other person under whose order the sale is notified.

(4) In the absence of a notice under sub-section (1) any decree or order passed in the suit or proceeding shall be declared void, if the Commissioner, within one month of his coming to know of such suit or proceeding, applies to the Court in this behalf.

(5) In the absence of a notice under sub-section (2) or sub-section (3) the sale shall be declared void, if the Commissioner within one month of his coming to know of the sale, applies in this behalf to the Court, or other authority under whose order the sale was held."

Section 71 enables the Commissioner to join as a party in any litigation on his own application and to conduct or defend certain suits or proceedings on behalf of or in the interest of the wakf.

7. It will be noticed from the analysis of the Act that the Commissioner has a definite duty to perform in all suits in which the interests of the wakf are involved. Sub-section (1) of Section 70 requires that in every suit or proceeding in respect of any wakf property the Court shall issue a notice to the Commissioner. This was done here because the Commissioner was a party and a summons had gone to him from the Court. It is contended before us that this was not notice but only a summons but we think that nothing much turns upon this distinction. The Commissioner had notice of the proceedings. He appeared in the case, defended the wakf, characterised the suit as collusive and he was fully cognizant of all that was happening in the suit. The learned Judge in the High Court also held that there was no need to give the Commissioner another notice under sub-section (1) because the Commissioner had already notice of the suit.

8. The question, therefore, is whether in the absence of a notice under sub-section (1) the decree could be declared to be void. Here the argument of the Commissioner in the High Court was that he had been removed from the array of the defendants and that he was therefore entitled to a special notice of the petition of compromise in the case. It is to be noticed that Section 70 speaks of several special notices, such as, in sub-section (2) before any wakf property is notified for sale in execution of a decree, or in sub-section (3) before any wakf property is notified for sale for the recovery of any revenue, cess, rates or taxes, but it does not provide for any special notice of a petition for compromise of a suit except the first notice that a suit had been filed in the court. It is significant that in Section 69 although compromise cannot be made without the sanction of the trying court, there is no mention of any special notice to the Commissioner. It follows, therefore, that the Commissioner was entitled to a notice of the suit. That may be by a letter from the court giving him this notice, or if he was made a party, by a summons to attend the court. In the present case the second course was followed and a copy of the plaint must have accompanied the summons and in our opinion this was sufficient compliance with the provisions of the first sub-section of Section 70. It is to be recalled that the Commissioner did appear, filed a written-statement, contested the suit and also described it as a collusive action between the plaintiff and the other defendants. It is, however, surprising that when an application was made for striking off his name from the array of the defendants the Commissioner agreed to such a course. This meant that in spite of notice to him of the collusive nature of the suit he was content to remain outside the suit and to give up all his pleas about the wakf and the collusive nature of the suit. Having so acted it seems difficult to think that the decree could be declared void simply because the Commissioner had no special notice of the compromise. No special notice of compromise petition is required to be issued under the Act. He had notice of whole of the suit and of the claim made by the plaintiff in the case. He was afforded an opportunity to resist the suit and, in fact, resisted it but later gave up the fight and agreed to go out of the suit. In these circumstances, it will be wrong to hold that the decree was void

because the Commissioner was not given a notice of the compromise petition.

9. Learned counsel for the Commissioner relied strongly upon a decision of the Madras High Court reported in *State Wakf Board, Madras v. Abdul Azeez Sahib*, AIR 1968 Mad 79 in which the decision in the present case was noticed and applied for declaring a decree void. In that case the counsel for the representatives of Wakf Board, Mr. Sherfuddin was also for some time the Chairman of the Wakf Board and his knowledge of the suit was attributed to the State Wakf Board and it was held that there was notice as required by Section 57 (1) of Wakf Act, 1954 (29 of 1954). Section 57 (1) of that Act read:

"In every suit or proceeding relating to title to wakf property... the Court shall issue notice to the Board at the cost of the party instituting such suit or proceeding." Under Section 57 (3) it was further provided:

"In the absence of a notice under sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the Court in this behalf".

Under the third sub-section quoted here the application had to be made within one month of the knowledge of the Board and it was held by the trial Judge that knowledge of Mr. Sherfuddin was knowledge of the Board and the application was delayed. Reversing this decision the learned Chief Justice of Madras held that knowledge of Mr. Sherfuddin was not the knowledge of the Chairman of the State Wakf Board and could not be held to constitute knowledge within the section. According to the learned Chief Justice the knowledge which started limitation for the application was official knowledge in his capacity as a Chairman and not in his capacity as counsel. This case is thus distinguishable. Here the Commissioner of Wakfs Board was made a party and had full notice of the pendency of the suit and that it was a collusive suit between the plaintiff and the Mutwallis. It cannot be said, therefore, that he had no knowledge or that he had no notice of the proceedings. Indeed the learned Chief Justice of Madras while relying upon the decision in the present appeal also said that the facts of the two cases were quite different and the main point

involved was also different. He only relied upon a passage that in the judgment of the learned Judge of the Calcutta High Court the private knowledge of the Commissioner did not exonerate the court from its obligation to give notice to the Board. There is no question here of any private knowledge. The knowledge was provided by the summons to the Commissioner and he did appear in the case. In the other case there was no notice whatever from the court, nor even a summons and it is thus clearly distinguishable.

10. The learned counsel further relied upon *Muzafar Ahmed v. Indra Kumar Das*, 77 Cal LJ 159 = (AIR 1944 Cal 40). In that case the Commissioner was sent a notice but was not made a party. The suit was dismissed. In the appeal that followed the Commissioner was not made a party and no notice of appeal was served on him. The appeal was allowed. In the second appeal a ground was taken that the appeal below was incompetent as there was no notice to the Commissioner. Notice of the second appeal was, however, issued to the Commissioner. The decree was held to be not void but voidable and as the Commissioner had not applied within a month, the decree was allowed to stand. The Court also held that the words 'suit or proceeding' in Section 70 (4) did not include an appeal. There is much in this decision which may require careful consideration. It is sufficient to say that the decision does not support the present contention of the Commissioner.

11. *Benoy Kumar Acharjee Choudhury v. Ahammad Ali*, 46 Cal WN 339 = (AIR 1942 Cal 467 (1)) only lays down that under Section 70 of the Act, a notice is necessary to be served on the Commissioner in a suit in respect of wakf property even though the wakf may not be admitted. To this proposition no exception can be taken but it does not advance the case of the Commissioner.

12. On the other hand, in *The Commissioner of Wakfs, Bengal v. Shabbzada Mohammed Zahangir Shah*, (1942) 46 Cal WN 157 it was held that although a Commissioner was entitled to a notice of a suit, under Section 70 of the Wakf Act, but if he actually contested the suit as a party-defendant, he could be treated as an intervener under Section 71, even if no notice was given to him and that the suit was not vitiated. This case sup-

ports the proposition that joining the Commissioner as a party and his actual appearance in the suit stand equal to a notice under Section 70 (1).

13. None of the cases really supports the proposition now contended for before us. The language of the fourth sub-section of Section 70 is quite clear that the Commissioner must not have knowledge previously of the suit. Where the Commissioner has knowledge of the suit he cannot claim a second knowledge as the start of limitation. In other words his presence as a party in the suit after summons to him must be treated as a notice to him under the first sub-section of Section 70. The decision of the Subordinate Judge was thus correct and was wrongly reversed.

14. The Commissioner attempted to raise the question of a notice under Section 80 of the Code of Civil Procedure but that question could only arise in the original suit and not in these proceedings. In the result the judgment under appeal must be set aside and that of the Subordinate Judge, Howrah restored with costs against the Commissioner. We regret this result and only hope that some way will be found out of the difficulty created by the foolish action of the Commissioner in leaving the field clear for the compromise of the suit.

Appeal allowed.

AIR 1970 SUPREME COURT 292

(V 57 C 62)

(From Allahabad: AIR 1965 All 487)

J. C. SHAH AND G. K. MITTER, JJ.

Income Tax Officer, Special Investigation Circle B Meerut (In all Appeals), Appellants v. M/s. Seth Brothers and others etc., Respondents.

Civil Appeals Nos. 700 to 703 of 1965, D/- 15-7-1969.

(A) Income-tax Act (1961), Section 132 (as amended in 1965) — Rule 112 framed under Sec. 295 (1) — Exercise of power under Section 132 — Should be bona fide. AIR 1965 All 487, Reversed — (Criminal P. C. (1898), Sections 103, 165) — Constitution of India, Article 31).

Section 132 does not confer any arbitrary authority upon the Revenue Officers.

LM/AN/D375/69/MVJ/D

The Commissioner or the Director of Inspection must have, in consequence of information, reason to believe that the statutory conditions for the exercise of the power to order search exist. He must record reasons for the belief and he must issue an authorization in favour of a designated officer to search the premises and exercise the powers set out therein. The condition for entry into and making search of any building or place is the reason to believe that any books of accounts or other document which will be useful for, or relevant to, any proceeding under the Act may be found. If the Officer has reason to believe that any books of account or other documents would be useful for, or relevant to any proceedings under the Act, he is authorised by law to seize those books of account or other documents, and to place marks of identification thereon, to make extracts or copies therefrom and also to make a note or an inventory of any articles or other things found in the course of the search. Since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the tax payer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorizes it to be exercised. If the action of the Officer issuing the authorization, or of the designated officer is challenged the Officer concerned must satisfy the Court about the regularity of his action. If the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the Court. If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed. But where power is exercised bona fide, and in furtherance of the statutory duties of the tax officers any error of judgment on the part of the Officers will not vitiate the exercise of the power. Where the Commissioner entertains the requisite belief and for reasons recorded by him authorises a designated Officer to enter and search premises for books of account and documents relevant to or useful for any proceeding under the Act, the Court in a petition by an aggrieved person cannot be asked to substitute its own opinion whether an order authorising search should have been issued. Again, any irregularity in the course of entry, search and seizure committed by the Officer acting in pursuance of the authorisation will not be sufficient to vitiate the action taken, provided the officer has

in executing the authorisation acted bona fide. (Para 8)

The Act and the Rules do not require that the warrant of authorization should specify the particulars of documents and books of account; a general authorisation to search for and seize documents and books of account relevant to or useful for any proceeding complies with the requirements of the Act and the Rules. It is for the Officer making the search to exercise his judgment and seize or not to seize any documents or books of account. An error committed by the officer in seizing documents which may ultimately be found not to be useful for or relevant to the proceeding under the Act will not by itself vitiate the search, nor will it entitle the aggrieved person to an omnibus order releasing all documents seized. (Para 9)

The aggrieved party may undoubtedly move a competent Court for an order releasing the documents seized. In such a proceeding the officer who has made the search will be called upon to prove how the documents seized are likely to be useful for or relevant to a proceeding under the Act. If he is unable to do so, the Court may order that those documents be released. But the circumstance that a large number of documents have been seized is not a ground for holding that all documents seized are irrelevant or the action of the officer is mala fide. By the express terms of the Act and the rules the Income Tax Officer may obtain the assistance of a police officer. By sub-section (13) of Section 132 the provisions of the Code of Criminal Procedure, 1898 relating to searches apply so far as may be, to searches under Section 132. Thereby it is only intended that the officer concerned shall issue the necessary warrant, keep present respectable persons of the locality to witness the search, and generally carry out the search in the manner provided by the Code of Criminal Procedure. But sub-section (2) of Section 132 does not imply that the limitations prescribed by Section 165 of the Code of Criminal Procedure are also incorporated therein. (1968) 70 ITR 293 (All), Rel. on; AIR 1965 All 487, Reversed. (Para 10)

Further, in the absence of anything to show that the documents were either replaced or tampered with the irregularity in not placing identification marks on several documents will not by itself sup-

ply a ground, for holding that the search was mala fide. A delay of two months in issuing a notice calling for explanation is also not a ground for holding that the action was taken for a collateral purpose. (Para 18)

(B) Constitution of India, Article 226 — Income-tax Act (1961), Section 132 — Petition under Article 226 challenging order under Section 132 — Serious allegations made — High Court must take evidence viva voce and must not base its conclusion on affidavits. AIR 1965 All 487, Reversed.

In appropriate cases a writ petition may lie challenging the validity of the action under Section 132, Income-tax Act 1961 on the ground of absence of power or on a plea that proceedings were taken maliciously or for a collateral purpose. But normally the High Court in such a case does not proceed to determine merely on affidavits important issues of fact especially where serious allegations of improper conduct are made against public servants. If the High Court is of the view that the question is in respect of which an investigation should be made in a petition for the issue of a writ, it should direct evidence to be taken viva voce. AIR 1965 All 487, Reversed.

(Para 21)

Cases Referred: Chronological Paras

(1968) 70 ITR 293 (All), Income Tax Officer A Ward, Agra v. Firm Madan Mohan Dhammamal II

In all the Appeals:

Mr. Sukumar Mitra, Senior Advocate (M/s. S. K. Aiyar, R. H. Dhebar and B. D. Sharma Advocates with him), for Appellant;

In C. A. No. 700 of 1965:

M/s. M. C. Chagla and S. C. Manchanda, Senior Advocates (M/s. P. N. Pachauri, P. N. Duda and D. N. Mukherjee, Advocates with them), for Respondent No. 1;

In C. A. No. 701 of 1965:

Mr. S. C. Manchanda, Senior Advocate (M/s. P. N. Pachauri, P. N. Duda and D. N. Mukherjee, Advocates with him), for Respondent No. 1;

In C. A. Nos. 702 and 703:

Mr. S. C. Manchanda (M/s. P. N. Pachauri, S. M. Jain and B. P. Mahe-shwari, Advocates with him), for Respondent No. 1.

The following Judgment of the Court was delivered by

SHAH, J.: M/s. Seth Brothers run a flour mill in the name and style of "Imperial Flour Mills". From April 1, 1953 to March 1956 the business was carried on by M/s. Seth Brothers of which the partners were Baikunth Nath and Vishwa Nath. Between March 1956 and March 31, 1957, the business was carried on by Baikunth Nath, Vishwa Nath, Dr. Manmohan Nath, Mrs. Rama Rahi and Mrs. Sushila Devi. On April 7, 1957 Mrs. Prem Lata was admitted as a partner. The partners were engaged in carrying on other businesses in the names of Seth Brothers (Private) Ltd., Nath Brothers (Private) Ltd., and Meerut Cold Storage and General Mills.

2. The owners of the business were, year after year, assessed to income-tax in respect of the income arising in the course of the business. On March 14, 1963 the Income-tax Officer, Meerut issued a notice under Section 148 of the Income-tax Act, 1961, intimating M/s. Seth Brothers that there was reason to believe that their income chargeable to tax had escaped assessment and it was proposed to re-assess this income for the assessment year 1954-55. In response to the notice Baikunth Nath and Vishwa Nath filed a return under protest. In the meantime information was received by the Income-tax Commissioner, U. P., that M/s. Seth Brothers were maintaining "duplicate records" and were evading assessment of their true income and that it was necessary to seize the records which may be found at "Shanti Niketan", Meerut in which M/s. Seth Brothers carried on the business of Imperial Flour Mills and other businesses. The Commissioner of Income-tax, U. P., on May 29, 1963 drew up a memorandum that on a report of the Income-tax Officer, D-Ward, Meerut requesting for authorisation under Section 132 of the Income-tax Act, 1961, to enter and search the premises of M/s. Seth Brothers, he was satisfied about the need for the issue of the authorisation. The Commissioner also issued an order in Form 45 prescribed under Rule 112 of the Income-tax Rules, 1962, authorising two Income-tax Officers—R. R. Agarwal and R. Kapoor—to enter the premises known as "Shanti Niketan", at Meerut and to search for and seize such books and documents as may be considered relevant or useful for the purpose of the proceeding of reassessment, and to place

identification marks thereon and to convey them to the Income-tax Office.

3. On the 7 and 8 of June, 1963 the premises described in the order were searched and account books and certain documents found therein were seized and were carried to the Income-tax Office. M/s. Seth Brothers then moved a petition in the High Court of Allahabad for an order quashing the proceedings of the Income-tax authorities. Petitions were also filed by Nath Brothers (Private) Ltd., Seth Brothers (Private) Ltd., and Seth Brothers, Meerut for the same relief. By these petitions they claimed writs of certiorari quashing the letters authorising search of the premises at Shanti Niketan, and writs of mandamus directing the Income-tax Officer to return all the books, papers and articles seized during the search and for writs of prohibition restraining the Income-tax Department from using any information gathered as a result of the search. It was submitted by the petitioners that K. L. Ananda, Income-tax Officer and Satya Prakash an "ex-employee" of M/s. Seth Brothers had given false information to the Deputy Director of Inspection with a view to blackmail the partners of M/s. Seth Brothers, and that the order of search was made by the Commissioner of Income-tax at the direction of the Deputy Director of Inspection, that the action of the Income-tax Officer in searching the premises and in seizing the books of account was malicious and that in any event Section 132 of the Income-tax Act, 1961, and the rules framed thereunder, were violative of the fundamental freedoms guaranteed by Articles 14, 19 (1) (f) and (g) and 31 of the Constitution.

4. Affidavits were filed on behalf of M/s. Seth Brothers. It was affirmed that "the so-called duplicate records" seized by the Income-tax Officer were copies of the books of account and that action had been taken by the Commissioner of Income-tax, not on his own initiative but at the behest of the Directorate of Inspection. In reply to the contentions raised by the assessee several affidavits sworn by Officers of the Income-tax Department were filed. The Commissioner of Income-tax stated in his affidavit that before issuing letters of authorisation and the warrant of search he was satisfied that it was necessary to take action under Section 132 of the Indian Income-tax Act, 1961, and that the letters of autho-

risation were not issued at the direction of the Directorate of Inspection. The Income-tax Officers stated that in consequence of the search a large number of "duplicate account books and records" maintained by M/s. Seth Brothers were recovered, that the search was carried out according to law and in the presence of two of the partners of the firm and their advocates, that all the documents seized were relevant for the purpose of reassessment, that there was close connection between the different business activities of the partners of M/s. Seth Brothers and that all the documents which were seized were in relation to those activities. The Deputy Director of Inspection in his affidavit stated that he did not give any direction to the Commissioner to issue authorisation for search and seizure.

5. The High Court of Allahabad held on a consideration of the averments made in the affidavits filed on behalf of M/s. Seth Brothers and the revenue that "there was reason to believe" that instructions were issued by the Directorate of Inspection for a general raid and seizure of all account books and papers which may be found at the premises of the firm; that some out of the documents seized by the Income-tax Officers were irrelevant for the purpose of any proceeding under the Act; that besides the documents belonging to M/s. Seth Brothers the Income-tax Officers seized documents relating to the transactions of the allied concerns; that marks of identification were not placed on certain documents at the time they were seized; that the documents seized were detained by the Income-tax Officer for more than two months; and that the police force employed during the raid was excessive. The High Court concluded:—

"It is true that there was no ill-will between the * * * (partners of Seth Brothers) on one side and respondents Nos. 1, 3 and 4 (Commissioners of Income-tax, U. P. and Punjab and Income-tax Officer, Special Investigation Circle A, Meerut) on the other side. But the extent of the seizure was far beyond the limits of Section 132 of the Act. The action was mala fide in the sense that, there was abuse of power conferred on Income-tax Officers by Section 132 of the Act. The act being mala fide, the proceedings should be quashed by this Court by issuing a writ of Mandamus."

The Income-tax Officer, S. I. Circle has appealed to this Court with special leave.

6. Section 132 as originally enacted by Act 43 of 1961 was substituted by a modified provision by the Finance Act of 1964 which in its turn was replaced by Section 1 of the Income-tax (Amendment) Act, 1965. By Section 8 of that Act it was provided inter alia, that any search of a building or place by an.... Income-tax Officer purported to have been made in pursuance of sub-section (1) of Section 132 of the principal Act shall be deemed to have been made in accordance with the provisions of that sub-section as amended by the Act of 1965 as if those provisions were in force on the day the search was made..... The relevant part of Section 132 as substituted by the Income-tax (Amendment) Act, 1965 may, therefore, be set out:

"132. Search and seizure.— (1) Where the Director of Inspection or the Commissioner, in consequence of information in his possession, has reason to believe that—

(a) any person to whom a summons under sub-section (1) of Section 37 of the Indian Income-tax Act, 1922 (XI of 1922), or under sub-section (1) of Section 131 of this Act, or a notice under sub-section (4) of Section 22 of the Indian Income-tax Act 1922, or under sub-section (1) of Section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (XI of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been disclosed for the purposes of the Indian Income-tax Act, 1922 (XI of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),

he may authorise any Deputy Director of Inspection, Inspecting Assistant Commis-

sioner, Assistant Director of Inspection or Income-tax Officer (hereinafter referred to as the authorised officer) to—

(i) enter and search any building or place where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by Clause (i) where the keys thereof are not available;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search;

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing.

(2) the authorised officer may requisition the services of any police officer or of any officer of the Central Government or of both, to assist him for all or any of the purposes specified in sub-section (1) and it shall be the duty of every such officer to comply with such requisition.

(3) The authorised officer may, where it is not practicable to seize any such books of account, other document, money, bullion, jewellery or other valuable article or thing, serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.

(8) The books of account or other documents seized under sub-section (1) shall not be retained by the authorised officer for a period exceeding one hundred and eighty days from the date of the seizure unless the reasons for retaining the same are recorded by him in writing and the approval of the Commissioner for such retention is obtained:

Provided

(13) The provisions of the Code of Criminal Procedure, 1898 (V of 1898), relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1)."

The Central Board of Direct Taxes has, in exercise of the power conferred by Section 295 (1) of the Act, framed R. 112 prescribing the procedure to be followed by the Commissioner and the authorised officers.

7. The Commissioner or the Director of Inspection may after recording reasons order a search of premises, if he has reason to believe that one or more of the conditions in Section 132 (1) exist. The order is in the form of an authorization in favour of a subordinate departmental officer authorising him to enter and search any building or place specified in the order, and to exercise the powers and perform the functions mentioned in Section 132 (1). The Officer so authorised may enter any building or place and make a search where he has reason to believe that any books of account or other documents which in his opinion will be useful for, or relevant to, any proceeding under the Act, may be found. The officer making a search may seize any books of account or other documents and place marks of identification on any such books of account or other documents, make or cause to be made extracts or copies therefrom and may make an inventory of any articles or things found in the course of any search which in his opinion will be useful for, or relevant to any proceeding under the Act, and remove them to the Income-tax Office or prohibit the person in possession from removing them. He may also examine on oath any person in possession of or control of any books of account or documents or assess.

8. The section does not confer any arbitrary authority upon the Revenue Officers. The Commissioner or the Director of Inspection must have, in consequence of information, reason to believe that the statutory conditions for the exercise of the power to order search exist. He must record reasons for the belief and he must issue an authorization in favour of a designated officer to search the premises and exercise the powers set out therein. The condition for entry into and making search of any building or place is the reason to believe that any books of account or other documents which will be useful for, or relevant to, any proceeding under the Act may be found. If the Officer has reason to believe that any books of account or other documents would be useful for, or relevant to, any proceeding under the Act,

he is authorised by law to seize those books of account or other documents, and to place marks of identification therein, to make extracts or copies therefrom and also to make a note or an inventory of any articles or other things found in the course of the search. Since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorizes it to be exercised. If the action of the Officer issuing the authorisation, or of the designated Officer is challenged the Officer concerned must satisfy the Court about the regularity of his action. If the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the Court. If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed. But where power is exercised bona fide, and in furtherance of the statutory duties of the tax officers any error of judgment on the part of the Officers will not vitiate the exercise of the power. Where the Commissioner entertains the requisite belief and for reasons recorded by him authorises a designated Officer to enter and search premises for books of account and documents relevant to or useful for any proceeding under the Act, the Court in a petition by an aggrieved person cannot be asked to substitute its own opinion whether an order authorising search should have been issued. Again, any irregularity in the course of entry, search and seizure committed by the Officer acting in pursuance of the authorisation will not be sufficient to vitiate the action taken, provided the Officer has in executing the authorisation acted bona fide.

9. The Act and the Rules do not require that the warrant of authorisation should specify the particulars of documents and books of account: a general authorisation to search for and seize documents and books of account relevant to or useful for any proceeding complies with the requirements of the Act and the Rules. It is for the Officer making the search to exercise his judgment and seize or not to seize any documents or books of account. An error committed by the Officer in seizing documents which may ultimately be found not to be useful for or relevant to the proceeding under the Act will not by itself vitiate the search,

nor will it entitle the aggrieved person to an omnibus order releasing all documents seized.

10. The aggrieved party may undoubtedly move a competent Court for an order releasing the documents seized. In such a proceeding the Officer who has made the search will be called upon to prove how the documents seized are likely to be useful for or relevant to a proceeding under the Act. If he is unable to do so, the Court may order that those documents be released. But the circumstance that a large number of documents have been seized is not a ground for holding that all documents seized are irrelevant or the action of the Officer is mala fide. By the express terms of the Act and the Rules the Income-tax Officer may obtain the assistance of a police officer. By sub-section (13) of Sec. 132 the provisions of the Code of Criminal Procedure, 1898, relating to searches apply, so far as may be, to searches under Section 132. Thereby it is only intended that the officer concerned shall issue the necessary warrant, keep present respectable persons of the locality to witness the search and generally carry out the search in the manner provided by the Code of Criminal Procedure. But sub-section (2) of Section 132 does not imply that the limitations prescribed by S. 165 of the Code of Criminal Procedure are also incorporated therein.

11. In *Income-tax Officer, A-Ward, Agra v. Firm Madan Mohan Damma Mal*, 1968-70 ITR 293 (All) it was observed that the issue of a search warrant by the Commissioner is not a judicial or a quasi-judicial act and even if the Commissioner is enjoined to issue a warrant only when in fact there is information in his possession in consequence of which he may form the necessary belief, the matter is not thereby subject to scrutiny by the Court. Section 132 of the Income-tax Act does not require specific mention by description of each particular document which has to be discovered on search: it is for the Officer who is conducting the search to decide whether a particular document found on search is relevant for the purpose or not. That statement of the law, in our judgment, accurately states the true effect of Section 132. The mere fact that it may ultimately be found that some document seized was not directly relevant to any proceeding under the Act or that another officer with more informa-

tion at his disposal may have come to a different conclusion will not be a ground for setting aside the order and the proceeding for search and seizure.

12. The authorisation issued by the Commissioner was, in the view of the High Court, open to challenge on the ground that the Commissioner did not apply his mind to the existence of circumstances which justified the exercise of the power to issue authorisation. The action of the Income-tax Officers who searched the premises was quashed on the ground that they seized some documents which were irrelevant to the process of reassessment. In our judgment, in reaching their conclusion that the Commissioner acted at the behest of the Director of Inspection, the High Court ignored important evidence on the record. It was averred in the petition of M/s. Seth Brothers that:—

(56) "It appears that the Deputy Director of Inspection at the instigation of Shri K. L. Nanda and Sri Satya Prakash, without making any enquiries or having any material, ordered a raid for search and seizure of all the account books and papers, which could be found."

(57) "That, according to such directions of the Directorate, the Commissioner of Income-tax, U. P. Lucknow, was made to issue authorisations under Section 132 of the Act of 1961 in favour of opposite Parties Nos. 3 and 4 to search out the premises of 'Shanti Niketan', Civil Lines, Meerut, and to seize the account books, documents and papers, which could be recovered therefrom."

The High Court observed that even though a number of affidavits were filed by the Income-tax authorities, no reference to paragraph 56 of the writ petition was made and the "only affidavit filed by Shri A. L. Jha, Commissioner of Income-tax was vague in the extreme". The allegation in paragraphs 56 and 57 of the writ petition made on definite allegation that the Commissioner of Income-tax acted at the behest of the Deputy Director of Inspection and not on his own satisfaction reached in consequence of information in his possession. In the verification clause Baikunth Nath stated that the contents of paragraph 57 were true on information received from the Deputy Director of Inspection (Investigation), Income-tax, Central Revenue Buildings, New Delhi, but said nothing about the contents of paragraph 56. The affidavits

filed on behalf of the Income-tax Department specifically denied the allegations made in paragraphs 56 and 57. R. R. Agarwal (one of the Income-tax Officers authorised to conduct the search) in his affidavit affirmed that the letter of authorisation was issued to him by the Commissioner of Income-tax, U. P., Lucknow, after the Commissioner had been satisfied on the report submitted by the deponent.

13. The Commissioner of Income-tax Mr. A. L. Jha, by his affidavit denied that letters of authorisation were issued under the directions of the Deputy Director of Inspection or any body connected with Directorate. He also stated that in respect of the case of M/s. Seth Brothers some information was brought to him by the Directorate and that information corroborated the report made to him by Mr. R. R. Agarwal and that after taking into consideration all those materials he was satisfied that a search of the premises of M/s. Seth Brothers "was called for" and that he issued the impugned letters of authorisation.

14. Mr. R. V. Ramaswamy, Deputy Director of Inspection (Investigation) in paragraph 6 of his affidavit denied that the raid or search of the premises of M/s. Seth Brothers was ordered by him.

15. The affidavit of R. Kapur, Income-tax Officers, Special Investigation Circle, who was authorised by the Commissioner of Income-tax to make the search is also relevant. Mr. Kapur averred that some information was received by Mr. R. R. Agarwal from which it appeared that the firm of M/s. Seth Brothers and its partners were "evading tax by maintaining duplicate sets of accounts" and by suppressing relevant documents and papers from the Department; that Mr. R. R. Agarwal made a written request to the Commissioner of Income-tax for letters of authorisation in order to carry out the search of the assessee's premises and in pursuance thereof on May 29, 1963 the Commissioner of Income-tax issued three authorisation letters two in favour of Mr. R. R. Agarwal and one in favour of the deponent authorising them to carry out the search in accordance with the terms of the authorisation letters.

16. In this state of the record we are unable to agree with the High Court that the letters of authorisation were issued by the Commissioner of Income-tax at the direction of the Director of Inspection

(Investigation). The attention of the Court was presumably not invited to the relevant paragraphs of the affidavits of the Officers concerned.

17. It is true that a large number of documents were seized from the premises of M/s. Seth Brothers but that has by itself no direct bearing on the question whether the Income-tax Officer acted mala fide. If the Income-tax Officer in making a search had reason to believe that any books of account or other documents useful for, or relevant to, any proceeding under the Act may be found, he may make a search for and seize those books of account and other documents. Some books, maps of the cold storage, assessment returns, and doctor's prescriptions were seized by the Income-tax Officer. It appears, however, from the inventory that a large number of documents which related to the business of the assessee and their allied concerns were also seized. It would be impossible merely from the circumstance that some of the documents may be shown to have no clear or direct relevance to any proceeding under the Act that the entire search and seizure was made not in bona fide discharge of official duty but for a collateral purpose. The suggestion that the books of account and other documents which could be taken possession of should only be those which directly related to the business carried on in the name of M/s. Seth Brothers has, in our judgment, no substance. The books of account and other documents in respect of other businesses carried on by the partners of the firm of the assessee would certainly be relevant because they would tend to show inter-relation between the dealings and supply materials having a bearing on the case of evasion of income-tax by the firm. We are unable to hold that because the Income-tax Officers made a search for and seized the books of account and documents in relation to business carried on in the names of other firms and companies, the search and seizure were illegal.

18. It is also said that marks of identification were not placed on several documents. Assuming that this allegation is true, in the absence of anything to show that the documents were either replaced or tampered with, that irregularity will not by itself supply a ground for holding that the search was mala fide. A delay of two months in issuing a notice calling for explanation is also not a ground for

holding that the action was taken for a collateral purpose.

19. It is not disputed that assistance of the police may be obtained in the course of a search. The High Court has, however, found that the police force employed was excessive. But we are unable to hold that on the evidence in keeping police officers present at the time of the search in the house of influential businessmen to ensure the protection of the officers and the record, "excessive force was used."

20. We accordingly see no good grounds to accept the finding recorded by the High Court that the manner in which the search and seizure were conducted "left no room for doubt that the Income-tax Officer did not apply his mind and formed no opinion regarding the relevancy or usefulness of the account books and documents for any proceedings under the Income-tax Act." The High Court accepted that the correctness of the opinion actually formed by the Income-tax Officer was not open to scrutiny, in a writ petition, but in their view no opinion was in fact formed by the Officer and the search and seizure of documents and books of account must on that account be held as made in excess of the powers conferred upon the Income-tax Officer and mala fide. For these observations we find no warrant. The Income-tax Officers concerned have sworn by their affidavits that they did in fact form the requisite opinion under Section 132 of the Act and the other evidence and the circumstances do not justify us in discarding that assertion.

21. These proceedings were brought before the High Court by way of a writ petition under Article 226 of the Constitution before any investigation was made by the Income-tax Officers pursuant to the action taken by them. In appropriate cases a writ petition may lie challenging the validity of the action on the ground of absence of power or on a plea that proceedings were taken maliciously or for a collateral purpose. But normally the High Court in such a case does not proceed to determine merely on affidavits important issues of fact especially where serious allegations of improper conduct are made against public servants. The Income-tax Officers who conducted the search asserted that they acted in good faith in discharge of official duties and not for any collateral purpose. The Commissioner of Income-tax also denied that

he acted at the direction of the Deputy Director of Inspection and that case was supported by the Deputy Director of Inspection. If the learned Judges of the High Court were of the view that the question was one in respect of which an investigation should be made in a petition for the issue of a writ, they should have directed evidence to be taken viva voce. The High Court could not on the assertions by the partners of the firm which were denied by the Income-tax Officer, infer that the premises of M/s. Seth Brothers were searched and documents were seized for a collateral purpose, merely from the fact that many documents were seized or that some of the documents seized marks of identification were not put or that the documents belonging to the "sister concerns" of the "Imperial Flour Mills" were seized.

22. In our view the decision of the High Court that the action of the Commissioner of Income-tax, U. P. and the Income-tax Officers who purported to act in pursuance of the letters of authorisation was mala fide, cannot be accepted as correct.

23. Counsel for M/s. Seth Brothers contended that opportunity may be given to the assessee to lead evidence viva voce to prove that the revenue officers acted for a collateral purpose. We do not entertain this request since we propose to remand the case to the High Court to decide questions which have not been decided. The applicants if so advised may move the High Court for leave to lead evidence. It is for the High Court to decide whether at this stage after nearly six years leave to examine witnesses should be granted.

24. The order passed by the High Court is set aside and the proceeding is remanded to the High Court. The High Court will deal with and dispose of the proceeding according to law. We may observe that counsel for the Income-tax Officer did not invite us to decide the question of the vires of Section 132 of the Income-tax Act on which the High Court has expressed no opinion. M/s. Seth Brothers and the other petitioners in the High Court will pay the costs of these appeals in this Court. There will be one hearing fee. Costs in the High Court will be costs in the petitions.

Case remanded.

AIR 1970 SUPREME COURT 300

(V 57 C 63)

(From Andh. Pra: ILR (1964) Andh Pra 616)

J. C. SHAH, Actg. C. J., V. RAMASWAMI AND A. N. GROVER, JJ.

V. Jaganmohan Rao and others, Appellants v. The Commissioner of Income-tax and Excess Profits Tax, Hyderabad, Respondents.

Civil Appeals Nos. 893 to 898 and 1381 to 1386 of 1966, D/- 31-7-1969.

(A) Income-tax Act (1922), Section 34 — Word "information" in Section 34(1)(b) would cover information as to relevant judicial decisions — Once valid proceedings are started under Section 34 (1) (b) the whole assessment proceedings start afresh and the Income Tax Officer can levy tax on entire income escaped assessment during relevant year.

The assessee purchased a spinning mill during the pendency of the litigation for partition between the sons of the vendor and the vendor in respect of the mill and other properties claiming them as joint family properties. The vendor purported to sell the same as the sole owner. In that case the High Court held that the properties of the vendor were not his self-acquired properties but were joint family properties in which the plaintiffs (minor sons) had a two-third share. During the pendency of appeal to Privy Council, the assessee submitted returns for the relevant years. However, before the assessments were taken up the assessee entered into a compromise with the plaintiffs by virtue of which he got a release of the interest of the vendor's son on payment of a certain amount. On an application of the sons for recovery of their share profits, during pendency of appeal, the High Court appointed the assessee as the Receiver directing him to deposit the profits in the High Court and the assessee deposited certain amounts in the relevant years. The Privy Council decided the appeal holding that the Vendor was the absolute owner of the Mill and the sons had no right, title or interest therein. On receipt of the Privy Council decision, the Income-tax Officer issued a notice under Section 34 in respect of the income received by the assessee as lease income of the mill. The assessee contended that the proceedings initiated under Section 34 were invalid as there was no new information leading to

the discovery that income had escaped assessment and that in any event the assessee was entitled to set-off the sum paid to the sons of vendor under the compromise approved by the High Court for releasing their rights.

Held that the word "information" in Section 34 (1) (b) included information as to the true and correct state of the law, and so would cover information as to relevant judicial decisions and secondly that the word 'escape' in S. 34 (1) was not confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertence or oversight or other lacuna attributable to the assessing authorities. Even in a case where a return had been submitted, if the Income-tax Officer had erroneously failed to tax a part of the assessable income, it was a case where that part of the income had escaped assessment. The decision of the Privy Council, was "information" within the meaning of S. 34 (1) (b) and the proceedings for re-assessment were validly initiated. Once proceedings under Section 34 were taken to be validly initiated with regard to two-third share of the income, the jurisdiction of the Income-tax Officer could not be confined only to that portion of the income. The Income-tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that has escaped assessment during that relevant year.

(Para 4)

(B) Income-tax Act (1922), S. 10 (2) (xv) — Capital expenditure or Revenue expenditure — Money paid in consideration or acquisition of a source of profit of income is capital expenditure — Such amount held, could not be apportioned between capital and income. ILR (1964) Andh Pra 616, Reversed.

Where money is paid to perfect a title or as consideration for getting rid of a defect in the title or a threat of litigation the payment would be capital payment and not revenue payment. Money paid in consideration or the acquisition of a source of profit on income is capital expenditure.

(Para 5)

The assessee who had purchased a Mill during the pendency of a litigation for partition between the vendor's son and vendor, entered into a compromise with the vendor's sons to get release of their two-third interest on payment of certain amount. During the pendency of appeal

to Privy Council from partition suit, the High Court appointed the assessee as Receiver directing him to deposit the profits in the High Court and the assessee deposited certain amounts in the relevant years. The Privy Council decided the appeal holding that the vendor was absolute owner of the Mill and the sons had no right, title or interest therein.

Held, as the payment, to the sons of vendor, was made by the assessee in order to perfect his title to capital asset, the assessee was not entitled to set-off any portion of the amount as attributable to the lease money. It was a lump sum of payment for acquisition of a capital asset and the claim of the plaintiffs for the lease money from the property was merely ancillary or incidental to the claim to the capital asset. Hence that amount could not be apportioned between capital and income. ILR (1964) Andh Pra 616, Reversed.

(Para 6)

Cases Referred: Chronological Paras
(1964) 1964 AC 948 = 1964-2 WLR

339, Commr. of Taxes v. C.

Neechanga Consolidated Copper
Mines Ltd.

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(1959) AIR 1959 SC 257 (V 46) =

35 ITR 1, Maharaja Kumar Kamal
Singh v. Commr. of I. T.

4

(1947) AIR 1947 Pat 115 (V 34) =

14 ITR 673, Kamakhya Narain
Singh v. Commr. of I. T.

4

(1926) 1926 AC 205 = 95 LJ KB

336, Atherton v. British Insulated
and Helsby Cables Ltd.

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(In C. As. Nos. 893 to 898 of 1966) and the Respondents (In C. As. Nos. 1381 to 1386 of 1966): Mr. D. Narasaraju Senior Advocate (M/s. P. Ramarao, K. R. Chaudhuri and K. Rajendra Chaudhuri, Advocates with him), for Appellants; (In C. As. Nos. 893 to 898 of 1966) and Appellant (In C. As. Nos. 1381 to 1386 of 1966): Mr. Jagdish Swarup, Solicitor-General of India (M/s. S. K. Aiyar and R. N. Sachthey, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.—The assessee who is the Kartha of a Hindu Undivided Family was assessed in that status for the relevant assessment year, 1944-45, 1945-46, 1946-47 not only to income-tax but also to excess profits tax. On February 1, 1941 he purchased from Randhi Appalawamy (hereinafter referred to as the vendor) a spinning mill known as Sri Satyanarayana Spinning Mills, Rajahmun-

dry for a sum of Rs. 54,731. The purchase was made at a period when there was litigation between the sons of the vendor and the vendor in respect of the spinning mill and other properties. The sons had filed a suit against the father, the vendor, claiming the schedule properties including the mill as joint family properties and for partition of the same. The vendor claimed that the properties were his self-acquired properties. The District Judge, Rajahmundry held that the properties were the self-acquired properties of the vendor and dismissed the suit of the plaintiffs. Against the judgment of the District Judge an appeal was filed in the Madras High Court, being A. S. No. 175 of 1938. While the appeal was pending, on February 1, 1941 the assessee purchased the mill from the vendor who purported to sell the same as the sole owner. In A. S. No. 175 of 1938 the Madras High Court held that the properties of the vendor were not his self-acquired properties but were joint family properties in which the plaintiffs had a two-thirds share. Against this judgment the vendor preferred an appeal to the Privy Council. While that appeal was pending the assessee had submitted returns for the relevant assessment years. However, before the assessments were taken up the assessee entered into a compromise with the plaintiffs on September 7, 1945 by virtue of which he got a release of the interest of the vendor's sons on payment of Rs. 1,15,000. While the appeal was pending before the Privy Council the plaintiffs had applied to the High Court for recovery of their share of the profits. The High Court appointed the assessee as the Receiver directing him to deposit the profits in the High Court. The assessee deposited a sum of Rs. 1,09,613 for the year 1944-45, Rs. 31,087 for the year 1945-46 and Rs. 4,775 for the year 1946-47. Under the compromise the assessee was entitled to withdraw these amounts on payment of Rs. 1,15,000. The Privy Council decided the appeal on July 2, 1947, AIR 1947 PC 189 reversing the order of the High Court and restoring that of the District Judge holding that Appalaswamy was the absolute owner of the mill and the sons had no right, title or interest therein. On receipt of the Privy Council's decision which finally determined the rights of the parties and the ownership of the assessee in the mill, the Income-tax Officer issued on March 2, 1948 a notice under Section 34 of the

Income-tax Act in respect of Rs. 1,09,613 received by the assessee as lease income of the mill. It was contended for the assessee (1) that the proceedings initiated under Section 34 of the Act for the year 1944-45 assessment were invalid in law as there was no new information leading to the discovery that income had escaped assessment, (2) that in any event the assessee was entitled to set off the sum of Rs. 1,15,000 paid to the sons of Appalaswamy under the compromise approved by the High Court for releasing their rights, if any, in the mill against the assessee's income from the mill. The Income-tax Officer rejected these contentions and treated the whole amount of Rs. 1,15,000 as paid towards capital expenditure in acquiring an asset. The Appellate Assistant Commissioner rejected the appeal of the assessee. The Tribunal affirmed the order of the Appellate Assistant Commissioner. It held in the first place that the assessee had not disclosed the impugned source of income from the mill in his original assessment, that the matter as to the assessee's ownership of the mill was sub judice and that the decision of the Privy Council constituted information not only of law but also as to the factum of the ownership of the Mill and the income therefrom. The Tribunal expressed the view that the sum of Rs. 1,15,000 could not be allowed to be set off against the assessee's income from the mill as it was an ex gratia payment to the sons of Appalaswamy who had no right, title or interest in the mill and it was paid in order to perfect a supposed defective title and as such was of capital nature. Thereafter the Income-tax Appellate Tribunal stated a case to the High Court under Section 66 (2) of the Indian Income-tax Act, 1922 on the following questions of law:

"R. A. No. 779 which relates to the assessment year 1944-45:

(1) Whether, on the facts and in the circumstances of the case, in respect of the assessment year 1944-45, the assessment made on the assessee in the status of a Hindu undivided family in respect of income received by him as Receiver could be justified notwithstanding the provisions of Section 41 of the Act?

(2) Whether, on the facts and in the circumstances of the case, the assessment of the entire income of Rs. 1,09,613 in the hands of the assessee is valid in the face of the compromise memo dated 7th September, 1945 approved by the Court?

(3) Whether, on the facts and in the circumstances of the case, the assessee is not entitled to set off Rs. 1,15,000 being the amount paid to the minors for releasing their rights in the property from out of the amount received from the Mill? R. A. No. 780 which relates to assessment year 1945-46:

(1) Whether, on the facts and in the circumstances of the case, the assessment made under Section 34 of the Act is valid in law?

(2) Whether, on the facts and in the circumstances of the case, in respect of the assessment year 1945-46, the assessment on the assessee in the status of a Hindu undivided family in respect of the income received by him as Receiver could be justified notwithstanding the provisions of Section 41 of the Act?

(3) Whether, on the facts and in the circumstances of the case, the assessment of the entire income of Rs. 31,087 in the hands of the assessee is valid in the face of the compromise memo dated 7th September, 1945 approved by the Court?

(4) Whether, on the facts and in the circumstances of the case, the assessee is not entitled to set off Rs. 1,15,000 being the amount paid to the minors for releasing their rights in the property from out of the amount received from the mill? R. A. No. 781 which relates to assessment year 1946-47:

(1) Whether, on the facts and in the circumstances of the case, in respect of the assessment year 1946-47 the assessment on the assessee in the status of a Hindu undivided family in respect of income received by him as Receiver could be justified, notwithstanding the provisions of Section 41 of the Act?

(2) Whether, on the facts and in the circumstances of the case, the assessment of the entire income of Rs. 4,775 in the hands of the assessee is valid in the face of the compromise memo dated 7th September, 1945 approved by the Court?

(3) Whether, on the facts and in the circumstances of the case, the assessee is not entitled to set off Rs. 1,15,000 being the amount paid to the minors for releasing their right in the property from out of the amount received from the Mill?"

2. The Appellate Tribunal pointed out in the statement of the case that question No. 1 in R. A. No. 780 for the assess-

ment year 1945-46 pertained to the earlier assessment year 1944-45 in R. A. No. 779 and also that question No. 2 in R. A. No. 780 and R. A. No. 779 for the assessment year 1945-46 and the corresponding excess profits tax assessment did not arise in that year but pertained to the earlier assessment year 1944-45 in R. A. No. 779 and the corresponding excess profits tax assessment in R. A. No. 782 (sic).

3. The High Court answered question Nos. 1 and 2 in R. A. No. 779 and question No. 1 in R. A. No. 780 in the affirmative. The High Court held that re-assessment proceedings have been validly initiated under Section 34 of the Act. The High Court found that the assessment on the assessee in the status of Hindu Undivided Family in respect of income received by him as Receiver was proper. The High Court thought that the basis of the compromise in the Madras High Court entered into between the assessee and the minor sons of the vendor Appalaswamy wherein the assessee paid Rs. 1,15,000 to the minor sons cannot be ignored. The High Court negatived the contention of the Income-tax Department that the sum of Rs. 1,15,000 was paid to cure a supposed defect in the title and that it was a capital payment. Upon the interpretation of the terms of the compromise the High Court took the view that the amount of Rs. 1,15,000 was paid partly towards acquisition of capital asset and partly towards the discharge of the claim towards profits and hence it should be apportioned towards capital and income in the proportion of 90/85. C. As. Nos. 1381 to 1386 of 1966 are brought by certificate from the judgment of the High Court on behalf of the Commissioner of Income-tax and C. A. Nos. 893 to 898 of 1966 were brought by special leave from the same judgment to this Court on behalf of the assessee.

4. After the Amending Act of 1939 and before the Amending Act of 1948 Section 34 stood as follows:

"(1) If in consequence of definite information which has come into his possession the Income-tax Officer, discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may in any case in which he has reason to believe that the assessee has concealed

the particulars of his income or deliberately furnished inaccurate particulars thereof at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains or in the case of a company on the principal officer thereof a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act, shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

* * * * *

(2) No order of assessment under Section 23 or of assessment or re-assessment under sub-section (1) of this section shall be made after the expiry, in any case to which clause (c) of sub-section (1) of Section 23 applies, of eight years, and in any other case, of four years from the end of the year, in which the income, profits or gains were first assessable.

* * * * *

The first question arising in this case is whether the proceeding under Section 34 is legally valid. It was contended by Mr. Narasaraaju that the decision of the Privy Council could not be said to be definite information within the meaning of the section. It was said that the Income-tax Officer was fully aware of the circumstances of the case and the assessee had placed all the relevant facts before him namely that under the High Court's judgment the vendor was only entitled to one-third share of the income pending the decision of the appeal before the Privy Council. In our opinion there is no justification for this argument. It is not true to say that the assessee brought all the relevant facts before the Income-tax Officer. On the contrary he deliberately suppressed the fact that there was a compromise between himself and the plaintiffs under which he was entitled to the whole of the income from the mill. At any rate the Privy Council's decision which determined the rights of the parties irrespective of the compromise did constitute definite information within the meaning of Section 34 of the Income-tax Act. This view is borne out by the decision of this Court in Maharaja Kumar Kamal Singh v. Commissioner of Income-tax, 35 ITR 1=(AIR 1959 SC 257). In that case the Income-tax Officer had, following the decision of

the High Court in Kamakhya Narain Singh's case, 14 ITR 673=(AIR 1947 Pat 115) omitted to bring to assessment for the year 1945-46 the sum of Rs. 93,604 representing interest on arrears of rent due to the assessee in respect of agricultural land on the ground that the amount was agricultural income. Subsequently the Privy Council, on appeal from that decision held that interest on arrears of rent payable in respect of agricultural land was not agricultural income. As a result of this decision the Income-tax Officer initiated re-assessment proceedings under S. 34 (1) (b) of the Income-tax Act and brought the amount of Rs. 93,604 to tax. In these circumstances it was held by this Court firstly that the word information in S. 34(1)(b) included information as to the true and correct state of the law, and so would cover information as to relevant judicial decisions, secondly that 'escape' in Section 34 (1) was not confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertence or oversight or other lacuna attributable to the assessing authorities. But even in a case where a return had been submitted, if the Income-tax Officer had erroneously failed to tax a part of the assessable income, it was a case where that part of the income had escaped assessment. The decision of the Privy Council, therefore, was held to be information within the meaning of Section 34 (1) (b) and the proceedings for re-assessment were validly initiated. In our opinion the principle of this decision governs the present case and it must be held that the proceedings initiated under Section 34 for the assessment year 1944-45 were legally valid. It was stated on behalf of the appellant that in any case the Income-tax Officer could have legitimately assessed one-third share of the income which was due to the assessee according to the judgment of the Madras High Court and there was escape only to the extent of two-third share of the income. This argument is not of much avail to the appellant because once proceedings under Section 34 are taken to be validly initiated with regard to two-third share of the income, the jurisdiction of the Income-tax Officer cannot be confined only to that portion of the income. Section 34 in terms states that once the Income-tax Officer decides to reopen the assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all

or any of the requirements which may be included in a notice under Section 22 (2) and may proceed to assess or re-assess such income, profits or gains. It is, therefore, manifest that once assessment is reopened by issuing a notice under sub-section (2) of Section 22 the previous under-assessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started under Section 34 (1) (b), the Income-tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year.

5. The second question involved in this case is whether the High Court was right in holding that any portion of the amount of Rs. 1,15,000 was liable to be treated as business expenditure. It is well established that where money is paid to perfect a title or as consideration for getting rid of a defect in the title or a threat of litigation the payment would be capital payment and not revenue payment. What is essential to be seen is whether the amount of Rs. 1,15,000 was paid for bringing into existence a right or asset of an enduring nature. In other words if the asset which is acquired is in its character a capital asset, then any sum paid to acquire it must surely be capital outlay. Money paid in consideration or the acquisition of a source of profit or income is capital expenditure both on principle and authority. In *Atherton v. British Insulated and Helsby Cables Ltd.*, 1926 AC 205 at p. 213, Viscount Cave said:

"But where an expenditure is made, not only once for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

In *Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd.*, 1964 AC 948, Lord Radcliffe observed at p. 960:

"Courts have stressed the importance of observing a demarcation between the cost of creating, acquiring or enlarging the permanent (which does not mean perpetual) structure of which the income is to be the produce or fruit and the cost of earning that income itself or performing the income-earning operations. Probably this is as illuminating a line of dis-

inction as the law by itself is likely to achieve".

6. It is, however, contended on behalf of the assessee that the amount of Rs. 1,15,000 was paid partly for the acquisition of capital asset and partly to discharge the claim towards profits and hence there should be an apportionment of the amount. It is not possible to accept this contention. It appears from the order of the High Court that the value of the mill was fixed at Rs. 1,15,000 after taking into consideration the fact that the mill was built on a leasehold premises. The value of the machinery was fixed at Rs. 1,36,000 and the leasehold interest was fixed at Rs. 14,000. On this basis the share of the minors was taken to be Rs. 90,000. In respect of the profits the claim of the plaintiffs was taken to be Rs. 85,000. The total claim was therefore Rs. 1,75,000 so that the offer of Rs. 1,15,000 for the release of the claim of the plaintiffs in the mill was held to be fair. The High Court, therefore, certified the compromise to be for the benefit of the minor plaintiffs. In the course of its order dated September 7, 1945 the High Court observed:

"There are, however, numerous risks which the continuance of the litigation would necessarily involve. The Privy Council might hold that the mill was the self-acquired property of the father, in which case the plaintiffs would get nothing and would incur a liability for costs. It might also be held that, though the property was the family property, the father was entitled as the natural guardian to sell the interests of minor sons in discharge of a binding family obligation. There is the further possibility that by the time the litigation ends the property will have deteriorated and its value will have been materially reduced by the termination of the lease of the land.

Taking all these contingencies into consideration we are of opinion that the offer made by the purchaser of Rs. 1,15,000 for the release of the claim, if any, of the two sons in the mill sold to him by their father is a fair offer, the acceptance of which would be beneficial to the minor second plaintiff."

It is true that the High Court took into consideration the income from the mill in testing whether the offer made by the purchaser of Rs. 1,15,000 for the release of the claim of the plaintiffs was a fair offer. But that does not mean that the

sons of Appalaswamy were given as a result of the compromise a share in the profits of the assessee. It is clear from the circumstances of this case that the payment of Rs. 1,15,000 was made by the assessee in order to perfect his title to capital asset and the assessee is not entitled to set off any portion of the amount as attributable to the lease money. It was a lump sum payment for acquisition of a capital asset and the claim of the plaintiffs for the lease money from the property was merely ancillary or incidental to the claim to the capital asset. In our opinion the High Court was in error in holding that the amount should be apportioned between capital and income. In the result so far as questions 3 and 4(?) in R. A. No. 779, questions 1 and 2 in R. A. No. 780 and questions 2 and 3 in R. A. No. 781 are concerned the answer is that the entire amount of Rs. 1,15,000 should be treated as capital payment and the assessee is not entitled to exclude from the income sought to be assessed in his hands any portion of that amount.

7. We accordingly allow C. A. Nos. 1381 to 1386 of 1966 to the extent indicated above. C. A. Nos. 893 to 898 of 1966 are dismissed. There will be no order as to costs in either of two sets of appeals.

Order accordingly.

AIR 1970 SUPREME COURT 306 (V 57 C 64)

(From Andhra Pradesh:
ILR (1967) Andh Pra 265)

J. C. SHAH, A. C. J., V. RAMASWAMI
AND A. N. GROVER, JJ.

M/s. Kurapati Venkatasatyanarayana and Brothers, Appellant v. The State of Andhra Pradesh, Respondent.

Civil Appeal No. 1451 of 1968, D/- 1-8-1969.

(A) Constitution of India, Article 286 (1) (a) — Exemption under — Assessee delivering goods outside State by way of direct sale — He can claim exemption — He need not prove that goods were actually consumed there. ILR (1967) Andh Pra 265, Reversed.

Where the goods are, as a direct result of a sale, delivered outside the State of Madras for the purpose of consumption in the State of first delivery, the assessee would be entitled to the exemption from

sales-tax by virtue of the Explanation to Article 286 (1) (a) and it would not be necessary for the assessee to prove further that the goods so delivered were actually consumed in the State of first destination. AIR 1961 SC 347, Applied; ILR (1967) Andh Pra 265, Reversed.

(Para 8)

(B) Sales Tax — Madras General Sales Tax Act (9 of 1939), Sec. 2 (h) — Assessee selling goods outside State and inside State — Single assessment order for period prior to Constitution and subsequent assessment on sale outside State illegal after Constitution by virtue of Article 286 (1) (a) — Held, that the order of assessment as a whole was not illegal as the assessment could be split up and dissected and the items of sale separated and taxed for different periods. Case law discussed.

(Para 12)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 1350 (V 53)=

17 STC 612, State of J. & K. v. Caltex India Ltd. 10

(1961) AIR 1961 SC 347 (V 48)=

12 STC 56, India Copper Corpn. Ltd. v. State of Bihar 2, 8, 9

(1958) AIR 1958 SC 452 (V 45)=

1958 SCR 1355, Tata Iron & Steel Co. Ltd. v. State of Bihar 4, 7

(1955) AIR 1955 SC 765 (V 42)=

6 STC 627, Ram Narain Sons Ltd. v. Asstt. Commr. of Sales Tax 10

(1953) AIR 1953 SC 252 (V 40)=

1953 SCR 1069, State of Bombay v. United Motors (India) Ltd. 5, 11

(1953) AIR 1953 SC 274 (V 40)=

1953 SCR 677=1953 Cri LJ 1105, Popatlal Shah v. State of Madras 4, 7

(1951) 1951 AC 786, Bennett & White (Calgary) Ltd. v. Municipal District of Sagar City No. 5 10

(1926) 1926 SCR (Can) 515, Montreal Light, Heat & Power Consolidated v. City of Westmount 10

(1920) 256 US 642=65 L Ed 1139, Bowman v. Continental Oil Co. 11

(1887) 127 US 411=32 L Ed 229, Frank Batterman v. Western Union Telegraph Co. 11

M/s. Rajeshwara Rao and B. Parthasarathi, Advocates, for Appellant; Mr. D. Manikanniah, Senior Advocate, (Mr. A. V. V. Nair, Advocate, with him), for Respondent.

The following judgment of the Court was delivered by

RAMASWAMI, J.:— This appeal is brought by certificate from the judgment

of the High Court of Andhra Pradesh dated March 11, 1965 in A. S. Nos. 93 and 169 of 1957.

2. The appellant was a firm of dealers in pulses at Vijayawada. It was sending pulses like green gram and black gram to other States viz., Bombay, Bengal, Madras and Kerala by rail in the course of their business. The consignments were addressed to 'self' and the railway receipts were endorsed in favour of Banks for delivery against payments. The purchasers obtained the railway receipts after payments and took delivery of the goods. The total turnover of the business of the appellant for the year 1949-50 was Rs. 17,05,144-2-2. Of the said turnover a sum of Rs. 3,61,442-7-3 represented the turnover of sales effected outside the then Madras State. For the assessment year 1949-50 the Deputy Commercial Tax Officer collected sales tax on the total turnover without exempting the value of the sales effected outside the State. The appellant was permitted to pay sales tax under Rule 12 of the Madras General Sales Tax (Turnover and Assessment) Rules. The appellant submitted monthly returns and paid sales tax without claiming any such exemption till the end of January, 1950. But in the returns for the months of February and March, 1950 the appellant claimed exemption on sales effected outside the State. The appellant submitted a consolidated return Ex. A-18 to the Deputy Commercial Tax Officer on March 30, 1950 claiming exemption in respect of a sum of Rs. 10,37,334-7-9 being the value of the sales effected outside the State for the period commencing from April 1, 1949 and ending January 31, 1950. The Deputy Commercial Tax Officer fixed the taxable turnover of the appellant at Rs. 17,05,144-2-2 and issued a notice Ex. A-23 dated October 24, 1950 to show cause why the appellant should not be assessed accordingly. The appellant was thereafter held liable to pay tax amounting to Rs. 26,642-14-0 on a net turnover of Rs. 17,05,144-2-2. The appellant preferred an appeal to the Commercial Tax Officer and a revision petition to the Board of Revenue, Madras but was unsuccessful. The appellant, therefore brought a suit for the recovery of Rs. 21,270-13-0 being the amount of tax illegally collected from him together with interest, contending that the sales effected outside the State could not be taxed under Article 286 (1) (a) of the Constitution of India. The State of Madras con-

tested the suit on the ground that the sales were taxable as they fell within the purview of explanation 2 to Section 2 (h) of the Madras General Sales Tax Act, 1939 (hereinafter referred to as the Act). The Subordinate Judge held that for the period from April 1, 1949 to January 25, 1950 the appellant was not entitled to impeach the assessment on the turnover relating to sales outside the State. As regards the period from January 26, 1950 to March 31, 1950 the Subordinate Judge took the view that the part of the turnover relating to outside sales was not liable to sales-tax but as there was a single order of assessment for the entire period the entire assessment was illegal. Against the judgment of the Subordinate Judge both the appellant and the respondent filed Appeals A. S. No. 93 of 1957 and A. S. No. 169 of 1957 to the High Court of Andhra Pradesh. But its order dated April 18, 1960 in Appeal No. 169 of 1957 the High Court called for a finding from the trial Court as to whether the appellant was able to prove the facts entitling him to invoke the explanation to Article 286 (1) (a). By its order dated July 21, 1962 the trial Court submitted a finding to the effect that in view of the decision of the Supreme Court in *India Copper Corporation Ltd. v. The State of Bihar*, 12 STC 56=(AIR 1961 SC 347) the burden of proof was not on the appellant and that the finding will have to be given in its favour. But by its order dated March 5, 1963 the High Court directed the Subordinate Judge to record a finding after considering the evidence adduced by the appellant as to whether the goods in question were delivered for consumption within the delivery States. In its order dated March 22, 1963 the trial Court, after considering the evidence given by the appellant's witnesses came to the conclusion that the deliveries were not made for purposes of consumption within the delivery States only. The High Court by a common judgment dated March 11, 1965 in A. S. Nos. 93 and 169 of 1957 held that the appellant could not claim the benefit under Article 286 (1) (a) of the Constitution in the absence of evidence as to how the wholesalers disposed of the goods after obtaining delivery and therefore the entire turnover for the year 1949-50 would be assessable to tax. In the result A. S. No. 169 of 1957 filed by the respondent was allowed and A. S. No. 93 of 1957 filed by the appellant was dismissed.

3. The Madras General Sales Tax Act, 1939 was enacted in exercise of the legislative authority conferred upon the Provincial Legislatures by Entry 48 of List II read with Section 100 (3) of the Government of India Act, 1935. The explanation to Section 2 (h) of this Act is as follows:

"Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 the sale or purchase of any goods shall be deemed, for the purpose of this Act, to have taken place in this Province, wherever the contract of sale or purchase might have been made.

(a) If the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made or,

(b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this Province at any time after the contract of sale or purchase in respect thereof was made."

4. Under Entry 48 of List II of the Government of India Act, 1935 the Provincial Legislatures could tax sales by selecting some fact or circumstance which provided a territorial nexus with the taxing power of the State even if the property in the goods sold passed outside the Province or the delivery under the contract of sale took place outside the Province. Legislation taxing sales depending solely upon the existence of a nexus, such as production or manufacture of the goods, or presence of the goods in the Province at the date of the contract of sale, between the sale and the legislating Province could competently be enacted under the Government of India Act, 1935. (See *Tata Iron & Steel Co. Ltd. v. The State of Bihar*, 1958 SCR 1355=(AIR 1958 SC 452) and *Poppatlal Shah v. The State of Madras*, 1953 SCR 677=(AIR 1953 SC 274)).

5. By Article 286 of the Constitution certain fetters were placed upon the legislative powers of the States as follows:

"(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State

in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

Therefore, by incorporating Section 22 of the Madras Act read with Article 286, notwithstanding the amplitude of the power otherwise granted by the charging section read with the definition of 'sale', a cumulative fetter of triple dimension was imposed upon the taxing power of the State. The Legislature of the Madras State could not since January 26, 1950, levy a tax on sale of goods taking place outside the State or in the course of import of the goods into, or export of the goods out of, the territory of India, or on sale of any goods where such sale took place in the course of inter-State trade or commerce. By the Explanation to Article 286 (1) (a) which is incorporated by Section 22 of the Madras Act a sale is deemed to take place in the State in which the goods are actually delivered as a direct result of such sale for the purpose of consumption in that State even though under the law relating to sale of goods the property in the goods has by reason of such sale passed in another State. In the State of Bombay *v. The United Motors (India) Ltd.*,

1953 SCR 1069=(AIR 1953 SC 252) it was held that since the enactment of Article 286 (1) (a) a sale described in the Explanation which may for convenience be called an "Explanation sale" is taxable by that State alone in which the goods sold are actually delivered as a direct result of sale for the purpose of consumption in that State.

6. With a view to impose restrictions on the taxing power of the States under the pre-Constitution statutes, amendments were made in those statutes by the Adaptation of Laws Order. As regards the Madras Act the President issued on July 2, 1952 the Fourth Amendment inserting a new section, Section 22 in that Act. It runs as follows:

"Nothing contained in this Act shall be deemed to impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place—

(a) (i) outside the State of Madras, or
(ii) in the course of import of the goods into the territory of India or of the export of the goods out of such territory, or

(b) except in so far as Parliament may by law otherwise provide, after the 31st March, 1951, in the course of inter-State trade or commerce, and the provisions of this Act shall be read and construed accordingly.

Explanation.—For the purposes of clause (a) (i) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State".

By this amendment the same restrictions were engrafted on the pre-Constitution statutes as were imposed by Article 286 of the Constitution upon post-Constitution statutes.

7. As regards the sales for the period from April 1949 to January 25, 1950 it was admitted before the Deputy Commercial Tax Officer that the goods were actually in the Madras State at the time the contract of sale was concluded. It was for this reason that the Deputy Commercial Tax Officer negatived the claim which the appellant made in respect of those sales. It appears that in the trial Court the appellant challenged the constitutional validity of explanation to Section 2 (h) of

the Act. But in view of the decision of this Court in the Tata Iron & Steel Co.'s case, 1958 SCR 1355=(AIR 1958 SC 452) and Poppatlal Shah's case, 1953 SCR 677=(AIR 1953 SC 274) counsel on behalf of the appellant did not seriously dispute the validity of the assessment in regard to sales from April 1, 1949 to January 25, 1950.

8. With regard to the period from January 26, 1950 to March 31, 1950 the contention of the appellant is that the High Court was in error in holding that the burden of proof was on the appellant to show that there was not only delivery of goods for consumption within the delivery States but there was actual consumption of the goods in those States. In our opinion the argument is well founded and must be accepted as correct. In India Copper Corporation's case, 12 STC 56=(AIR 1961 SC 347) it was pointed out by this Court that if the goods were as a direct result of a sale delivered outside the State of Bihar for the purpose of consumption in the State of first delivery, the assessee would be entitled to the exemption from sales-tax by virtue of the Explanation to Art. 286 (1) (a) of the Constitution and it would not be necessary for the assessee to prove further that the goods so delivered were actually consumed in the State of first destination.

9. In the present case the Subordinate Judge has, upon a consideration of the evidence adduced by the parties stated in his report dated June 27, 1962 that the intention of the appellant was that the sale and delivery should be for the purpose of consumption in the delivery States. It is true that in his subsequent report dated March 22, 1963 the Subordinate Judge gave a different finding. But it is obvious that the subsequent report of the Subordinate Judge is vitiated because the principle laid down by this Court in India Copper Corporation's case, 12 STC 56=(AIR 1961 SC 347) has not been taken into account. Having regard to the evidence adduced by the appellant in this case we are satisfied that the part of the turnover which related to sales from January 26, 1950 to March 31, 1950 was not liable to sales-tax and the levy of sales-tax from the appellant to this extent is illegal.

10. The next question arising in this appeal is whether the assessment order of the Deputy Commercial Tax Officer for the year 1949-50 is illegal in its

entirety notwithstanding the fact that the State Government had a right to levy sales-tax on outside sales which were effected prior to January 26, 1950. It was argued for the appellant that the assessment must be treated as one and indivisible and if a part of the assessment is illegal the entire assessment must be deemed to be infected and treated as invalid. In support of this argument reference was made to the decision of this Court in *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax*, 6 STC 627 at p. 637=(AIR 1955 SC 765 at p. 770) in which this Court observed as follows:

"The necessity for doing so is, however, obviated by reason of the fact that the assessment is one composite whole relating to the pre-Constitution as well as the post-Constitution periods and is invalid in toto. There is authority for the proposition that when an assessment consists of a single undivided sum in respect of the totality of the property treated as assessable, the wrongful inclusion in it of certain items of property which by virtue of provision of law were expressly exempted from taxation renders the assessment invalid in toto".

The Court cited with approval a passage from the judgment of the Judicial Committee in *Bennett & White (Calgary) Ltd. v. Municipal District of Sagar City No. 5*, 1951 A. C. 786 at p. 816.

"When an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a Court can sever the items and cut out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component (not dismissible as 'de minimis') is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is bad wholly. That matter is covered by authority. In *Montreal Light, Heat & Power Consolidated v. City of Westmount*, (1926) SCR (Can) 515 the Court (see especially per Anglin, C. J.) in these conditions held that an assessment which was bad in part was infected throughout, and treated it as invalid. Here their Lordships are of opinion, by parity of reasoning, that the assessment was invalid in toto."

Applying the principle to the special facts and circumstances of the case the Court set aside the orders of assessment and directed that the case should be remanded to the Assessment Officer for re-assessment of the appellants in accordance with law. The same principle was applied but with a different result in the later case the *State of Jammu and Kashmir v. Caltex (India) Ltd.*, 17 STC 612=(AIR 1966 SC 1350) in which the question arose as regards the validity of an assessment of sales-tax of all retail sales of motor spirit. The Petrol Taxation Officer assessed the respondent to pay sales-tax for the period January, 1955 to May, 1959 under Section 3 of the *Jammu & Kashmir Motor Spirit (Taxation of Sales) Act, 2005*. The respondent applied under Section 103 of the Constitution of Jammu & Kashmir and a single Judge of the High Court held that the respondent was liable to pay sales-tax only in respect of the sales which took place during the period January to September, 1955 and issued a writ restraining the appellants from levying tax for the period October, 1955 to May, 1959. On appeal a Division Bench of the High Court quashed the assessment for the entire period. On appeal to this Court it was held that though there was one order of assessment for the period January 1, 1955 to May 1959 the assessment could be split up and dissected and the items of sale could be separated and taxed for different periods. It was pointed out that the sales-tax was imposed in the ultimate analysis on receipts from individual sales or purchases of goods effected during the entire period, and, therefore, a writ of mandamus could be issued directing the appellant not to realise sales-tax with regard to transactions of sale during the period from September 7, 1955 to May, 1959.

11. A similar question arose for determination in an American case (*Frank Batterman v. Western Union Telegraph Co.*, (1887) 127 US 411). The question in that case was "whether a single tax, assessed under the Revised Statutes of Ohio, Section 2778, upon the receipts of a telegraph company which receipts were derived partly from inter-State commerce and partly from commerce within the State but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that the said receipts were derived from inter-State commerce". It was held un-

animously by the Supreme Court of the United States that the assessment was not wholly invalid but it was invalid only in proportion to the extent that such receipts were derived from inter-State commerce. It was observed that where the subjects of taxation can be separated so that which arises from inter-State commerce can be distinguished from that which arises from commerce wholly within the State, the Court will act upon this distinction, and will restrain the tax on inter-State commerce, while permitting the State to collect that upon commerce wholly within its own territory. The principle of this case has been consistently followed in American cases: (see *Bowman v. Continental Company*, (1920) 256 US 642). This case has been cited with approval by this Court in 1953 SCR 1069 at p. 1097=(AIR 1953 SC 252 at p. 263) wherein it was observed that the same principle should be applied in dealing with taxing statutes in this country also.

12. In the present case we are of opinion that though there is a single order of assessment for the period from April 1, 1949 to March 31, 1950 the assessment could be split up and dissected and the items of sale separated and taxed for different periods. It is quite easy in this case to ascertain the turnover of the appellant for the pre-Constitution and post-Constitution periods for these figures are furnished in the plaint by the appellant himself. It is open to the Court in these circumstances to sever the illegal part of the assessment and give a declaration with regard to that part alone instead of declaring the entire assessment void. For these reasons we hold that the appellant should be granted a declaration that the order of assessment made by the Deputy Commercial Tax Officer for the year 1949-50 is invalid to the extent that the levy of sales-tax is made on sales relating to goods which were delivered for the purpose of consumption outside the State for the period from January 26, 1950 to March 31, 1950. The result is that the appellant is entitled for refund of the amount illegally collected from him for the period from January 26, 1950 to March 31, 1950. The trial Court has already found that the appellant is entitled to claim exemption with regard to turnover for this period to the extent of Rs. 3,34,107-15-6 and the tax payable on this sum is Rs. 5,220-7-0. The appellant is, therefore, entitled to a decree for the

refund of Rs. 5,220-7-0. The appellant is also entitled to interest at 6 per cent per annum from the date of suit till realisation of this amount.

13. For these reasons we allow this appeal and set aside the judgment of the Andhra Pradesh High Court dated March 11, 1965 in A. S. Nos. 93 and 169 of 1957 and allow this appeal to the extent indicated above.

14. There will be no order with regard to costs.

Appeal allowed.

AIR 1970 SUPREME COURT 311 (V 57 C 65)

(From Kerala)*

J. C. SHAH, A. C. J., V. RAMASWAMI
AND A. N. GROVER, JJ.

The Sales Tax Officer, Special Circle, Ernakulam and another, Appellants v. M/s. Sudarsanam Iyengar and Sons, Respondent.

Civil Appeal No. 1232 of 1969, D/- 13-8-1969.

Sales Tax — Travancore Cochin General Sales Tax Rules (1950), Rule 33 — “Determine”, meaning of — Notice for reopening of original assessment on ground of certain turnover escaping assessment, issued within time limit of three years — Owing to writ petition and stay orders, assessment could not be completed before expiry of time limit — Assessment proceedings held were within time. W. P. No. 46 of 1967, D/- 18-6-1968 (Ker), Reversed.

On a true construction of Rule 33 it should be held that the proceedings under that Rule have to commence within three years next succeeding to that to which the tax relates and that it is not necessary that the entire proceedings relating to the escaped assessment should be completed within that period. In other words if such proceedings under Rule 33 have been commenced within the period prescribed by the rule they can be continued even beyond the period of three years till a final order of assessment is made. AIR 1967 SC 1408 and (1968) 21 STC 29 (SC) and AIR 1964 SC 766, Rel. on. (Para 3)

*(Writ Appeal No. 46 of 1967, D/- 18-6-1968—Ker.)

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In the context of Sales Tax Legislation the use of the words "proceed to assess" (as in Section 11 (4) of Punjab General Sales Tax Act 1948) and "determine" in Rule 33 (1) of Travancore Cochin General Sales Tax Rules, 1950 would not lead to different consequences or result. In this connection the words which follow the word "determine" in Rule 33 must be accorded their due signification. The words "assess the tax payable" cannot be ignored and it is clearly meant that the assessment has to be made within the period prescribed. Assessment is a comprehensive word and can denote the entirety of proceedings which are taken with regard to it. It cannot and does not mean a final order of assessment alone unless there is something in the context of a particular provision which compels such a meaning being attributed to it. Despite the phraseology employed in R. 33 the principle which has been laid down in other cases relating to analogous provisions in Sales Tax statute must be followed as otherwise the purpose of a provision like Rule 33 can be completely defeated by taking certain collateral proceedings and obtaining a stay order or by unduly delaying assessment proceedings beyond a period of three years.

(Para 4)

It is open to the legislature or the rule-making authority to make its intention quite clear that on the expiry of a specified period no final order of assessment can be made. Then the taxing authorities would certainly be debarred from completing the assessment beyond the period prescribed.

(Para 5)

Therefore, where the notice for reopening of original assessment for the 1962-63 on the ground that certain turnover has escaped assessment, was issued by the Sales Tax Officer in December 1965 but owing to the writ petition and stay orders the assessment could not be completed before the expiry of time limit of three years i. e. before 31-3-1966;

Held that the assessment proceedings relating to the year 1962-63 were within time. W. P. No. 46 of 1967, D/- 18-6-1968 (Ker.), Reversed.

(Para 5)

Cases Referred: Chronological Paras

(1968) 21 STC 29 (SC), State of Punjab v. Murlidhar Mahabir Parshad

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(1967) AIR 1967 SC 1408 (V 54)= 19 STC 493, State of Punjab v. Tarachand Lajpat Rai

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(1964) AIR 1964 SC 766 (V 51) = 1964-4 SCR 436, Ghanshyam Das v. Regional Asst. Commr. of Sales Tax, Nagpur

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M. R. K. Pillai, Advocate, for Appellants; T. A. Ramachandran, Advocate, for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Kerala High Court. The facts may be firstly stated: The respondent was a non-resident dealer carrying on business in Quilon, Ernakulam and Calicut in the State of Kerala. When the assessment in respect of sales tax for the assessment years 1961-62 and 1962-63 was pending the respondent had applied for a bifurcation of the assessment by treating his business at three places mentioned above as separate units. This request was acceded to by the Board of Revenue. The orders of assessment relating to the two years were made in April 1964 and March 1964 respectively.

2. The Sales Tax Officer issued notices in December 1965 for reopening the original assessments on the ground that certain turnover had escaped assessment. The objections of the respondent to these notices having failed a writ petition seeking to quash the orders made by the Sales Tax authorities was filed. A learned Single Judge held that in respect of the assessment year 1961-62 the Sales Tax Officer had no jurisdiction or authority to proceed under Rule 33 of the Travancore Cochin General Sales Tax Rules, 1950 which were in force at the material time. It was found that the notice served in December 1965 relating to that assessment year was beyond the time limit of three years prescribed by the rule. As regards the assessment year 1962-63 the learned Judge held that the time limit would expire on March 31, 1966. Owing to the writ petition and the stay orders which had been made the assessment could not be completed. The learned Judge felt that it was owing to the orders of the court that the Sales Tax authorities had been prevented from completing the assessment within the time. While disposing of the writ petition it was observed that the Sales Tax authorities would be at liberty to complete the proceedings initiated by the notice within the period of 59 days at the expiry of which the period prescribed by Rule 33 was to expire. The respondent

preferred an appeal to a Division Bench which set aside the direction granting 59 days extension for completing the assessment on the ground that the same was not justified under the law.

3. Counsel for the appellant has confined the appeal only to the proceedings relating to the assessment year 1962-63. It is admitted that with regard to the other year 1961-62 the proceedings became barred. It is contended before us that on a true construction of Rule 33 it should be held that the proceedings under that Rule have to commence within three years next succeeding to that to which the tax relates and that it is not necessary that the entire proceedings relating to the escaped assessment should be completed within that period. In other words if such proceedings under Rule 33 have been commenced within the period prescribed by the rule they can be continued even beyond the period of three years till a final order of assessment is made. Reliance has been placed on a number of decisions of this court some of which may be noticed. In the State of Punjab v. Tara Chand Lajpat Rai, 19 STC 493 = (AIR 1967 SC 1408) the question which came up for consideration was that where the Sales Tax Authority issued a notice under Section 11 (2) of the Punjab General Sales Tax Act, 1948 before the expiry of three years from the termination of the period for furnishing returns but finalised the assessment order after three years from the aforesaid date, whether such an assessment could be said to be barred by time. It was held that assessment proceedings commenced in the case of a registered dealer either when he furnished a return or when a notice was issued to him under Section 11 (2) of the Punjab Act and if such proceedings were taken within the prescribed time, though the assessment was finalised subsequently even after the expiry of the prescribed period no question of limitation would arise. In the State of Punjab v. Murlidhar Mahabir Parshad, (1968) 21 STC 29 (SC) the question of laws was whether on a proper interpretation of sub-sections (4) and (5) of Section 11 of the Punjab Act the period of limitation was three years for making the assessment from the last date on which the return was to be filed or whether the order of assessment was valid even after it was made after a period of three years provided the necessary notice had been

issued within that period. The aforesaid provision of the Punjab Act may be read:

"11 (4) If a registered dealer, having furnished returns in respect of a period fails to comply with the terms of a notice issued under sub-section (2) the Assessing Authority shall within three years after the expiry of such period, proceed to assess to the best of his judgment the amount of the tax due from the dealer.

(5) If a registered dealer does not furnish returns in respect of any period by the prescribed date, the Assessing Authority shall within three years after the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed to assess to the best of his judgment, the amount of tax, if any, due from the dealer."

Relying mainly on the observation in Ghanshyam Das v. Regional Assistant Commissioner of Sales Tax, Nagpur, 1964-4 SCR 436 = (AIR 1964 SC 766) this court held that the proceedings for assessment were valid because the same had been initiated within the period prescribed under Section 11 (5). The principle laid down in Tara Chand Lajpat Rai's case, 19 STC 493 = (AIR 1967 SC 1408) was followed.

4. Rule 33 of the relevant rules is in these terms:

Rule 33 (1) "If for any reason the whole or any part of the turnover of business of a dealer or licensee has escaped assessment to tax in any year or if the licence fee has escaped levy in any year, the assessing authority or licensing authority as the case may be, subject to the provisions of sub-rule (2) may at any time within three years next succeeding that to which the tax or licence fee relates determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable or levy the licence fee in such turnover after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary".

Now in view of the previous decisions, the principle is firmly established that assessment proceedings under the Sales Tax Act must be held to be pending from the time the proceedings are initiated until they are terminated by a final order of assessment. The distinguishing feature on which emphasis has been laid by the counsel for the respondent is that the language employed in Rule 33 is such as to lead to only one conclusion that the final determination of the turnover which

has escaped assessment and the assessment of the tax have to be done within three years. It is pointed out that in the other Sales Tax provisions which came up for consideration in the cases mentioned above the words employed were "proceed to assess" e. g., sub-sections (4) and (5) of Section 11 of the Punjab General Sales Tax Act. Our attention has been invited to the appropriate dictionary meaning of the word "determine" which is "to settle or decide"—to come to a judicial decision—(Shorter Oxford English Dictionary). It is suggested that the word "determine" was employed in R. 33 with a definite intention to set the limit within which the final order in the matter of assessment should be made, the limit being three years. We find it difficult to accept that in the context of Sales Tax legislation the use of the words "proceed to assess" and "determine" would lead to different consequences or result. In this connection the words which follow the word "determine" in Rule 33 must be accorded their due signification. The words "assess the tax payable" cannot be ignored and it is clearly meant that the assessment has to be made within the period prescribed. Assessment is a comprehensive word and can denote the entirety of proceedings which are taken with regard to it. It cannot and does not mean a final order of assessment alone unless there is something in the context of a particular provision which compels such a meaning being attributed to it. In our judgment despite the phraseology employed in Rule 33 the principle which has been laid in other cases relating to analogous provisions in Sales Tax statute must be followed as otherwise the purpose of a provision like Rule 33 can be completely defeated by taking certain collateral proceedings and obtaining a stay order as was done in the present case or by unduly delaying assessment proceedings beyond a period of three years.

5. It is undoubtedly open to the legislature or the rule-making authority to make its intention quite clear that on the expiry of a specified period no final order of assessment can be made. Then the taxing authorities would certainly be debarred from completing the assessment beyond the period prescribed as was the case in sub-section (3) of Section 34 of the Income-tax Act 1922: but such is not the case here and we would hold that

the assessment proceedings relating to the year 1962-63 were within time.

6. The appeal is allowed and the judgment of the High Court is set aside. The case shall go back to the High Court for disposal of such points as were previously not decided. In terms of the previous order dated April 3, 1969, the respondents shall be entitled to costs in this court.

Appeal allowed.

AIR 1970 SUPREME COURT 314

(V 57 C 66)

(From Patna)*

K. S. HEGDE AND A. N. RAY, JJ.

Baidyanath Panjira, Appellant v. Sita Ram Mahto and others, Respondents.

Civil Appeal No. 25 of 1969, D/- 13-8-1969.

(A) Representation of the People Act (1950), S. 23 (1), (2) and (3) (as amended by Act 47 of 1966) — Scope — Power to correct entries in electoral roll or to include new names — Cannot be exercised after last date for making nomination and before completion of election.

Section 23 (3) takes away the power of the Electoral Registration Officer or the Chief Electoral Officer to correct the entries in the electoral rolls or to include new names in the electoral rolls of a constituency after the last date for making the nominations for election in that constituency and before the completion of that election. Section 23 (3) does not deal with any mode or procedure in the matter of registering the voters. It interdicts the concerned officers from interfering with the electoral rolls under the prescribed circumstances. It puts a stop to the power conferred on them. It is not a question of irregular exercise of power but a lack of power. (Para 7)

The object of Section 23 (1) and (2) is to see that to the extent possible, all persons qualified to be registered as voters in any particular constituency should be duly registered and to remove from the rolls all those who are not qualified to be registered. Sub-section (3) of Sec. 23, however, is an important exception to the rules noted earlier. It gives a mandate to the electoral registration officers not to amend, transpose or delete any entry in

* (Elec. Petn. No. 4 of 1968, D/- 11-12-1968—(Pat.).)

the electoral roll of a constituency after the last date for making nominations for election in that constituency and before the completion of that election. If there was no such provision, there would have been room for considerable manipulations, particularly when there are only limited number of electors in a constituency. But for that provision, it would have been possible for the concerned authorities to so manipulate the electoral rolls as to advance the prospects of a particular candidate. This would be more so if either all or a section of the electors are persons nominated to local authorities. The legislative mandate like the one embodied in Section 23 (3) must be considered as mandatory not merely because of the language employed in that sub-section but also in view of the purpose behind the provision in question. (Para 7)

(B) Representation of the People Act (1950), S. 23 (2) and (3) (as amended by Act 47 of 1966) and 27 (2) — There is no conflict between Sections 23 (2) and 27 (2) — Inclusion of names of electors after last date for making nomination — Objection to — Entertainability.

There is no conflict between sub-section (2) of Section 23 and sub-section (2) of Section 27. In fact the provisions of Section 23 have been incorporated into Section 27 (2) in view of Section 27 (2) (e). A fair reading of the various clauses in Section 27 (2) will make it clear that the entries in an electoral roll of a constituency, as they stood on the last date for making the nominations for an election in that constituency, should be considered as final for the purpose of that election. Hence, objection to inclusion of names of electors after last date for making nomination can be validly taken. (Para 8)

(C) Representation of the People Act (1951), S. 62 (1) — Representation of the People Act (1950), S. 23 (3) (as amended by Act 47 of 1966) — Electoral roll referred to in Section 62 (1) is that which is in force on last day for making nomination.

In view of S. 23 (3) of the Act of 1950 the electoral roll referred to in S. 62 (1) of the 1951 Act must be understood to be the electoral roll that was in force on the last day for making the nominations for the election. Therefore, an objection can be validly taken to the franchise exercised by electors whose names were included in the electoral roll after last date for making nomination. (Para 9)

(D) Representation of the People Act (1951), S. 100 (1) (d) — Grounds for declaring election void — Inclusion of names of electors in electoral roll in contravention of S. 23 (3) of Representation of the People Act (1950) (as amended by Act 47 of 1966) — Reception of such votes materially affecting election of returned candidate — Held, it was sufficient ground for invalidating election under S. 100 (1) — (Representation of the People Act (1950), Section 23 (3) (as amended by Act 47 of 1966)). AIR 1963 SC 458, Referred; Election Petition No. 4 of 1968, D/- 11-12-1968 (Pat), Affirmed.

(Para 10)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 458 (V 50) =

1963-3 SCR 479, B. M. Ramaswamy v. B. M. Krishnamurthy 11

Mr. D. Goburdhun, Advocate, for Appellant; M/s. Birendra Prasad Sinha, S. K. Bagga, Hardev Singh and Mrs. S. Bagga, Advocates, for Respondent No. 1; Mr. Hardev Singh, Advocate, for Respondents Nos. 2 and 3.

The following Judgment of the Court was delivered by

HEGDE, J.: The principal question raised in this appeal under S. 116A of the Representation of the People Act, 1951 (to be hereinafter referred to as the Act) is as to the scope of S. 23 (3) of the Representation of the People Act, 1950 (to be hereinafter referred to as the 1950 Act). A few subsidiary contentions have also been canvassed. They will be considered at the appropriate stage.

2. The election petition from which this appeal arises relates to the Darbhanga Local Authorities Constituency of the Bihar Legislative Council. The calendar for the election for that constituency was as follows:

1. Last date for filing nomination papers—2-4-1968.
2. Date of scrutiny of nomination papers—4-4-1968.
3. Last date for withdrawal of candidatures—6-4-1968.
4. Date of poll—28-4-1968.
5. Date of declaration of result—29-4-1968.

3. Originally five candidates submitted their nominations for the election in question. On scrutiny all of them were held to have been validly nominated. Two of them later withdrew their candidatures within the period prescribed leaving in the field Shri Baidyanath Panjira, the appellant herein, Shri Raj Kumar Mahaseth,

whose names were included in the roll on that date must be held to be void votes. That conclusion satisfies one of the conditions prescribed in Section 100 (1) (d). We have now to see whether the other conditions prescribed in that clause namely whether the High Court on the material before it could have been of the opinion that the result of the election in so far as it concerned the returned candidate has been materially affected because of the reception of the votes which are void. The High Court elaborately considered that question. It has examined each one of the disputed votes and has come to the conclusion that if those votes had been excluded, the valid votes received by the contesting candidates in the first count would have been as follows:

| | |
|-------------------|-----|
| Appellant | 32. |
| Respondent No. 2. | 46. |
| Respondent No. 3. | 23. |

In the second count after the elimination of the third respondent and taking into consideration the second preferences given by the electors who gave their first preference to him, the following would have been the position:

| | |
|------------------|--------------|
| Appellant | 43 votes and |
| Respondent No. 2 | 57 votes. |

No material was placed before us to show that this conclusion was wrong. There was some controversy about two votes but we do not think it necessary to go into the same as any decision as regards their validity will not affect the final conclusion.

11. Before leaving this case, it is necessary to mention that at one stage of the arguments, the learned Counsel for the appellant contended that the decision of this Court in *B. M. Ramaswamy v. B. M. Krishnamurthy*, 1963-3 SCR 479 = (AIR 1963 SC 458) governs the facts of this case. But after some discussion he gave up that contention. The ratio of that decision has no relevance for our present purpose. In that case, the High Court came to the conclusion that the corrections in the concerned electoral roll had been made before the last date prescribed for filing nominations to the election but it came to the conclusion that the electors newly added to the list were not qualified to be registered as electors. This Court overruled that finding holding that every person whose name finds place in the electoral roll must be held to be qualified to be a candidate whether he was qualified to

be registered as an elector or not. In other words it upheld the finality of the electoral roll as it stood on the last date for filing nominations for the election.

12. For the reasons mentioned above this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 318 (V 57 C 67)

(From Allahabad: AIR 1967 All 491)

S. M. SIKRI, G. K. MITTER
AND K. S. HEGDE, JJ.

Dhian Singh, Appellant v. Municipal Board, Saharanpur and another, Respondents.

Criminal Appeal No. 122 of 1967, D/- 31-7-1969.

(A) Criminal P. C. (1898), Section 417(3) — Prevention of Food Adulteration Act (1954), Section 20 — Complaint for offence under the Act purported to have been filed by Municipal Board but signed by its Food Inspector — Acquittal — Municipal Board held competent to file appeal against acquittal — Municipal Board was competent to file complaint or to authorise its Food Inspector on its behalf.

Where a complaint for an offence under the Prevention of Food Adulteration Act, was purported to have been filed by the Municipal Board but it was signed by its Food Inspector, the Municipal Board held, was competent to file appeal, under Section 417 (3) of Criminal P. C. against the acquittal of the accused. (Para 6)

The Municipal Board being a local authority was competent to file complaint in view of Section 20, Prevention of Food Adulteration Act. It was also competent for that Board to authorise some one else to file complaints under the Prevention of Food Adulteration Act on its behalf. It is true that the complaint was signed by the Food Inspector but it was competent for the Municipal Board to authorise him to file the complaint. Criminal Appln. No. 100 of 1966, D/- 27-3-1969 (SC), Relied on. (Paras 4, 5)

(B) Prevention of Food Adulteration Act (1954), Section 13 — Report of Public Analyst — Need not contain mode or particulars of analysis nor the test applied — But should contain result of analysis namely, data from which it can be

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inferred whether the article of food was or was not adulterated — Relevant data given in report — Accused can be convicted on basis of such report. AIR 1964 All 270, Approved. (Para 7)

(C) Constitution of India, Article 136 — Proceedings under Prevention of Food Adulteration Act — Food Inspector's authority to file complaint on behalf of Municipal Board neither challenged before trial court nor before High Court in appeal — Accused cannot be permitted to take up contention for first time before the Supreme Court after disposal of appeal by the High Court. AIR 1966 SC 128, Relied on. (Para 5)

(D) Prevention of Food Adulteration Act (1954), Section 20 — Permission under — No question of applying one's mind to the facts of case before institution of complaint arises — Authority under section can be conferred long before a particular offence takes place.

Under Section 20 no question of applying one's mind to the facts of the case before the institution of the complaint arises as the authority to be conferred under that provision can be conferred long before a particular offence has taken place. It is a conferment of an authority to institute a particular case or even a class of cases. That section merely prescribes that persons or authorities designated in that section are alone competent to file complaints under the statute in question. AIR 1948 PC 82 and AIR 1954 SC 637, Disting. (Para 5)

Cases Referred: Chronological Paras
(1969) Cri. App. No. 100 of 1966,

D/- 27-3-1969 (SC), K. C. Agarwal v. Delhi Administration 5
(1967) 1967 All WR (HC) 223 =
1967 All Cri R. 172, Dhian Singh v. Municipal Board, Saharanpur 3
(1966) AIR 1966 SC 128 (V 53) =
1965-2 SCR 894 = 1966 Cri LJ 106, Mangaldas Raghavji v. State of Maharashtra 5

(1964) AIR 1964 All 270 (V 51) =
1963 All LJ 765, Nagar Mahapalika of Kanpur v. Sri Ram 7
(1954) AIR 1954 SC 637 (V 41) =
1954 Cri LJ 1656, Madan Mohan Singh v. State of U. P. 5

(1948) AIR 1948 PC 82 (V 35) =
75 Ind App 30, Gokulchand Dwarkadas Morarka v. The King 5

M/s. R. K. Garg and S. C. Agarwal, Advocates of M/s. Ramamurthi and Co., and Miss Sumitra Chakravarty and Mr. Uma Dutt, Advocates, for Appellant; Mr.

O. P. Rana, Advocate, for Respondent No. 2.

The following Judgment of the Court was delivered by

HEGDE, J.: Two contentions advanced in this appeal by special leave are (1) that the appeal filed by the Municipal Board, Saharanpur before the High Court of Allahabad under Section 417 (3) of the Criminal Procedure Code was not maintainable in law, and (2) the accused could not have been convicted on the strength of the certificate of the Public Analyst annexed to the complaint. The High Court rejected both these contentions.

2. The material facts relating to this appeal are these: The accused in this case is the proprietor of Khalsa Tea Stall situated in Court Road, Saharanpur. Among other things, he was selling coloured sweets. On suspicion that the sweets sold by him were adulterated, the Food Inspector, Municipal Board, Saharanpur purchased from the accused for examination some coloured sweets under a Yad-dasht on May 31, 1963 and sent a portion of the same to the Public Analyst of the Government of U. P. for examination. The Public Analyst submitted his report on June 24, 1963. It reads:

"See Rule 7 (3)

Report By The Public Analyst
Report No. 11652

I hereby certify that I, Dr. R. S. Srivastava, Public Analyst for Uttar Pradesh, duly appointed under the provisions of the Prevention of Food Adulteration Act, 1954, received on the 4th day of June, 1963, from the Food Inspector C/o Medical Officer of Health, Municipal Board, Saharanpur, a sample of coloured sweet (Patisa) prepared in Vanaspati No. 264 for analysis, properly sealed and fastened and that I found the seal intact and unbroken.

I, further certify that I have caused to be analysed the aforementioned sample, and declare the result of the analysis to be as follows:—

Test for the presence of coal-tar dye:—
Positive.

Coal-tar dye identified:—Metanil yellow. (Colour Index No. 138).

Analytical Data In Respect of
Fat Or Oil Used In The Preparation of the Sample

1. Bityro—refractometer reading at 40°C:— 50.5.

2. Melting point :— 83.8°C.

has taken place. It is a conferment of an authority to institute a particular case or even a class of cases. That section merely prescribes that persons or authorities designated in that section are alone competent to file complaints under the statute in question.

6. For the reasons mentioned above, we are unable to accept the contention of the accused that the Municipal Board of Saharanpur was not competent to file the appeal.

7. The only other question canvassed before us is that the report of the analyst could not have afforded a valid basis for founding the conviction as the data on the basis of which the analyst had reached his conclusion is not found in that report or otherwise made available to the court. We are unable to accept this contention as well. It is not correct to say that the report does not contain the data on the basis of which the analyst came to his conclusion. The relevant data is given in the report. A report somewhat similar to the one before us was held by this Court to contain sufficient data in *Mangaldas's case* referred to earlier. The correct view of the law on the subject is as stated in the decision of the Allahabad High Court in *Nagar Mahapalika of Kanpur v. Sri Ram*, 1963 All LJ 765 = (AIR 1964 All 270) wherein it is observed:

"that the report of the public analyst under Section 13 of the Prevention of Food Adulteration Act, 1954, need not contain the mode or particulars of analysis nor the test applied but should contain the result of analysis namely, data from which it can be inferred whether the article of food was or was not adulterated as defined in Section 2 (1) of the Act."

8. In the result the appeal fails and the same is dismissed. The appellant is on bail. He should surrender to his bail and serve the sentence imposed on him.

Appeal dismissed.

AIR 1970 SUPREME COURT 322 (V 57 C 68)

(From Rajasthan: ILR (1966) 16 Raj 607)
J. C. SHAH, Ag. C. J., V. RAMASWAMI
AND A. N. GROVER JJ.

Satyanarayan S. Mody, Appellant v.
Controller of Estate Duty, Delhi and
Rajasthan, New Delhi, Respondent.

Civil Appeal No. 438 of 1967, D/- 31-7-1969.

LM/AN/E3/69/LGC/D

Estate Duty Act (1953), Section 10 — Three Fixed Deposit receipts in name of P — P intimating bank to renew two receipts in joint names of P and S payable to either or survivor and also executing a gift in favour of S — Renewals of receipts by P on several occasions even after gift — Third receipt which was also renewed in joint names of P and S encashed and the amount invested in name of S alone — Death of P within two years of encashment — Other two receipts encashed by S — Whole amount under three receipts held liable to estate duty.

Section 10 of the Estate Duty Act (1953) clearly means that if in respect of any property which is gifted, bona fide possession and enjoyment is not immediately assumed by the donee and thenceforward retained by him to the entire exclusion of the donor or of any benefit to him therein the property gifted shall not be excluded from the estate subject to estate duty. (Para 10)

One P by her letter informed the Bank in which she has fixed deposits that she intended to make a gift of the amounts of two out of the three fixed deposit receipts to S and requested that the receipts be renewed in joint names of P and S, payable to either or survivor. She also executed a gift deed in favour of S. The third receipt had already been obtained in their joint names. The deposit receipts were renewed on several occasions by P, even after the execution of the gift deed, in the joint names of P and S. The third receipt was encashed on 25-8-1955 and the amount realised was invested in the name of S alone. The other two receipts were renewed in names of P and S. After the death of P on 15-2-1956, the two receipts were encashed by S.

Held, that on the facts and circumstances of the case the entire sum under the three receipts was liable to be included in the estate of the deceased as property deemed to pass on her death under Section 10 of the Estate Duty Act and was liable to estate duty.

In the circumstances it could not be said that bona fide possession and enjoyment of the property gifted was immediately assumed by S and thenceforward retained by him to the entire exclusion of P. The right retained by P to have the receipts made out in her name jointly with S and the power to recover the amount from the Bank without the concurrence of S clearly indicated that she was not excluded, but she had retained

important benefits in herself in the fixed deposit receipts. The conduct of P clearly indicated that she had no intention to part with control over the property.

(Para 11)

It is true that the third receipt was encashed during the life time of P and the amount was invested in the name of S alone. But the encashment and re-investment were within two years of the death of P and the amounts so reinvested were liable to be included in the estate of P.

(Para 12)

Cases Referred: Chronological Paras
(1933) AIR 1933 Mad 628 (V 20) =
65 Mad LJ 471, Imperial Bank
of India, Madras v. S. Krishna-
murthi

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Mr. M. C. Chagla, Senior Advocate (M/s. B. D. Sharma and M. D. Bhargava, Advocates with him), for Appellant; Mr. Jagdish Swarup, Solicitor General of India (M/s. T. A. Ramachandran, R. N. Sachthey and B. D. Sharma, Advocates with him), for Respondents.

The following Judgment of the Court was delivered by

SHAH, Ag. C. J.: Purnabai widow of Sagarmal Mody held on April 1, 1953 three deposit receipts of the aggregate face value of Rs. 6,26,724-14-0 with the State Bank of Bikaner. By her letter dated July 22, 1952 Purnabai informed the Bank that she intended to make a gift of the amounts of two out of the three receipts to Suryakant son of her adopted son Satyanarayana, and requested that the receipts be renewed for three months in the joint names of

"Purnabai Sagarmal Mody and/or Suryakant S. Mody — payable to either or survivor,"

and that the renewed fixed deposit receipts be sent to Satyanarayana at Bombay. Pursuant to this letter two fresh receipts were issued on August 3, 1953 for Rs. 5,00,000 and Rs. 45,793-4-0. It appears that a receipt for Rs. 80,931-10-0 was previously obtained in the joint names of Purnabai and Suryakant on July 4, 1953.

2. On August 16, 1953 Purnabai executed a deed of gift in favour of Suryakant in respect of the three receipts containing the following recitals:

"Out of natural love and affection I have towards the said Suryakant son of Satyanarayana I hand over to the said Satyanarayana as the father and natural guardian of the said Suryakant Fixed Deposit Receipts total for Rs. 6,26,724-14-0.

* * * * F. D. R. No. 222/8293, dated 3rd August, 1953 for Rs. 45,793-4-0, F. D. R. No. 221/8292, dated 3rd August, 1953 for Rs. 5,00,000 of the Bank of Bikaner Ltd., Jaipur and F. D. R. No. 11446, dated 4th July, 1953 for Rs. 80,931-10-0 of Bank of Bikaner Ltd., Jhunjhunu in the name of Purnabai Sagarmal and Suryakant Satyanarayana Mody payable to either or survivor as and by way of gift to the said Suryakant on the 15th day of August 1953 and that the said Satyanarayana for and on behalf of and as the natural guardian of the said Suryakant accepted the said gift of Rs. 6,26,724-14-0 * * * gifted by me as aforesaid."

The gift deed contained a confirmation by Satyanarayana that he had accepted the gift for and on behalf of and as natural guardian of Suryakant, "to the intent and effect that the said Suryakant shall be the absolute owner of the sum gifted."

3. On August 17, 1953 Purnabai addressed a letter to the Manager of the Bank enclosing a copy of the declaration of gift and intimated that her grandson Suryakant was the sole owner of the amount of the two fixed deposit receipts and till Suryakant S. Mody attained the age of majority the receipts should remain in the joint names as they then stood.

4. From time to time, Purnabai presented the receipts for renewal when they matured and obtained fresh receipts in the joint names of herself and Suryakant. On August 25, 1955 the receipt for Rs. 80,931-10-0 was encashed and out of the amount of Rs. 86,732 realized, Rs. 5,000 were invested in the name of Suryakant in National Savings Certificates. The balance was also deposited alone with a firm in Bombay also in the name of Suryakant alone. The other two receipts were renewed in the joint names of Purnabai and Suryakant.

5. After the death of Purnabai on February 15, 1956, the two receipts were encashed by Suryakant. The Assistant Controller of Estates Duty in proceedings for assessment of estate duty held inter alia that possession and enjoyment of the gifted property was not assumed by the donee to the entire exclusion of the donor, and on that account the amount of the two receipts and interest thereon formed part of the estate of Purnabai and was liable to estate duty. Regarding the third receipt for Rs. 80,931-10-0 the Assis-

tant Controller observed that even though the earlier receipt was discharged on August 25, 1955 i. e., within two years of the death of Purnabai and the amount was invested in the name of Suryakant, by virtue of the provisions of the Estate Duty Act the amount held in the name of Suryakant alone, was for assessment of estate duty liable to be included in the estate of Purnabai.

6. In appeal the Central Board of Revenue confirmed the order. The Board held that at all material times during the currency of the fixed deposit Purnabai had the right to receive the money from the Bank by giving discharge for the same and that whenever the Fixed Deposit Receipts matured during the lifetime of Purnabai, the receipts were, in fact, discharged by her alone and in the circumstances it could not be said that the property was held by the donee to the entire exclusion of the donor.

7. The Board of Revenue referred the following question to the High Court of Rajasthan for opinion:

"Whether on the facts and in the circumstances of the case the sum of Rs. 6,85,193 was correctly included in the estate of the deceased as property deemed to pass on her death under Section 10 of the Estate Duty Act, 1953?" The High Court of Rajasthan answered the question in the affirmative. With certificate granted by the High Court this appeal has been preferred.

8. The deposit receipts were renewed from time to time after August 16, 1953 in the joint names of Purnabai and Suryakant. Till August 25, 1955 under their terms the receipts could be encashed by either or the survivor. Even after Purnabai made a gift of the amount represented by the three receipts, she continued to obtain the receipts in the joint names, presumably with the object of the not parting with control over those receipts.

9. Counsel for the appellant however contended that the fixed deposit receipts were held by Purnabai in her name as benamidar for Suryakant. Counsel placed strong reliance upon the letters dated July 22, 1953, August 17, 1953 and the terms of the deed of gift dated August 16, 1953. By the letter dated July 22, 1953 the Manager of the Bank was informed that in respect of two out of the three receipts Purnabai intended to make a gift and the Manager was requested that the receipts be made in the joint names of

Purnabai and Suryakant. It was expressly recited in the letter:

"I intend to gift the entire amount of the receipts to my grandson Mr. Suryakant S. Mody hence you are requested to prepare the receipts in joint names as under:

"Purnabai Sagarmall Mody and/or Suryakant S. Mody payable to either or survivor."

The deed of gift also recites that Purnabai had made a gift of the amount of Rs. 6,26,724-14-0 represented by the previous receipts in favour of Suryakant and that the gift was accepted by Satyanarayana on behalf of Suryakant. The letter dated August 17, 1953 recites that a copy of the deed of declaration of gift was sent to the Bank for record and information and proceeds to state:

"Further I would like to state that now Suryakant S. Mody is the sole owner of the above Fixed Deposit Receipts in question, till Suryakant S. Mody attains majority the receipts should remain in joint names as it stands now."

It is clear that Purnabai desired to make a gift of the amount represented by the previous deposit receipts and did in fact execute a deed of gift. The Bank had notice of the gift deed. Counsel for the appellant contends that Purnabai did everything possible to divest herself of her interest in the money held by her, in deposit with the Bank, and retained no interest therein and that in obtaining renewal of the receipts in the joint names of herself and of Suryakant, she was merely a benamidar and in any event was acting on behalf of Suryakant. Counsel further contends that the Bank having notice of the gift could not have parted with the money except only for the benefit of the minor and by obtaining renewal of the receipt in favour of the minor Suryakant and Purnabai, the latter retained no possession or enjoyment of the money represented by the receipts. Counsel invited our attention to a decision of the Madras High Court in Imperial Bank of India, Madras v. S. Krishnamurthi, AIR 1933 Mad 628 in which Beasley, C. J. speaking for the Court observed that when a Bank having notice that the administrators of the estate of the depositor intended to commit a breach of trust by seeking to invest monies contrary to express directions of the will paid out the money, the Bank was liable to make good to the beneficiary the money deposited by the testator. In that

case one Naidu had deposited a sum of money with the Imperial Bank of India in fixed deposit. Naidu died having bequeathed by his will the amount deposited to his son Krishnamurthi who was then a minor. Naidu had appointed by his will two persons to be guardians of Krishnamurthi with authority to receive the amount in fixed deposit with the Imperial Bank and to apply the same for the maintenance and education of Krishnamurthi. The guardians obtained from the High Court of Madras grant of letters of administration with copy of the will annexed. After the death of one of the guardians the surviving guardian withdrew the money from the Bank on the pretext that he wanted to invest it on more advantageous terms in house property or some other form of investment and misappropriated it. On attaining the age of majority Krishnamurthi sued the Bank. It was held by the High Court that the Bank knowing of the trust created by the will had parted with and delivered the amount deposited to the administrator who intended to commit a breach of the trust. The learned Chief Justice quoted a passage from Hart's Law of Banking (Edn. 3) at p. 159 that "A banker who receives into his possession moneys of which his customer to his knowledge became the owner in a fiduciary character, contracts the duty not to part with them even at the mandate of his customer for purposes which are inconsistent with the customer's fiduciary character and duty," and upheld the claim of Krishnamurthi.

10. It is unnecessary to consider whether in the present case the investment was made by renewal of fixed deposit receipts after August 16, 1953 for a purpose which the Bank knew was inconsistent with Purnabai's fiduciary character and duty. We are not concerned in this case to decide whether the Bank could have refused to pay the amount of the renewed deposit receipts if demanded by Purnabai. Whether the amount of deposit receipts was liable to estate duty must be determined on the true effect of Section 10 of the Estate Duty Act 34 of 1953. Section 10 of that Act provides:

"Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire

exclusion of the donor or of any benefit to him by contract or otherwise:

Provided that the property shall not be deemed to pass by reason only that it was not, as from the date of the gift, exclusively retained as aforesaid, if by means of the surrender of the reserved benefit or otherwise, it is subsequently enjoyed to the entire exclusion of the donor or of any benefit to him for at least two years before the death. Provided.....".

The phraseology of the section is somewhat involved. The purport of the section is however, clear. The section clearly means that if in respect of any property which is gifted, bona fide possession and enjoyment is not immediately assumed by the donee and thenceforward retained by him to the entire exclusion of the donor or of any benefit to him therein the property gifted shall not be excluded from the estate subject to estate duty.

11. The question which must be determined therefore, is whether in the present case the donee did under the deed of gift immediately assume bona fide possession and enjoyment of the fixed deposit receipts gifted to him, and thenceforward retained the same to the entire exclusion of Purnabai or of any benefit arising to her by contract or otherwise. The conduct of Purnabai clearly indicates that she had no intention to part with control over the property; the deposit receipts were obtained in joint names, and Purnabai had authority to withdraw the amount from the Bank, without consulting the guardian of Suryakant. The deposit receipts were renewed on several occasions even after the execution of the deed of gift in the joint names of Purnabai and Suryakant. Purnabai alone presented the fixed deposit receipts for renewal. She could under the terms of the receipts receive the moneys to the entire exclusion of Suryakant. We are unable to hold, in the circumstances, that bona fide possession and enjoyment of the property gifted was immediately assumed by Suryakant and thenceforward retained by him to the entire exclusion of Purnabai. The right retained by Purnabai to have the receipts made out in her name jointly with Suryakant and the power to recover the amount from the Bank without the concurrence of Suryakant clearly indicate that she was not excluded, but she had retained important

benefits in herself in the fixed deposit receipts.

12. It is true that the third receipt was encashed during the life time of Purnabai, and the amount was invested in the name of Suryakant alone. But the encashment and reinvestment were within two years of the death of Purnabai and the amounts so reinvested were liable to be included in the estate of Purnabai.

13. The argument that fixed deposit receipts had remained exclusively in the possession of Satyanarayana as guardian of Suryakant and they were obtained by him from Purnabai for the purpose of renewal is not supported by any evidence. There is also no evidence that in obtaining the receipts in the joint names Purnabai acted as a guardian of Suryakant nor that she was a benamidar of Suryakant. We are of the view that the High Court was right in answering the question against the appellant.

14. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 326 (V 57 C 69)

(From Patna)*

S. M. SIKRI, G. K. MITTER AND
K. S. HEGDE, JJ.

Ram Prasad Sharma, Appellant v. The State of Bihar, Respondent.

Criminal Appeal No. 208 of 1966, D/- 30-7-1969.

Penal Code (1860), Sections 302, 304 — Accused charged under Section 302 for having shot down deceased with gun — Sessions Judge rejecting prosecution story on basis of entries in chaukidar's hath chitha which showed that deceased was dead prior to date of occurrence — Who made entry and whether it was made in discharge of official duty not proved — Hath Chitha is not admissible — Conviction by High Court on basis of other evidence and F. I. R., held, justified — Evidence Act (1872), Section 35.

Out of fourteen persons who were tried by Sessions Judge on various charges, one R was charged under Section 302,

*(Criminal Appeal No. 530 of 1962 and Govt. Appeal No. 44 of 1962, D/- 22-2-1966—(Pat).)

LM/AN/E5/69/GDR/D

Penal Code, for having shot down with his gun one K when he opened fire on the crowd of the villagers. The Sessions Judge rejected the version of the prosecution regarding the shooting down of K mainly on the basis of entries in an attested copy of the Chaukidar's hath chitha according to which the death of K took place three days prior to the occurrence. The Sessions Judge also relied on the First Information Report in which the name of K did not find mention. There being no proof as to who made the entry and whether the entry was made in the discharge of any official duty, the High Court held the hath chitha inadmissible but on other evidence on record it came to the conclusion that K was actually shot down by R and convicted R. under Section 304, Penal Code. The High Court also accepted the explanation of prosecution witness who had made the F. I. R. that he had named one C as being the person shot and killed by R because he had heard a hulla that C had been murdered.

Held, that the High Court was right in holding the hath chitha inadmissible in evidence. The reason why an entry made by a public servant in a public or other official book, register or record stating a fact in issue or a relevant fact has been made relevant under Section 35 of Evidence Act is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. Inasmuch as there was no proof that the entry was made by a public servant in the discharge of his official duties, the hath chitha was rightly held to be inadmissible. (Para 12)

Held further that the High Court was right in accepting the explanation of prosecution witness who had made the F. I. R. AIR 1945 Pat 489 and AIR 1965 SC 282, Rel. on; Cri. A. No. 530 of 1962 and Govt. Appeal No. 44 of 1962, D/- 22-2-1966 (Pat), Affirmed. (Para 13)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 282 (V 52) =
1965-3 SCR 861, Brij Mohan
Singh v. Priya Brat Narain Sinha

11, 12
(1945) AIR 1945 Pat 489 (V 32) =
26 Pat LT 225, Sanatan Senapati
v. Emperor 11

M/s. A. S. R. Chari and M. K. Ramamurthi, Senior Advocate (M/s. G. Ramamurthy and Vineet Kumar Advocates,

with them), for Appellant; Mr. B. P. Jha, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.: Fourteen persons were tried by the learned Second Additional Sessions Judge, Bhagalpur, on various charges. Out of these 14 persons Sheo Prasad Sharma and Ram Prasad Sharma were charged under Section 302, I. P. C. Sheo Prasad Sharma was charged under Section 302 for having intentionally caused the death of Qudrat Mian by shooting him down with his gun whereas Ram Prasad Sharma was charged under this section for having shot down with his gun Kaleshwar Yadav and thus having caused the murder of this person.

2. The Second Additional Sessions Judge, Bhagalpur convicted Sheo Prasad Sharma under Sections 304, 324/34, 201 and 148 and sentenced him to seven years rigorous imprisonment. The appellant, Ram Prasad Sharma was convicted under Sections 326/149, 324/34, 201 and 148, I. P. C. and sentenced to four years rigorous imprisonment. Seven other accused were also convicted but it is not necessary to mention the sections under which they were convicted. Five of the accused persons were acquitted by the learned Second Additional Sessions Judge.

3. Two appeals were filed before the High Court, one by the State and the other by the nine convicted persons, including Ram Prasad Sharma. Both the appeals were heard together. The High Court accepted the appeal of the State as far as Ram Prasad Sharma was concerned and convicted him under Section 304, I. P. C., in connection with the shooting and causing the death of Kaleshwar and sentenced him to rigorous imprisonment for seven years. The convictions of seven others were altered from under Sections 326/149 to one under Sections 304/149 but the sentence of four years rigorous imprisonment was maintained. In other respects the convictions were maintained. The High Court, however, quashed the convictions under Section 201, I. P. C.

4. The nine convicted persons filed petition for special leave to appeal. This Court by its order dated October 4, 1966 rejected the petition except as regards Ram Prasad Sharma and his appeal is now before us.

5. The prosecution case as accepted by the High Court was, in brief, as

follows. On August 15, 1960, at about 1.30 or 2 p.m., by the side of a Danr (water channel) known as Chaksafia Danr at village Bindi about five miles away from police Station, Banka, a serious occurrence took place. The Chaksafia Danr runs between village Bindi which is to its east and Banki which is to its west and then goes further north to village Bhadrar and other villages. Lands of several villages, namely, Bhadrar, Nayadih, Uprama, Basuara, Jitnagar, Majhiara, Banki, etc. are irrigated from the water of this Danr and there are detailed entries regarding the respective rights of the different villages in the Fard Abpashi which was prepared at the time of the last survey. It appears that the villagers of different villages who enjoy the above rights go in a body every year during the rainy season for clearing this Danr in order that there may not be any obstruction in the flow of water therein. On the date of occurrence, i. e. August 15, 1960, a number of persons of villages Bhadrar, Nayadih, Uprama, Basuara, Jitnagar and Bhatkunki went along with spades to clear this Danr in the usual course and some of them had lathis also with them. The total number of persons were estimated to vary from about 150 to about 400. When they reached the brick kiln, which exists in Malmala Tikar they were confronted by a mob of 40 to 50 persons including all the convicted persons. Sheo Prasad Sharma and Ram Prasad Sharma were armed with guns and Patal Thakur was armed with a pharsa and the remaining accused except Dhanusdhari Mehta were armed with bhalas.

6. It may be mentioned that in the First Information Report Dhanusdhari Mehta was alleged to have been armed with a pistol but this allegation was subsequently given up. Dhanusdhari Mehta was a retired Inspector of police; his son Ram Prasad Sharma was practising lawyer at Bhagalpur at the time of the occurrence in question.

7. On seeing this crowd of villagers, Sheo Prasad Sharma directed them to return and threatened to shoot them if they failed to do so. There was some exchange of hot words and brick-bats were thrown by both sides. Sheo Prasad Sharma thereafter fired one shot towards the sky but the villagers did not disperse. Then Dhanusdhari ordered his two sons Ram Prasad Sharma and Sheo Prasad Sharma to open fire on the villagers. On

this both Ram Prasad Sharma and Sheo Prasad Sharma opened fire with their guns on the villagers. One shot fired by Sheo Prasad Sharma hit one Qudrat Mian and he fell down and died on the spot. One other villager was alleged to have been shot by Ram Prasad Sharma and he died on the spot. A number of villagers sustained gun shot injuries and as a result of the firing by Sheo Prasad Sharma and Ram Prasad Sharma, who are estimated to have fired about 12 rounds, the villagers dispersed. Sobhan Mandal, one of the injured person went to the Police Station with three other injured persons, namely, Chotan Rai, P. W. 5, Jagdeo Choudhary, P. W. 8 and Kishori Prasad Singh, P. W. 12, who had also sustained gun shot injuries.

8. The learned Additional Sessions Judge had rejected the prosecution story that Kaleshwar Yadav was shot and killed during the occurrence. He had come to the conclusion that Kaleshwar Yadav had died prior to the date of occurrence. The High Court has accepted the prosecution version and it is this finding which is being seriously challenged by the learned counsel for Ram Prasad Sharma, appellant.

9. The learned Additional Sessions Judge had rejected the version of the prosecution regarding the shooting down of Kaleshwar Yadav mainly on the basis of entries in an attested copy of the Chaukidar's hath chitha (Ext. D) according to which the death of Kaleshwar took place in Gopalpur mauza on August 12, 1960, that is, three days prior to the occurrence. The learned Additional Sessions Judge had also relied on the First Information Report in which the name of Kaleshwar Yadav does not find mention.

10. Two points arise before us, first, whether the hath chitha is admissible in evidence, and secondly, whether on the evidence on record it is otherwise proved that Kaleshwar Yadav was shot down by the appellant Ram Prasad Sharma.

11. According to the entries in this document, Ext. D, Kaleshwar Yadav died on August 12, 1960, in Gopalpur Mauza and in the remarks column of this register he is described as "Bahanoi (brother-in-law) of Asarfi Yadav." We looked at the attested copy produced in Court and we were unable to ascertain the date on which the attested copy had been obtained by the defence. The only dates this document bears are the date of attesta-

tion (October 15, 1960) by the District Statistical Officer, the date September 22, 1960, next to the signature of one Shukdeo Chowdhary, and the date of admission by the Additional Sessions Judge (June 25, 1962). As rightly pointed out by the High Court the learned Sessions Judge took this copy on record in an extraordinary manner. The prosecution evidence closed on June 21, 1962 and on June 25, 1962, this attested copy was admitted in evidence without any proof. On the same day an order was passed calling for the original. On the very next day the Public Prosecutor filed a petition objecting to the admission of this document and alleged that the document was bogus. The hearing of the argument thereafter proceeded on July 4, 1962. The Public Prosecutor again filed a petition that this document be not taken in evidence. The learned Additional Sessions Judge disposed of this petition with the following order:

"Let the petition be placed with the record. The original has once again been called for. The matter will be discussed in the judgment."

It is pointed out by the High Court that there is no further reference to the document in the order sheet. After the arguments concluded on July 7, 1962, the case was adjourned for judgment. The judgment of the learned Additional Sessions Judge shows that the original was subsequently received by him with letter dated July 10, 1962, and he observed that he was satisfied about its genuineness. The High Court rightly pointed out that the Additional Sessions Judge should have dealt with the question of the admissibility of the document. The High Court, following *Sanatan Senapati v. Emperor*, AIR 1945 Pat 489 and *Brij Mohan Sinha v. Priya Brat Narain Sinha*, 1968-3 SCR 861 = (AIR 1965 SC 282) held that the document was inadmissible in evidence.

12. We agree with the conclusion arrived at by the High Court. Section 35 of the Evidence Act provides:

"An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact."

In this case it has not been proved that the entry in question was made by a

public servant in the discharge of his official duties. As observed by this Court in 1965-3 SCR 861 at p. 864 = (AIR 1965 SC 282 at p. 286) "the reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high." No proof has been led in this case as to who made the entry and whether the entry was made in the discharge of any official duty. In the result we must hold that Ex. D, the hath chitha, was rightly held by the High Court to be inadmissible.

13. The High Court then dealt with the other evidence on the record and came to the conclusion that Kaleshwar was actually shot down by the appellant, Ram Prasad Sharma. The learned counsel for the appellant has tried to assail these findings but he has not been able to show in what way the High Court has gone wrong in coming to the conclusion. The High Court states that ten witnesses have named Kaleshwar being the second person who was shot. Further Kaleshwar's son and widow, P. Ws. 24 and 34, Chamak Lal Yadav and Karma Devi, deposed that on the day of occurrence Kaleshwar had left his house with a Kudal and had gone to Chaksafia Danr along with others. They further deposed that on the next day they learnt from Nandai Lal Singh, P. W. 17, that Kaleshwar had been killed. The High Court further accepted the explanation of P. W. 1, who had made the F. I. R., that he had named Choltan as being the person shot and killed by Ram Prasad because he had heard a hulla that Choltan had been murdered. It seems to us that the High Court came to a correct conclusion and was right in accepting the explanation of P. W. 1.

14. The learned counsel further contends that it was doubtful that 12 rounds would have been fired. He points out the number of injuries received by the villagers. But these injuries support the prosecution story. From the injuries on the various persons examined by Dwarka Nath Prasad, P. W. 41, apart from the persons who had died and whose bodies had been held to have been cremated by unidentified persons, it appears that 20 persons had received gun shot injuries; one of them had as many as 14 lacerated wounds and another had 10 lacerated

wounds. Apart from that there is no reason to doubt the oral evidence given in this case that a number of rounds were fired.

15. In the result the appeal fails and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 329 (V 57 C 70)

(From Goa, Daman and Diu J. C.'s Court — AIR 1968 Goa 17)

M. HIDAYATULLAH C. J., S. M. SIKRI,
R. S. BACHAWAT, G. K. MITTER AND
K. S. HEGDE JJ.

Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro, Appellant v. The State of Goa, Respondent.

Criminal Appeal No. 50 of 1968, D/- 26-3-1969.

(A) Geneva Conventions Act (1960) Sch. IV, Arts. 6 and 47 — "Occupation" — Meaning — In the case of annexation of Goa, the occupation was true annexation by subjugation and as such had ceased in the sense contemplated by Art. 47 — Terms "Annexation," and "subjugation" — Meaning.

The principle which is accepted is that the Occupying Power must apply the Conventions even when it claims, during conflict, to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory. Article 6 mentions a period of one year because if the occupied power turns victorious the land would be freed in one year and if the occupying power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. In this, as in other laws, a line is drawn arbitrarily and it is at the end of one year. Otherwise also, occupation, which means belligerent occupation, comes to an end when hostilities cease and the territory becomes a part of the occupying power. Annexation may sometimes be peaceful, or after war. If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title. In the case of military action in Goa the military engagement was only a few hour's duration and there was no resistance at all. The final

LM/AN/B809/69/GGM/M

annexation date was December 20, 1961 when the entire government and administration were taken over and there was no army in occupation and no army in opposition. The occupation on December 20, 1961 was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation. Therefore since occupation in the sense used in Art. 47 had ceased, the protection must cease also. 1953 ICJ 47, Ref. (Paras 26, 27 and 28)

The definition of 'occupation' in the Hague Regulations has to be read since the Regulations are the original rules and the Conventions only supplement the Regulations. The definition in Art. 42 of the Regulations shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities. Thus as to whether occupation in Art. 47 is belligerent occupation which continues after the total defeat of the enemy. Courts must take the facts of State from the declaration of state authorities. Military occupation is temporary de facto situation which does not deprive the occupied power of its sovereignty nor does it take away its statehood. All that happens is that pro tempore the Occupied Power cannot exercise its rights. In other words belligerent occupation means that the Government cannot function and authority is exercised by the occupying force. Annexation on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a de jure right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. There is however a difference between true annexation on the one hand and premature annexation, or as it is sometimes called 'anticipated annexation' on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. 'Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated. Subjugation puts an end to the state of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the de jure title passes to

the conqueror. After subjugation the inhabitants must obey the laws such as are made and not resist them.

(Paras 21 to 25)

(B) Geneva Conventions Act (1960), Preamble — Act does not give special remedy but gives indirect protection by providing for breaches of Conventions.

The Geneva Conventions Act by itself does not give any special remedy. It does give indirect protection by providing for breaches of conventions. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter as indignation of mankind. (Para 15)

(C) Constitution of India, Art. 51 — International Law — Reception and residence of alien is discretionary with State.

It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason of its own territorial supremacy, not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. This proposition is so well grounded in International Law that every country has adopted the passport system, which document certifies nationality and entry into any State is only possible with the concurrence of that State. Again a State exercises territorial supremacy over persons in its territory, whether its own subjects or aliens and can make laws for regulating the entry, residence and eviction of aliens. 1891 AC 272, Rel. on.

(Para 6)

Cases Referred: Chronological Paras
(1953) 1953 ICJ 47, Minguers and Encrenos case 28
(1891) 1891 AC 272 = 64 LT 378, Musgrove v. Chun Teeong Toy 6
(1584) 3 Co. Rep. 7-a = 76 ER 637, Heydon's case 10

Mr. Edward Gardner, Q. C., M/s. A. Bruto Da Costa, M. Bruto Da Costa, P. C. Bhartari, Mrs. A. K. Varma, Advocates and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., for Appellant; Mr. Niren De Attorney General

for India and Mr. G. R. Rajagopaul, Senior Advocate (M/s. J. M. Mukhi and R. H. Dhebar, Advocates with them), for Respondent.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: The appellant (Rev. Father Monteiro) is a resident of Goa. After the annexation of Goa by India, he had the choice of becoming an Indian national or retaining Portuguese nationality. He chose the latter and was registered as a foreigner. He also obtained a temporary residential permit which allowed him to stay on in India till November 13, 1964. The period of stay expired and he did not ask for its extension or renewal. He was ordered to leave India by the Lt. Governor of Goa. The Lt. Governor is empowered by a notification of the President of India issued under Art. 239 of the Constitution to discharge the functions of the Central Government and his order has the same force and validity as if made by the Central Government. Rev. Father Monteiro disobeyed the order, and in consequence was prosecuted under S. 14 read with S. 3(2)(c) of the Foreigners Act. He was convicted and sentenced to 30 days simple imprisonment and a fine of Rs. 50 (or 5 days' further simple imprisonment). He appealed unsuccessfully to the Court of Session and his revision application to the Court of the Judicial Commissioner, Goa also failed. He now appeals by special leave of this Court against the order of the Judicial Commissioner, Goa dated August 7, 1967.

2. The defence of Rev. Father Monteiro was that he was protected by the Geneva Conventions Act, 1960, that the order of the Lt. Governor for his deportation was ultra vires the Act and that he had committed no offence. The Judicial Commissioner and the two courts below have held, for different reasons, that the Geneva Conventions ceased to apply after Goa became a part of India and that the Municipal Courts in India can give him no redress against an Act of State. In the appeal before us Mr. Edward Gardner Q. C. appeared for Rev. Father Monteiro with the leave of this Court.

3. To understand the case, a brief history of the annexation of Goa and what happened thereafter is necessary. Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961 Goa was occupied by the Indian Armed Forces following a

short military action. It then came under Indian Administration from December 20, 1961 and was governed under the Goa, Daman and Diu (Administration) Ordinance 1962 promulgated by the President of India. Under the Ordinance all authorities were to continue performing their functions and all laws (with such adaptations as were necessary) were to continue in force and power was conferred on the Central Government to extend to Goa other laws in force in India. The Ordinance was later replaced by an Act of Parliament bearing the same title and numbered as Act I of 1962. It was enacted on March 27, 1962 and came into force from March 5, 1962. It re-enacted the provisions of the Ordinance and in addition gave representation to Goa in Parliament amending for the purpose the Representation of the People Act. The same day (March 27, 1962), the Constitution (Twelfth Amendment) Act, 1962 was enacted and was deemed to have come into force on December 20, 1961. By this amendment Goa was included in Union Territories and a reference to Goa was inserted in Article 240 of the Constitution. Many Acts in force in India were then extended to Goa and many Regulations and Orders were promulgated. Amongst the Acts so extended were the Citizenship Act of 1955, the Foreigners Act 1946 and the Registration of Foreigners Act, 1939. The Central Government also promulgated under S. 7 of the Citizenship Act, 1955, the Goa, Daman and Diu (Citizenship) Order 1962 and as it directly concerns the present matter we may reproduce the second paragraph of the Order (in so far as it is material to our purpose) here:

"2. Every person who or either of whose parents or any of whose grand-parents was born before twentieth day of December, 1961, in the territories now comprised in the Union Territory of Goa, Daman and Diu shall be deemed to have become a citizen of India on that day:

Provided that any such person shall not be deemed to have become a citizen of India as aforesaid if within one month from the date of publication of this Order in the Official Gazette that person makes a declaration in writing to the Administrator of Goa, Daman and Diu or any other authority specified by him in this behalf that he chooses to retain the citizenship or nationality which he had immediately before the twentieth day of December 1961.

Provided further....."

4. Pursuant to this Order, on April 27, 1962 Rev. Father Monteiro made his declaration of Portuguese nationality and on August 14, 1964 applied for a residential permit. On his failure to apply for a renewal of the permit the order of the Lt. Governor was passed on June 19, 1965. Prosecution followed the disobedience of the order.

5. At the outset it may be stated that Mr. Gardner concedes that he does not question the legality of the military action or the annexation. In fact, he is quite clear that we may consider the annexation to be legal. His contention, in brief, is that the order of the Lt. Governor is tantamount to deportation of Rev. Father Monteiro and the Geneva Conventions Act gives protection against such deportation during occupation which has not validly come to an end, and, therefore, no offence was committed by him.

6. The argument overlooks one cardinal principle of International Law and it is this. Rev. Father Monteiro by his declaration retained his Portuguese nationality. His sojourn in India was subject to such laws as existed in India in general and in Goa in particular. It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason of its own territorial supremacy, not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. This proposition is so well-grounded in International Law that every country has adopted the passport system, which document certifies nationality and entry into any State is only possible with the concurrence of that State. Again a State exercises territorial supremacy over persons in its territory, whether its own subjects or aliens and can make laws for regulating the entry, residence and eviction of aliens. Therefore, the application of the Foreigners Act, the Registration of Foreigners Act and the Orders passed under them, to Rev. Father Monteiro was legally competent. A considerable body of writers on International Law support the proposition and it is sufficient to refer only to Oppenheim (Vol. I) pp. 675/676 and Brierly Law of Nations p. 217. If authority were needed the proposition would be found supported in the decision of the Privy Council in *Musgrove v. Chun Teeong Toy* 1891 AC 272. The Lord Chancellor in that case denied that an alien excluded from

British Territory could maintain an action in a British Court to enforce such a right.

7. This proposition being settled, Mr. Gardner sought support for his plea from the provisions of the Geneva Conventions Act of 1960. That Act was passed to enable effect to be given to the International Conventions done at Geneva in 1949. Both India and Portugal have signed and ratified the Conventions. Mr. Gardner relies on the provisions of the Fourth Schedule relative to the protection of certain persons in time of war. He refers in particular to Articles 1, 2, 4, 6, 8, 47 and 49. By Articles 1 and 2 there is an undertaking to respect and ensure respect for the Conventions in all circumstances of declared war or of any other armed conflict even if the state of war is not recognised by one of the parties and to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets with no armed resistance. Article 4 defines a protected person and the expression includes those who at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Article 6 then lays down the beginning and end of application of the Convention. The Convention applies from the outset of any conflict or occupation. In the territory of Parties to the conflict, the application of the Convention ceases on the general close of Military operation. In the occupied territory it ceases one year after the general close of military operations but the occupying Power is bound for the duration of occupation, to the extent that such Power exercises the functions of Government in such territory, by Articles 1-12, 27, 29-34, 47, 49, 51, 52, 53, 59, 61-73 and 143.

8. We next come to Articles 47 and 49 which are the crux of the matter and are relied upon for the protection. Mr. Gardner points out that under Article 48 even protected persons may in no circumstance renounce in part or in entirety the rights secured to them by the Conventions. The case, therefore, depends on whether Articles 47 and 49 apply here. We may now read Articles 47 and 49:

"47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of

the occupation of a territory, into the institutions or Government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

"49. Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuation may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Powers undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

9. The point of difference between the parties before us in relation to Article 47 is whether the occupation continues, the annexation of the territory notwithstanding, and in relation to Art. 49 whether the order of the Lt. Governor amounts to deportation of a protected person.

10. Mr. Gardner's submissions are: the order that has been made is a deportation order and it is therefore *ultra vires* the Geneva Conventions. These Conventions create individual rights which cannot even be waived. So long as oc-

cupation continues these rights are available and the Geneva Conventions must not be looked at in isolation but read in conjunction with International Law as part of the positive law. They should not be abandoned lightly. According to him, conquest was a method of acquiring territory in the past but after the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War, the acquisition of territory in International Law by the use of force does not confer any title. Occupation, therefore, can only be of *terra nullius*, not now possible. He invokes the rule in Heydon's case, 1584-8 Co. Rep. 7-a case and says that the history of the making of the Geneva Conventions shows that this was precisely the mischief sought to be met and the Conventions now become a part of the laws of India through Parliamentary Legislation. He concedes that the war of liberation of Goa and the annexation were lawful but he contends that annexation does not deprive protected persons of the protection. According to him, once there is military action and occupation, occupation cannot cease by a unilateral act of annexation by incorporating the territories of Goa with India. If India did not care to be bound by the Conventions, there was a method of denunciation in Article 158 but since the Convention is registered under Article, 159 even denunciation at a late stage was not possible. He relies upon Article 77 and says that 'Liberated' means when the occupation comes to an end. The amendment of the Constitution only legalises annexation so far as India is concerned but in International Law the territory remains occupied. The occupation is not at an end and it cannot be brought about unilaterally. The words of Art. 47 themselves are clear enough to establish this. In short, the contention is that occupation does not come to end by annexation and, therefore, the protection continues till there is either cession of territory or withdrawal of the Occupying Power from the territory, both of which events have not taken place. In support of his propositions he relies upon Dholakia (International Law) Pp. 180, 181, 293; Oppenheim International Law (Vol. I) 7th Edn. Pp. 574 et seq; R. Y. Jennings: The Acquisition of Territories in International Law Pp. 53-56, 67.

11. The contention on behalf of the State is that by occupation is meant occupation by armed forces or belligerent

occupation and occupation comes to an end by conquest followed by subjugation. Reference is made to many works on International Law. We have to decide between these two submissions.

12. This is the first case of this kind and we took time to consider our decision. We are of opinion that the pleas of Mr. Gardner that the Geneva Conventions Act makes punishable the conduct of Rev. Father Monteiro, must fail.

13. To begin with, the Geneva Conventions Act gives no specific right to any one to approach the Court. The Act was passed under Article 253 of the Indian Constitution read with entries 13 and 14 of the Union List in the Seventh Schedule to implement the agreement signed and merely provides for certain matters based on Geneva Conventions. What method an aggrieved party must adopt to move the Municipal Court is not very clear but we need not consider the point because of our conclusions on the other parts of the case. We shall consider the Conventions themselves. Before we consider the Geneva Conventions, which form Schedules to the Act, it is necessary to look at the Act itself to see what rights it confers in relation to the Conventions, and whether it gives a right to Rev. Father Monteiro in the present circumstances to invite the Court's opinion. Being a court of law, this Court must be satisfied about its own jurisdiction, the foundation for which must be in some enforceable law.

14. Prior to the Geneva Conventions Act of 1960 there were the Geneva Convention Act of 1911 and the Geneva Conventions Implementing Act of 1936. We need not consider them because by the twentieth section of the present Act, the former ceases to have effect as part of the law of India and the latter is repealed. The Act is divided into five Chapters, Chapter I deals with the title and extent and commencement of the Act and gives certain definitions. Of these, the important definition is that of 'protected internee' as a person protected by the Fourth Convention and interned in India. Chapter II then deals with punishment of offenders against the Conventions and the jurisdiction of courts to deal with breaches by punishing them. Chapter III lays down the procedure for the trial of protected persons, for offences enabling a sentence of death or imprisonment for a term of two years or more to be imposed and for appeals etc. Chapter IV

prohibits the use of Red Cross and other emblems without the approval of Central Government and provides for a penalty. Chapter V gives power to the Central Government to make rules. The Act then sets out the Conventions in its schedules and the Conventions which are four in number are set out in as many Schedules to the Act.

15. It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for breaches of Convention. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter to what Westlake aptly described as indignation of mankind.

16. The appellant has, however, sought the aid of the Geneva Conventions to establish that he could not be compelled to leave Goa and thus committed no offence. We may, therefore, say a few words about the Geneva Conventions, particularly Schedule IV, which deals with the protection of civilian persons in time of war. In the past protection of civilian population was inadequately provided in Conventions and treaties. The four conventions came at different times, the oldest in 1864 and the last in 1949. The Fourth Hague Convention of 1907 contained Articles 42-56, but this protection was restricted to occupation by an enemy army. The Regulations merely stated the principles and enjoined maintenance of law and order and regard for family rights, lives of persons and private property, and prohibited collective punishments. In effect, these were confined to the 'forward areas of war' and did not apply when 'total war' took place and the civilian population was as much exposed to the dangers of war as the military. The example of the First World War showed that civilian population was exposed to exactions. At the time when the Hague Regulations were done, it was thought that such matters as non-intern-

ment of the nationals of the adversary would be observed. But the First World War proved to the contrary. It was in 1921 that the International Committee of the Red Cross produced a draft Convention which among other things enjoined that the inhabitants of the occupied territory should not be deported and civilians in enemy territory must be allowed to return to their homes unless there were reasons of State security and the internees must receive the same treatment as prisoners of war. The Diplomatic Conference of 1929 and the Red Cross Conference of 1934 made useful studies but action scheduled to take place in 1940 could not be implemented as the Second World War broke out. Although the belligerent countries had accepted that the 1929 Convention regarding prisoners of war was applicable to civilians, the lessons of the Second World War were different. We know the treatment of civilians by Germany and the horrid deaths and privations inflicted on them. War, though outlawed, continues still and as President Max Huber said:—

“War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger.”

17. At the termination of the last war the International Red Cross Conference at Stockholm prepared a draft in 1948, which became the basis of the deliberations of the Diplomatic Conference which met at Geneva from April 21 to August 12, 1949 and the present Convention was framed. The Regulations were not revised or incorporated. The 1949 Conventions are additional to the Regulations and it is expressly so laid down in Article 154 of the Geneva Conventions.

18. The Hague Regulations, Arts. 42 to 56, contained some limited and general rules for the protection of inhabitants of occupied territory. The Regulations are supplementary. Regulations 43 and 55 which have no counterpart in the Geneva Conventions must be read. They are not relevant here. Similarly, as there is no definition of ‘occupation’ in the Geneva Conventions, Article 42 of the Regulation must be read as it contains a definition:

“42. A territory is considered as occupied when it finds itself in fact placed under the authority of hostile army”.

19. The Regulations further charge the authority having power over the territory

to take all measures to establish and assure law and order. The Regulations generally charged the occupying power to respect the persons and property of the inhabitants of the occupied territory. There was no provision showing when occupation commenced and when it came to an end. It is because of this omission that it is claimed in this case that occupation continues so long as there is no cession of the territory by the conquered or withdrawal by the conqueror and that till then the protection of the Geneva Conventions obtains. However, Article 6 which provides about the beginning and end of the application of the Conventions throws some light on this matter.

20. The question thus remains what is meant by occupation? This is, of course, not occupation of terra nullius but something else. Since there is no definition of occupation in the Geneva Conventions, we have to turn to the definition in the Hague Regulations. Article 154 of the 4th Schedule reads:

“154. Relation with the Hague Conventions.—In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29th July, 1899, or that of 18th October, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of the Hague.”

21. The definitions of ‘occupation’ in the Regulations must be read since the Regulations are the original rules and the Conventions only supplement the Regulations. We have already quoted the definition and it shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities. In the Justice case, (United States v. Attstoccer, et al. (1947) U. S. Military Tribunal, Nuremberg L.R. 3 T.N.C. vi 34) it was stated that the laws of belligerent occupation apply only to an occupation during the course of actual warfare and that once the enemy has been totally defeated those laws do not apply to the ensuing occupation.

22. The question thus resolves itself into this: Is occupation in Article 47 belligerent occupation or occupation which continues after the total defeat of the enemy? In this connection courts must take the Facts of State from the declaration of State authorities. Military

occupation is temporary de facto situation which does not deprive the Occupied Power of its sovereignty nor does it take away its Statehood. All that happens is that pro tempore the Occupied Power cannot exercise its rights. In other words belligerent occupation means that the Government cannot function and authority is exercised by the occupying force.

23. Annexation, on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a de jure right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. As Greenspan—The Modern Law of Land Warfare put it (p. 215) military occupation must be distinguished from subjugation, where a territory is not only conquered, but annexed by the conqueror.

24. There is, however, a difference between true annexation on the one hand and premature annexation, or as it is sometimes called 'anticipated annexation', on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated. (See Oppenheim International Law (7th Edn.) pp. 846-847 (Vol. I) 566 (Vol. I), pp. 448/52 (Vol. II), 430-439 (Vol. II) and 599 et. seq. (Vol. II), Greenspan (ibid) pp. 215 et. seq. 600-603; Could: Introduction to International Law pp. 652-656, 662-663; Brierly: Law of Nations p. 155.

25. The Conventions rightly lay down that annexation has no effect on the protection. But they speak of premature or anticipated annexation. Premature or anticipated annexation has no effect. Such a plea was negatived for the same reason by the Nuremberg Tribunal. In fact, when the Convention itself was being drafted the experts were half-inclined to add the word 'alleged' before 'annexation' in Article 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities are going on. Subjugation puts an end to the State of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the de facto but also the de jure title passes to the conqueror.

After subjugation the inhabitants must obey the laws such as are made and not resist them.

26. Thus the principle which is accepted is that the Occupying Power must apply the Convention even when it claims during conflict to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory. It may be asked why does Article 6 then mention a period of one year? The reason given is that if the Occupied Power turns victorious the land would be freed in one year and if the Occupying Power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. In this, as in other laws, a line is drawn arbitrarily and it is at the end of one year. Otherwise also, occupation, which means belligerent occupation, comes to an end when hostilities cease and the territory becomes a part of the Occupying Power. Annexation may sometimes be peaceful, as for example, Texas and Hawaiian Islands were peacefully annexed by the United States or after war, as the annexation of South Africa and Orange Free State by Britain.

27. The question, when does title to the new territory begin, is not easy to answer. Some would make title depend upon recognition. Mr. Stimson's doctrine of non-recognition in cases where a State of things has been brought about contrary to the Pact of Paris was intended to deny root of title to conquest but when Italy conquered Abyssinia, the conquest was recognised because it was thought that the state of affairs had come to stay. Thus, although the United Nations Charter includes the obligation that force would not be used against the territorial integrity of other States (Art. 2 para 4), events after the Second World War have shown that transfer of title to territory by conquest is still recognised. Prof. R. Y. Jennings poses the question: "What is the legal position where a conqueror having no title by conquest is nevertheless in full possession of the territorial power, and not apparently to be ousted?" He recommends the recognition of this fact between the two States. If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title.

28. In the present case the facts are that the military engagement was only a few hours' duration and then there was

no resistance at all. It is hardly necessary to try to establish title by history traced to the early days as was done in the *Minquiers and Encrenos* case, 1953 SCJ 47. Nor is there any room for the thesis of Dr. Schwarzenberger (A Manual of International Law, 5th Edn. p. 12) that title is relative and grows with recognition. True annexation followed here so close upon military occupation as to leave no real hiatus. We can only take the critical date of true and final annexation as December 20, 1961 when the entire government and administration were taken over and there was no army in occupation and no army in opposition. The occupation on December 20, 1961 was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation. It must be remembered that Mr. Gardiner concedes that the annexation was lawful. Therefore since occupation in the sense used in Article 47 had ceased, the protection must cease also. We are, therefore, of opinion that in the present case there was no breach of the Geneva Conventions.

29. We were invited to look at the matter from another point of view, namely, even if the protection against deportation envisaged by Arts. 47 and 49 were taken to be continued, what is the remedy which the Municipal Courts can give? It was said, the act was an act of State. In view of what we have already held it is not necessary to pronounce our opinion on this argument.

30. The national status of subjects of the subjugated State is a matter for the State, and courts of law can have no say in the matter. As Oppenheim (Vol. 1 p. 573) puts it:

"The subjugating State can, if it likes, allow them to emigrate, and to renounce their newly acquired citizenship, and its Municipal law can put them in any position it likes, and can in particular grant or refuse them the same rights as those which its citizens by birth enjoy."

The Geneva Convention ceased to apply after December 20, 1961. The Indian Government offered Rev. Father Monteiro Indian nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese national he could only stay in India on taking out a permit. He was, therefore, rightly prosecuted under the law applicable to him. Since no complaint is made about the

trial as such, the appeal must fail. It will be dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 337
(V 57 C 71)

(From: Kerala)*

J. C. SHAH AND G. K. MITTER, JJ.

E. V. Mathal, Appellant v. The Subordinate Judge, Kottayam and others, Respondents.

Civil Appeal No. 275 of 1969, D/- 21-4-1969.

(A) Houses and Rents — Kerala Buildings (Lease and Rent Control) Act (2 of 1965), Sections 34 (1), proviso and 11 (4) (i) — Kerala Buildings (Lease and Rent Control) Act (16 of 1959), Section 11 (4) (i) — Petition for eviction of tenant on ground of sub-letting filed after coming into force of Act 2 of 1965 — Petition, held maintainable in view of proviso to Section 34 (1) of Act of 1965 — Section 4 of Kerala Act 7 of 1125 held applicable — Words "corresponding provision" in proviso to section 34 (1), meaning of — (Kerala Interpretation and General Clauses Act (7 of 1125), S. 4) — Reasoning in O. P. No. 2653 of 1967, D/- 4-10-1967 (Ker.) as reported in 1968 Ker LT (SN) P. 4, Overruled.

Where the landlord filed a petition for eviction of the tenant after coming into force of the new Act 2 of 1965 on the ground that he was guilty of sub-letting and as such was not entitled to protection under Kerala Act 16 of 1959:

Held that the proceeding for eviction under the repealed Act 16 of 1959 was maintainable in view of proviso to Section 34 (1) of 1965 Act. (Para 3)

Provision of Section 11 of the Act of 1959 was a corresponding provision within the meaning of the proviso to subsection (1) of Section 34 of the Act of 1965. To correspond means to be in harmony with or be similar, analogous to. It does not mean to be identical with and therefore the relevant provisions of Section 11 (4) of the Act of 1965 must be held to be a provision corresponding to Section 11 (4) of the Act of 1959. Section 4 of the Kerala Interpretation and General Clauses Act (7 of 1125) was ap-

* (C. R. P. No. 1482 of 1968, D/- 5-11-1968 — Ker.)

pllicable. Reasoning in O. P. No. 2653 of 1967, D/- 4-10-1967 (Ker) as reported in 1968 Ker LT (SN) P. 4, Overruled.

(Para 3)

(B) Houses and Rents — Kerala Buildings (Lease and Rent Control) Act (2 of 1965), Section 20 — Words of Section 20 are much wider than those in Section 115 Civil P. C. — Revision not limited to a mere question of jurisdiction — District Judge is empowered to consider whether on evidence the finding of Subordinate Judge was proper — (Civil P. C. (1908), Section 115). (Para 4)

(C) Constitution of India, Article 136 — Finding of Subordinate Judge in rent control proceedings confirmed by High Court in revision under Section 115, Civil P. C. — Held, it was not necessary to examine the question as to whether revision was properly heard and disposed of by District Court. (Para 4)

(D) Constitution of India, Art. 136 — Concurrent finding of fact — Proceedings for eviction of tenant under Rent Control Act, on ground of sub-letting — District Court and High Court both accepting the evidence as conclusive of sub-letting — No interference. (Para 5)

Cases Referred: Chronological Paras (1968) 1968 Ker LT (SN) P. 4=O. P.

No. 2653 of 1967, D/- 4-10-1967,
Abdul Rahiman v. Rajan

3

Mr. C. K. Daphtary, Senior Advocate (M/s. Sardar Bahadur, Vishnu Bahadur and Miss Yougindra Khushalani, Advocates with him), for Appellant; Mr. M. C. Chagla, Senior Advocate (Mr. R. Gopalakrishnan, Advocate with him), for Respondents Nos. 3 and 4.

The following Judgment of the Court was delivered by

MITTER, J.— This is an appeal by special leave from a judgment and decree of the Kerala High Court dismissing a petition under Section 115 of the Code of Civil Procedure from an order of the District Judge of Kottayam.

2. The facts are as follows. The appellant before us was a monthly tenant of four houses covered by a single tenancy at a rent of Rs. 250/- granted in 1953. The landlord filed a petition in the Rent Control Court of Kottayam for eviction of the tenant on the ground that he required the premises for his personal use and occupation, and, secondly, that the tenant was guilty of sub-letting and as such not entitled to protection under the Kerala Buildings (Lease and Rent Con-

trol) Act, 1959. The Controller held against the landlord on both the points. On appeal being preferred therefrom, the Subordinate Judge held that there was no sub-letting by the tenant but the landlord required the premises for his personal use and occupation. He however found that two of the buildings formed the subject-matter of separate and independent agreements between the parties and as such allowed eviction of the tenants from two only out of the four properties. Both parties went in revision to the District Judge, Kottayam under Section 20 of the Kerala Act 2 of 1965. It is pertinent to note here that the Kerala Act of 1959 was repealed by the Kerala Buildings (Lease and Rent Control) Act, 1965 and the new Act came into force on 1st April, 1965. The petition for eviction was filed on August 31, 1965 after the coming into force of the new Act. The District Judge held that the landlord had not proved that he bona fide required the premises let for his personal use and occupation but disagreeing with the subordinate Judge he held that there had been in fact sub-letting and on the basis thereof ordered eviction of the tenants from all the four buildings. The tenant went up to the Kerala High Court by way of revision under Section 115 of the Code of Civil Procedure and the High Court found that no grounds had been made out for interference with the order of the District Judge and as such dismissed the petition with costs.

3. The main point urged by Mr. Daphtary counsel for the appellant was that assuming that there was a sub-letting by the tenant a proceeding for eviction would only lie under the provisions of the Act of 1965. Omitting the provisos, Section 11 (1) of the Act provided that:

“Notwithstanding anything to the contrary contained in any other law or contract a tenant shall not be evicted, whether in execution of a decree or otherwise except in accordance with the provisions of this Act.”

Sub-section (4) of the section however allowed the landlord to apply for eviction on the ground of sub-letting. The relevant portion of this sub-section runs as follows:

“(4) A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building.—

(i) if the tenant after the commencement of this Act, without the consent of

the landlord, transfers his right under the lease or sub-lets the entire building or any portion thereof if the lease does not confer on him any right to do so; or

(ii) to (v) ** ** *

Counsel urged that whatever may have been the provision under the Act of 1959 the proceedings by the landlord having been started after the repeal of that Act and the commencement of the Act of 1965 the landlord could get possession of the premises only if he satisfied the tests laid down in sub-section (4) which did not make sub-letting before the commencement of the Act a ground for eviction. It is to be noted however that Section 34 of the Act of 1965 provided for savings and special provision in the following manner. Sub-section (1) thereof runs as follows:

"(1) Notwithstanding the expiry of the Kerala Buildings (Lease and Rent Control) Act, 1959 (Kerala Act 16 of 1959) (hereinafter in this section referred to as the said Act), the provisions of Sections 4 and 23 of the Interpretation and General Clauses Act, 1125 (Kerala Act VII of 1125), shall apply upon the expiry of the said Act as if it had then been repealed by this Act:

Provided that any investigation, legal proceeding or remedy which could have been instituted, continued or enforced under the said Act if it had not expired, may be instituted, continued or enforced under the corresponding provisions of this Act."

Reference in this connection may also be made to Section 4 of the Kerala Interpretation and General Clauses Act, 1125 (Act 7 of 1125):

"4. Where any Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such

right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."

It was argued by Mr. Daphtary that Section 4 was not applicable because a different intention appeared from Section 34 (1) of the Act of 1965. We find ourselves unable to accept this contention. The proviso to Section 34 (1) lays down that a legal proceeding which could have been instituted, continued or enforced under the repealed Act of 1959 may be instituted under the corresponding provisions of the new Act. Mr. Daphtary tried to meet this by urging that Section 11 (4) of the Act of 1959 did not contain any corresponding provision. Sub-section (1) of Section 11 of the 1959 Act laid down that:

"Notwithstanding anything to the contrary contained in any other law or contract a tenant shall not be evicted, whether in execution of a decree or otherwise except in accordance with the provisions of this Act.

Provided

Sub-section (4) (i) of Section 11 however gave the landlord a right to apply for eviction and for an order directing him to be put in possession of the building

"if the tenant has without the consent of the landlord transferred his right under the lease or sub-let the entire building or any portion thereof, if the lease does not confer on him any right to do so, or the landlord has not consented to such sub-letting;"

We find ourselves unable to accept Mr. Daphtary's argument that the above quoted provision of Section 11 of the Act of 1959 was not "a corresponding provision" within the meaning of the proviso to sub-section (1) of Section 34 of the Act of 1965. To correspond means to be in harmony with or be similar, analogous to. It does not mean to "be identical with" and therefore the relevant provisions of Section 34 (1) of the Act of 1965 must be held to be a provision corresponding to Section 11 (4) of the Act of 1959. Our attention was drawn to the short notes of a judgment of the Kerala High Court in O. P. No. 2653 of 1967 dated 4th October, 1967, as given in Short Notes to Part 1, The Kerala Law Times, 1968. We find ourselves unable to accept the reasoning as given in the said Short Notes.

Mr. Daphtary raised a further contention that under the express words of sub-section (1) of Section 11 of the Act of 1965 the operation of any other law including the Act of 1959 was excluded. We do not think that is the proper construction to be put on the words of sub-section (1) of Section 11 in view of Section 34 (1) of the same Act.

4. Mr. Daphtary next argued that it was not open to the District Court to revise the order of the Subordinate Judge holding against sub-letting and thereby confirming the order of the Rent Controller on this point under Section 20 of the Act of 1965. The words of Section 20 however are much wider than those in Section 115 of the Code of Civil Procedure. Under Section 20 (1) the District Court is empowered to call for and examine the records relating to any order passed or proceedings taken under the Act for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceedings and pass such order in reference thereto as it thinks fit. On the words of this section we cannot hold that a revision is limited to a mere question of jurisdiction. In our view the District Judge was empowered to consider whether on the evidence the finding of the Subordinate Judge was proper. In any event, the same was confirmed by the High Court in revision under Section 115 of the Code of Civil Procedure and we do not feel called upon to examine the question as to whether the revision was properly heard and disposed of by the District Court.

5. Lastly, Mr. Daphtary argued that on the facts the Courts below should not have come to the conclusion that there was a sub-letting within the mischief of the Act. The buildings were let out as a lodging house and the evidence showed that one of the rooms was in the occupation of a lawyer who had been there for years and had put up his name board outside the room. Besides the name board of the lawyer, there were the name boards of other persons and the lawyer paid rent on a daily basis. The lawyer had installed a telephone in his room. In our opinion, there was sufficient evidence to hold that the lawyer was in exclusive possession of the room and although the rent was paid on a daily basis it was not a case of the grant of a licence. In any event, the finding as to sub-letting does not call for interference in this case seeing that the District Court and the High

Court both accepted the evidence as conclusive of sub-letting.

6. In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 340 (V 57 C 72)

(From: Punjab & Haryana)*

K. S. HEGDE AND A. N. RAY, JJ.

Kabul Singh, Appellant v. Kundan Singh and others, Respondents.

Civil Appeal No. 1359 of 1969, D/- 13-8-1969.

(A) Representation of the People Act (1950), Section 23 (3) — Inclusion of any name in electoral roll after prescribed date is prohibited whether application for inclusion was made before or after that date. (1959) 17 ELR 110 (Pat), Disting. (Para 6)

(B) Representation of the People Act (1951), Section 62 — Representation of the People Act (1950), Section 23 (3) — Person's name included in electoral roll as on last date of making nomination paper. — He is entitled to vote unless prohibited by any provision.

In view of provisions of Section 62 of the Representation of the People Act 1951 read with Section 23 (3) of the 1950 Act every person who is for the time being entered in the electoral roll of a constituency as it stood on the last date for making nominations for an election in that constituency is entitled to vote unless it is shown that he is prohibited by any of the provisions of the Act from exercising his vote. (Para 7)

(C) Representation of the People Act (1950), Section 30 — Finality of electoral roll cannot be challenged in a proceeding challenging validity of election — Right to vote being purely a statutory right, validity of any vote is to be examined on basis of provisions of the Act — Entries in electoral roll are final and are not open to challenge either before Civil Court or before a Tribunal considering validity of any election. AIR 1963 SC 458, Foll. (Para 9)

Cases Referred: Chronological Paras (1969) AIR 1969 NSC 150 (V 56) = Civil Appeal No. 25 of 1969,

(*Ele. Petn. No. 1 of 1968, D/- 20-3-1969 — Punj & Har.)

LM/AN/D961/69/LGC/D.

D/- 13-8-1969, Baidyanath Panjiar
v. Sitaram Mahto 4
(1963) AIR 1963 SC 458 (V 50)=
1963-3 SCR 479, B. M. Rama-
swamy v. B. M. Krishnamurthy 9
(1959) 17 ELR 110 (Pat), Ram-
swarup Prasad Yadav v. Jagat
Kishore Prasad Narain Singh 6

Mr. Hardev Singh, Advocate, for Appel-
lant; M/s. R. K. Garg, S. C. Agarwala
and D. P. Singh, Advocates of M/s. Rama-
murthi and Co. and Miss Sumitra Chakra-
varti, Advocate, for Respondent No. 1.

The following Judgment of the Court
was delivered by

HEGDE, J.:— This appeal under Sec. 116-A of the Representation of the People Act, 1951 (to be shortly referred to hereinafter as the Act) is directed against the decision of the High Court of Punjab and Haryana in Election Petition No. 1 of 1968 on its file. In that election petition, Kundan Singh, the 1st respondent to this appeal challenged the validity of the Returning Officer's declaration that the appellant has been duly elected from the Hoshiarpur Local Authorities Constituency to the Punjab Legislative Council in the election held in April, 1968. The High Court came to the conclusion that some of the votes polled in that election were invalid votes and if the valid votes alone are taken into consideration, as it should have been, then the 1st respondent is entitled to be declared elected. It accordingly set aside the declaration made in favour of the appellant and declared the 1st respondent as having been duly elected.

2. We may now briefly state the material facts. In March 1968, the Hoshiarpur Local Authorities Constituency was called upon to elect one member to the Punjab Legislative Council. The election calendar was as follows:

(1) The last date for filing nomination papers — 12-3-1968.

(2) Date of scrutiny of the nomination papers — 13-3-1968.

(3) The last date for withdrawal of candidatures — 16-3-1968.

(4) Date of polling — 7-4-1968.

(5) Date of counting and declaration of result — 8-4-1968.

In that election, as many as five candidates contested. They are the appellant and the respondents herein. On April 8, 1968, the Returning Officer after counting the votes cast declared the appellant to be the successful candidate as he had

secured one vote more than the 1st respondent. The 1st respondent challenged that declaration in the aforementioned election petition on various grounds of which, at present, we are only concerned with one viz., that the vote of Hari Singh should have been held to be a void vote as his name was included in the electoral roll on April 5, 1968, i.e., just two days before the date of polling. In his turn the appellant filed a recriminatory petition contending inter alia that the vote of Tarsem Singh was void as by the time the polling took place, he had become a government servant and the votes of two other persons namely Harjinder Singh and Balwant Singh were void as their names were included in the electoral roll after the last date for filing nominations for the election. Other grounds taken in the recriminatory petition are not relevant for our present purpose. They have not been pressed before us.

3. The election petition came up for trial before Mahajan, J. The learned Judge submitted the following question to a Full Bench for decision:

"Whether allegation in para. 4 (a) pertaining to the vote of Hari Singh is correct and the vote was void and was polled in favour of respondent No. 1 in violation of the Rules and has materially affected the result of the election of respondent No. 1".

The Full Bench by majority came to the conclusion that the vote of Hari Singh was void as his name was included in the electoral roll of the constituency after the last date for making nominations for the election in that constituency. Thereafter the case was sent back to Mahajan, J., for deciding the issues left undecided. On the basis of the opinion expressed by the Full Bench, the learned Judge came to the conclusion that the votes of Hari Singh, Harjinder Singh and Balwant Singh were void votes. Consequently he recounted the votes validly cast and came to the conclusion that the 1st respondent had been duly elected. He gave a declaration to that effect.

4. As seen earlier, the main contention in this appeal relates to the true effect of sub-section (3) of Section 23 of the Representation of the People Act, 1950 (to be hereinafter referred to as "the 1950 Act") which prohibits the deletion of any entry or inclusion of any name in the electoral roll of a constituency after the last date for making nominations for an election in that constituency and before

the completion of that election. We have considered the scope of that provision in *Baidyanath Panjiar v. Sitaram Mahto*, Civil Appeal No. 25 of 1969, D/- 13-8-1969=(AIR 1969 NSC 150) in which we have delivered judgment just now. In view of that decision, the view taken by the majority of the Full Bench must be held to be correct.

5. Evidently under an erroneous impression that Harjinder Singh and Balwant Singh had voted against him, the appellant had contended in his recriminatory petition that their votes were invalid. But on scrutiny it was found that one of them had given his first preference to him. Now it is contended on his behalf that as the 1st respondent had not challenged the validity of those votes, the trial Court could not have excluded from consideration the vote cast in his favour by one of those persons. This is an untenable contention. The votes of Harjinder Singh and Balwant Singh have been rejected on the ground that their names were included in the electoral roll in defiance of the mandate given under Section 23 (3) of the 1950 Act. What applies to Hari Singh equally applies to Harjinder Singh and Balwant Singh. The fact that the 1st respondent did not challenge the validity of those votes is immaterial in the circumstances of this case. The election petition and the recriminatory petition were parts of one enquiry. As the validity of these three votes had come up for consideration and as it has been held that those votes are void votes, it necessarily follows that those votes must be excluded from consideration in determining the result of the election.

6. Another contention urged by Shri Hardev Singh is that only the votes of those electors who had applied for the inclusion of their names in the electoral roll after the period mentioned in Section 23 (3) of the 1950 Act can be held to be void; as the person who cast his vote in favour of the appellant had applied for inclusion of his name some days before the last date for making nominations, the inclusion of his name in the roll after that date will not make his vote void. In support of his contention, he placed reliance on the decision of the Patna High Court in *Ramswaroop Prasad Yadav v. Jagat Kishore Prasad Narain Singh*, (1959) 17 ELR 110 (Pat). The ratio of that decision has no application to the facts of the present case. That decision was rendered before sub-section (3) of Section 23

of the 1950 Act was incorporated into the 1950 Act. The mandate of that provision is plain and unambiguous. It prohibits inclusion of any name in the electoral roll after the prescribed date whether the application for inclusion was made before or after that date.

7. The only other contention that remains to be considered is that the High Court should have held that the vote of Tarsem Singh is invalid. It is not disputed that Tarsem Singh's name finds place in the electoral roll of the constituency but the argument was that as he had taken up government service subsequent to the inclusion of his name in the electoral roll, he became disqualified to be a member of any local board and therefore he was not entitled to vote in the election. This contention cannot be upheld. Section 62 of the Act provides thus:

"62 (1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in Section 16 of the Representation of the People Act, 1950.

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for that constituency more than once, and if he does so vote, all his votes in that constituency shall be void.

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment of transportation or otherwise, or is in the lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force."

In view of those provisions read with Section 23 (3) of the 1950 Act every person who is for the time being entered in the electoral roll of a constituency as it stood on the last date for making nominations

for an election in that constituency is entitled to vote unless it is shown that he is prohibited by any of the provisions of the Act from exercising his vote. The prohibitions contained in sub-sections (3), (4) and (5) of Section 62 of the Act do not apply to the case of Tarsem Singh. Therefore we have to see whether the prohibition contained in sub-section (2) applies to his case. That sub-section says that no person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in Section 16 of the 1950 Act.

8. This takes us to Section 16 of the 1950 Act. It read thus:

"16 (1) A person shall be disqualified for registration in an electoral roll if he—

(a) is not a citizen of India; or
(b) is of unsound mind and stands so declared by a competent Court; or
(c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included:

Provided that the name of any person struck off the electoral roll of a constituency by reason of a disqualification under clause (c) of sub-section (1) shall forthwith be re-instated in that roll if such disqualification is during the period such roll is in force, removed under any law authorizing such removal".

9. It is not the case of the appellant that Tarsem Singh had incurred any of the disqualifications mentioned therein. No other provision of law in the Act or in any other law was brought to our notice disqualifying him from exercising his vote. The right to vote being purely a statutory right, the validity of any vote has to be examined on the basis of the provisions of the Act. We cannot travel outside those provisions to find out whether a particular vote was a valid vote or not. In view of Section 30 of the 1950 Act, Civil Courts have no jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled to register himself in the electoral roll in a constituency or to question the illegality of the action taken by or under the authority of the electoral registration officer or any decision given by any authority appointed under that Act for the re-

sion of any such roll. Part III of the 1950 Act deals with the preparation of rolls in a constituency. The provisions contained therein prescribe the qualifications for being registered as a voter (Section 19), disqualifications which disentitle a person from being registered as a voter (Section 16), revision of the rolls (Section 21), correction of entries in the electoral rolls (Section 22), inclusion of the names in the electoral rolls (Sec. 23), appeals against orders passed by the concerned authorities under Sections 22 and 23 (Section 24). Sections 14 to 24 of the 1950 Act are integrated provisions. They form a complete code by themselves in the matter of preparation and maintenance of electoral rolls. It is clear from those provisions that the entries found in the electoral roll are final and they are not open to challenge either before a Civil Court or before a Tribunal which considers the validity of any election. In *B. M. Ramaswamy v. B. M. Krishnamurthy*, 1963-3 SCR 479=(AIR 1963 SC 458), this Court came to the conclusion that the finality of the electoral roll cannot be challenged in a proceeding challenging the validity of the election.

10. For the reasons mentioned above this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 343
(V 57 C 73)

(From: Madhya Pradesh)*

J. C. SHAH, A. C. J., V. RAMASWAMI
AND A. N. GROVER, JJ.

Smt. Sitabai and another, Appellants
v. Ramchandra, Respondent.

Civil Appeal No. 856 of 1966, D/- 20-8-1969.

(A) Hindu Law — Hindu undivided family — Temporary reduction of coparcenary unit to single individual — Character of joint family property does not change. S. A. No. 275 of 1962, D/- 7-9-1965 (MP), Reversed.

Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members and the property of a joint family does not cease to belong to a joint family

(*S. A. No. 275 of 1962 D/- 7-9-1965-MP)

LN/AN/E432/69/DVT/D

merely because the family is represented by a single coparcener who possesses rights which an absolute owner of property may possess. The property which was the joint family property of the Hindu undivided family does not cease to be so because of the "temporary reduction of the coparcenary unit to a single individual". The character of the property, viz. that it was the joint property of a Hindu undivided family remains the same. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family.

(Para 3)

Where a Hindu undivided family consisted of two brothers, on death of one of them, the joint family property continues to retain its character as joint family property in the hands of the surviving brother, when the widow of the deceased brother continues to enjoy the right of maintenance out of the joint family properties. AIR 1966 SC 1523 & 1957 AC 540. Rel. on. S. A. No. 275 of 1962, D/- 7-9-1965 (M.P.), Reversed.

(Para 3)

(B) Hindu Adoptions and Maintenance Act (1956), Ss. 12, 11 (vi) and 14 (4) — Adoption — Effect — Ties of adopted child with his family of birth are severed and replaced by those of adoptive family — Hindu undivided family consisting of two brothers — On death of one brother, his widow begetting illegitimate son from surviving brother — Adoption of male child by her, thereafter — Adopted son becomes coparcener — He is entitled to joint property in preference to illegitimate child. S. A. No. 275 of 1962 D/- 7-9-1965 (MP), Reversed.

It is clear on a reading of the main part of Section 12 and sub-section (vi) of Section 11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. Correspondingly, these very ties are automatically replaced by those created by the adoption in the adoptive family. The legal effect of adoption is to transfer the child from the family of its birth to the family of its adoption. The scheme of Sections 11 and 12 is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. The child adopted is tied with

the relationship of sonship with the deceased husband of the widow. The other collateral relations of the husband become connected with the child through that deceased husband of the widow. For instance, the husband's brother would necessarily be the uncle of the adopted child. The daughter of the adoptive mother (and father) would necessarily be the sister of the adopted son, and in this way, the adopted son would become a member of the widow's family, with the ties of relationship with the deceased husband of the widow as his adoptive father. Though Section 14 of the Act does not expressly state so, it is a necessary implication of Sections 12 and 14 that a son adopted by the widow becomes a son not only of the widow but also of deceased husband. In other words the result of adoption by either spouse is that the adoptive child becomes the child of both the spouses. AIR 1966 Bom 174, Approved.

(Para 6)

When on death of one of the two brothers, who constituted a joint Hindu family, an illegitimate son was born to the widow of the deceased brother as a result of connection with the surviving brother and before the death of that brother the widow adopted a male child, the adopted son became the coparcener with the surviving brother of widow's husband and after his death, was entitled to joint family properties. S. A. No 275 of 1962, D/- 7-9-1965 (M.P.), Reversed.

(Paras 4, 6)

(C) Tenancy Laws — Madhya Bharat Land Revenue and Tenancy Act (66 of 1950), Sections 86, 87, 89 — Rights of ordinary tenant are heritable.

Under the scheme of the Act the rights of ordinary tenant are heritable. It is true that there are special provisions with regard to heritability as regards pakka tenant. But in the absence of any special statutory provision, the heritability of ordinary tenancies must be governed by the personal law of the tenants concerned. Section 86 applies to all classes of tenants and contemplates heritability and transferability of the rights of a tenant or a sub-tenant.

(Para 7)

(D) Constitution of India, Article 136 — Plea that jurisdiction of Civil Court was barred by provisions of M. B. Land Revenue and Tenancy Act, decided against respondent by first two courts — Decision not challenged before High

Court in second appeal — Plea cannot be raised in appeal to Supreme Court.

(Para 8)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 1523 (V 53) =
60 ITR 293, Gowli Buddanna v.
Commr. of I. T., Mysore 8

(1966) AIR 1966 Bom 174 (V 53)
= 67 Bom LR 864, Ankush
Narayan v. Janabai Rama Sawat 6

(1957) 1957 A. C. 540 = 1957-3
W. L. R. 293, Attorney General of
Ceylon v. A. R. Arunachalam
Chettiar 8

Mr. M. C. Chagla, Senior Advocate
(Mr. A. K. Nag, Advocate, with him), for
Appellants; M/s. K. A. Chitale and R.
Gopalkrishnan, Advocates, for Respon-
dent.

The following Judgment of the Court
was delivered by

RAMASWAMI, J.:— This appeal is
brought by special leave from the judg-
ment of the Madhya Pradesh High Court
dated September 7, 1965 in Second Ap-
peal No. 275 of 1962.

2. Dulichand and Bhagirath were
brothers and the properties concerned
are, according to the written statement
of the defendant himself, ancestral. Plain-
tiff Sitabai is the widow of Bhagirath, who
pre-deceased Dulichand, his elder brother
sometime in 1930. It is the admitted case
of both the parties that after Bhagirath
died, the plaintiff Sitabai was living with
Dulichand as a result of which connection
an illegitimate child defendant Ram-
chandra was born in 1935. Dulichand
died on March 13, 1958. Sometime be-
fore his death Sitabai adopted plaintiff
No. 2 Suresh Chandra and an adoption
deed was executed on March 4, 1958.
After the death of Dulichand, Ramchandra
took possession of the joint family pro-
perties. The plaintiff therefore brought
the present suit for ejectment of the
defendant Ramchandra, the illegitimate
son of Dulichand from the disputed pro-
perties. The suit was contested by the
defendant on the ground that Dulichand
had in his life-time surrendered the lands
to the Jagirdar who made re-settlement
of the same with the defendant. As re-
gards the house the contention of the
defendant was that Dulichand had exe-
cuted a will before his death making a
bequest of his house entirely to him. The
trial Court decided all the issues in favour
of the plaintiff and granted the plaintiffs
a decree for possession with regard to the

land and the house. The defendant took the
matter in appeal to the District Judge
who modified the decree. The District
Judge took the view that the will execut-
ed by Dulichand was valid so far as half
of his share in the house was concerned
and, therefore, defendant was entitled
to claim half the share of the house in
dispute. The defendant preferred a
second appeal before the Madhya Pra-
desh High Court which reversed the de-
cree of the lower Courts and held that
the plaintiff was not entitled to any relief
and the suit should be dismissed in its
entirety. The High Court held that
plaintiff No. 2 became the son of plaintiff
No. 1 in 1958 from the date of adoption
and did not obtain any coparcenary in-
terest in the joint family properties. The
High Court thought that on the date of
adoption Dulichand was the sole copar-
cener and there was nobody else to take
a share of his property and plaintiff No. 2
had no concern with the coparcenary pro-
perty in the hands of Dulichand.

3. The first question to be consider-
ed in this appeal is whether the High
Court was right in holding that plaintiff
No. 2 Suresh Chandra at the time of his
adoption by plaintiff No. 1 did not be-
come a coparcener of Dulichand in the
joint family properties. It is the admitt-
ed case of both the parties that the pro-
perties consisted of agricultural land and
a house jointly held by Bhagirath and
Dulichand. After the death of Bhagi-
rath, Dulichand became the sole surviv-
ing coparcener of the joint family. At
the time when plaintiff No. 2 Suresh
Chandra was adopted the joint family
still continued to exist and the disputed
properties retained their character of co-
parcenary properties. It has been point-
ed out in *Gowli Buddanna v. Commis-
sioner of Income-tax, Mysore*, 60 ITR 293
=(AIR 1966 SC 1523) that under the
Hindu system of law a joint family may
consist of a single male member and
widows of deceased male members and
that the property of a joint family did
not cease to belong to a joint family
merely because the family is represent-
ed by a single coparcener who possesses
rights which an absolute owner of pro-
perty may possess. In that case, one
Buddappa, his wife, his two unmarried
daughters and his unmarried son, Bud-
danna, were members of a Hindu un-
divided family. Buddappa died and after
his death the question arose whether the
income of the properties held by

Buddanna as the sole surviving coparcener was assessable as the individual income of Buddanna or as the income of the Hindu Undivided Family. It was held by this Court that since the property which came into the hands of Buddanna as the sole surviving coparcener was originally joint family property, it did not cease to belong to the joint family and income from it was assessable in the hands of Buddanna as income of the Hindu undivided family. As pointed out by the Judicial Committee in *Attorney General of Ceylon v. A. R. Arunachalam Chettiar*, 1957 AC 540 it is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family. In that case one Arunachalam Chettiar and his son constituted a joint family governed by the Mitakshara School of Hindu Law. The father and son were domiciled in India and had trading and other interests in India, Ceylon and far Eastern countries. The undivided son died in 1934 and Arunachalam became the sole surviving coparcener in the Hindu undivided family to which a number of female members belonged. Arunachalam died in 1938, shortly after the Estate Ordinance No. 1 of 1938 came into operation in Ceylon. By Section 73 of the Ordinance it was provided that property passing on the death of a member of the Hindu undivided family was exempt from payment of estate duty. On a claim to estate duty in respect of Arunachalam's estate in Ceylon, the Judicial Committee held that Arunachalam was at his death a member of the Hindu undivided family, the same undivided family of which his son, when alive, was a member and of which the continuity was preserved after Arunachalam's death by adoption made by the widows of the family and since the undivided family continued to persist, the property in the hands of Arunachalam as a single coparcener was the property of the Hindu undivided family. The Judicial Committee observe at p. 543 of the report:

".....though it may be correct to speak of him as the 'owner', yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumes a different quality; it is such, too, that female members of the family (whose members may increase)

have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property". Once again their Lordships quote from the judgment of *Gratison J.*: "To my mind it would make a mockery of the undivided family system if this temporary reduction of the coparcenary unit to a single individual were to convert what was previously joint property belonging to an undivided family into the separate property of the surviving coparcener." To this it may be added that it would not appear reasonable to impart to the legislature the intention to discriminate, so long as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparceners."

The basis of the decision was that the property which was the joint family property of the Hindu undivided family did not cease to be so because of the "temporary reduction of the coparcenary unit to a single individual." The character of the property, viz. that it was the joint property of a Hindu undivided family, remained the same. Applying the principle to the present case, after the death of Bhagirath the joint family property continued to retain its character in the hands of Dulichand as the widow of Bhagirath was still alive and continued to enjoy the right of maintenance out of the joint family properties.

4. The question next arises whether Suresh Chandra, plaintiff No. 2, when he was adopted by Bhagirath's widow he became a coparcener of Dulichand in the Hindu joint family properties. The High Court has taken the view that Suresh Chandra became the son of plaintiff No. 1 with effect from 1958 and plaintiff No. 2 would not become the adopted son of Bhagirath in view of the provisions of the Hindu Adoptions and Maintenance Act, 1956 (Act No. 78 of 1956). It was argued on behalf of the appellant that the High Court was in error in holding that the necessary consequence of a widow adopting a son under the provisions of Act 78 of 1956 was that the adoptee would be the adopted son of the widow and not of her deceased husband. In our view the argument put forward on behalf of the appellant is well founded and must be accepted as correct. Section 5 (1) of Act 78 of 1956 states:

"(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter...."

5. Section 6 deals with the requisites of a valid adoption and provides:

"No adoption shall be valid unless—

(i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter."

Sections 7 and 8 relate to the capacity of a male Hindu and a female Hindu to take in adoption. Under Section 7 any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. If he is married, he requires the consent of his wife in connection with the adoption. A person having more than one wife is required to have the consent of all his wives. Under S. 8, any female Hindu, who is of sound mind and not a minor is stated to have capacity to take a son or a daughter in adoption. The language of this section shows that all females except a wife have capacity to adopt a son or a daughter. Thus, an unmarried female or a divorcee or a widow has the legal capacity to take a son or a daughter in adoption. Section 11 relates to "other conditions for a valid adoption."

Clause (vi) of Section 11 states:

"(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption;"

Section 12 enacts:

"An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family;

Provided that—

(a) * * * * *

(b) * * * * *

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

Section 14 provides:

"(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the senior-most in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child."

6. It is clear on a reading of the main part of Section 12 and sub-section (vi) of Section 11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. The child altogether ceases to have any ties with the family of his birth. Correspondingly, these very ties are automatically replaced by those created by the adoption in the adoptive family. The legal effect of giving the child in adoption must therefore be to transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in Section 14 (1) namely where a wife is living, adoption by the husband results in the adoption of the child by both these spouses; the child is not only the child of the adoptive father but also of the adoptive mother. In case of there being two wives, the child becomes the adoptive child of the senior-most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the step-mother of the adopted child. When a widow or an unmarried woman adopts a child, any husband she marries subsequent to adoption becomes the step-father of the adopted child. The scheme of Sections 11 and 12, therefore, is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations of the husband would be connected with the child

through that deceased husband of the widow. For instance, the husband's brother would necessarily be the uncle of the adopted child. The daughter of the adoptive mother (and father) would necessarily be the sister of the adopted son, and in this way, the adopted son would become a member of the widow's family, with the ties of relationship with the deceased husband of the widow as his adoptive father. It is true that Section 14 of the Act does not expressly state that the child adopted by the widow becomes the adopted son of the husband of the widow. But it is a necessary implication of Sections 12 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband. It is for this reason that we find in sub-section (4) of Section 14 a provision that where a widow adopts a child and subsequently marries a husband, the husband becomes the "step-father" of the adopted child. The true effect and interpretation of Sections 11 and 12 of Act No. 78 of 1956 therefore is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. In other words the result of adoption by either spouse is that the adoptive child becomes the child of both the spouses. This view is borne out by the decision of the Bombay High Court in *Ankush Narayan v. Janabai Rama Sawat*, 67 Bom LR 864= (AIR 1966 Bom 174). It follows that in the present case plaintiff No. 2 Suresh Chandra, when he was adopted by Bhagirath's widow, became the adopted son of both the widow and her deceased husband Bhagirath and, therefore, became a coparcener with Dulichand in the joint family properties. After the death of Dulichand, Plaintiff No. 2 became the sole surviving coparcener and was entitled to the possession of all joint family properties. The Additional District Judge was, therefore, right in granting a decree in favour of the Plaintiff No. 2 declaring his title to the agricultural lands in the village Palasia and half share of the house situated in the village.

7. It is contended on behalf of the respondent that the rights of the Inamdar's tenants were not heritable under the Madhya Bharat Land Revenue and Tenancy Act, 1950 (Act No. 66 of 1950) and therefore the plaintiffs could not claim to

become the Inamdar's tenants after the death of Dulichand in the absence of a contract between the Inamdar and themselves. Reference was made to Sections 63 to 88 dealing with the rights of pakka tenants and it was argued that there was no provision in the Act dealing with the rights of an ordinary tenant. Section 87 states:

"An ordinary tenant is entitled to hold the land let to him in accordance with such terms as may be agreed upon with the person from whom he holds, provided that they are not inconsistent with the provisions of this Act."

Section 89 deals with the rights of sub-tenant and reads:

"(1) A sub-tenant is entitled to hold the land let to him in accordance with such terms as may be agreed upon with the person from whom he holds, subject to his compliance with the general conditions of tenancy as laid down in Section 55, provided that he shall, in no circumstances, lease out the land to any person.

* * * *

It is not possible to accept the argument advanced on behalf of the respondent that under the scheme of Act 66 of 1950 the rights of ordinary tenant are not heritable. It is true that there are special provisions with regard to heritability as regards pakka tenants. But in the absence of any special statutory provision, the heritability of ordinary tenancies must be governed by the personal law of the tenants concerned. Section 86 of the Act contains provisions with regard to mutation of names. Sub-section (1) of Section 86 states:

"When a holder of land, other than an assignee of proprietary rights, loses his rights, in any land in a village by death or by surrender or abandonment of the land or by transfer of his rights to any other person, or by dispossession or otherwise, the Patwari of the village in which the land is situated shall forthwith report the fact to the Tehsildar intimating the name of the new holder and the grounds on which the latter claims to succeed to the title of the former holder. Any person claiming to succeed to the title of the former holder may also apply to the Tehsildar for the mutation of his name within a period of two years from the date of the last holder loses his rights."

The section applies to all classes of tenants and contemplates heritability and

transferability of the rights of a tenant or a sub-tenant. We accordingly reject the argument of the respondent that the rights of Dulichand were not heritable.

8. It is also urged on behalf of the respondent that the jurisdiction of the Civil Court was barred by the provisions of the Madhya Bharat Land Revenue Administration and Ryotwari Land Revenue and Tenancy Act, 1950 (Act No. 66 of 1950). This issue was decided against the respondent in the trial court and also in the first appellate court. The decision of the lower courts on this point was not challenged in the High Court and it is not permissible for the respondent to raise this question at this stage.

9. For the reasons already given we hold that the judgment and decree of the High Court of Madhya Pradesh dated September 7, 1965 in Second Appeal No. 275 of 1962 should be set aside and the judgment and decree of the Additional District Judge, Indore dated April 21, 1962 in First Appeal No. 26 of 1961 should be restored. This appeal is accordingly allowed with costs.

Appeal allowed.

AIR 1970 SUPREME COURT 349 (V 57 C 74)

(From: Punjab)*

J. C. SHAH, ACTG. C. J., V. RAMA-SWAMI AND A. N. GROVER, JJ.

Channan Singh and another, Appellants
v. Smt. Jai Kaur, Respondent.

Civil Appeal No. 774 of 1966, D/- 11-8-1969.

(A) Punjab Pre-emption Act (1 of 1913) (as amended by Act 13 of 1964), Section 15 (2) (b), First Paragraph — Sale of property, received by widow from her husband — Her step-daughter can exercise right of pre-emption — Amendment Act 13 of 1964 should be given retrospective effect.

In view of the first paragraph of Cl. (b) of Section 15 (2), step-daughter of a widow is entitled to exercise her right of pre-emption to the property received by the widow from her deceased husband. This was so even before the amendment of Section 15 in 1964 and at any rate whatever doubts existed they were re-

* (L. P. A. No. 91 of 1961, D/- 31-8-1965 — Punjab)

moved by the Amendment Act of 1964 which must be given retrospective effect. L. P. A. No. 91 of 1961, D/- 31-8-1965 (Punjab), Affirmed; AIR 1968 Punjab 141 (FB), Approved. (Para 6)

The Amendment Act of 1964 is merely of a clarificatory or declaratory nature. Even in the absence of the words which were inserted by the Amendment Act of 1964 in Section 15 (2) (b) the only possible interpretation and meaning of the words "in the son or daughter of such female" could have reference to and cover the son or daughter of the husband of the female. The entire scheme of sub-section (2) of Section 15 is that the right of pre-emption has been confined to the issues of the last male holder from whom the property which has been sold came by inheritance. Looking at clause (a) of sub-section (2) where the property which has been sold has come to the female from her father or brother by succession the right of pre-emption has been given to her brother or brother's son. The principle which has been kept in view is that the person on whom the right of pre-emption is conferred must be a male lineal descendant of the last male holder of the property sold. This is so with regard to clause (a) of sub-section (2). Coming to clause (b) where the sale is by a female of land or property to which she has succeeded through her husband or through her son in case the son has inherited the same from his father the right of pre-emption is to vest firstly in the son or daughter of such female and secondly, in the husband's brother or husband's son of such female. Consequently retroactive intention can be attributed to the legislature when the Amendment Act of 1964 was enacted. It is well settled that if a statute is curative or merely declares the previous law retroactive operation would be more rightly ascribed to it than the legislation which may prejudicially affect past rights and transactions. ILR (1961) 2 Punjab 614 (627), Approved. (Paras 4, 5)

(B) Punjab Pre-emption Act (1 of 1913), Section 31 (as inserted by Amending Act 10 of 1960) — Scope — Appellate Court — Power of — Can give retrospective effect to substantive provisions of Amending Act 10 of 1960 only.

The language used in Section 31 was comprehensive enough so as to require an Appellate Court to give effect to the substantive provisions of the Amending Act whether the appeal before it was one against a decree granting pre-emption or

one refusing that relief. Although Section 31 was inserted in the Act for all times the phraseology employed therein does not show that its language was meant to cover those amendments which would be made subsequent to the Amendment Act of 1960. The word "said" can have reference in the context only to the enactment of 1960 and to no other. It would not be legitimate for the Courts to give an extended effect to a provision which has retrospective operation unless the language used and words employed warranted such a course being followed. AIR 1963 SC 553, Foll. (Para 3)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Punj 141 (V 55)=
ILR (1968) 1 Punj 104 (FB), Moti
Ram v. Bakhwant Singh 5
(1963) AIR 1963 SC 553 (V 50)=
(1963) 3 SCR 858, Ram Sarup v.
Munshi 8
(1961) ILR (1961) 2 Punj 614, Mota
Singh v. Prem Parkash Kaur 4

Mr. Harbans Singh, Advocate, for Appellants; Mr. Bishan Narain, Senior Advocate (Mr. S. K. Mehta, Advocate of M/s. K. L. Mehta and Co., with him), for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.— This is an appeal by special leave from a judgment of a Division Bench of the Punjab High Court decreeing the suit filed by the respondent for possession of certain land by pre-emption.

2. The facts may be shortly stated: Santa Singh was the owner of some land in village Samadh Bhai, tehsil Moga. He died leaving a widow Shrimati Sobhi. He also left a daughter Shrimati Jai Kaur from his other wife. On February 3, 1958 Smt. Sobhi sold 73 kanals 14 marlas of land to the appellants, the sale consideration mentioned in the sale deed being Rs. 8,000/-. Smt. Jai Kaur filed a suit for possession by pre-emption of the land which had been sold by Smt. Sobhi. According to her a consideration of Rs. 4,000/- only had been paid by the vendee. The trial Court decreed the suit in May 1959 granting a decree for possession on payment of Rs. 6,500/- together with costs. The Second Additional Judge to whom an appeal was taken dismissed it. In the High Court the learned Single Judge took the view that Smt. Jai Kaur not being the daughter of the vendor Smt. Sobhi had no right of pre-emption under

Section 15 (2) of the Punjab Pre-emption Act 1913 as amended by the Punjab Pre-emption Amendment Act, 1960. The suit was dismissed. Smt. Jai Kaur filed an appeal under Clause 10 of the Letters Patent of the High Court. Relying on an amendment made by the Punjab Pre-emption Amendment Act, 1964 in the first paragraph of clause (b) of sub-section (2) of Section 15 of the Punjab Pre-emption Act, hereinafter called the Act, the Division Bench reversed the judgment of the Single Judge and decreed the plaintiff's suit.

3. The relevant provisions of the statute may now be noticed together with the amendments made in 1960 and 1964. Section 15 of the Act was substituted by Section 4 of the Amendment Act, 1960. According to the substituted section the right of pre-emption in respect of agricultural land and village immoveable property shall vest thus:

(1)

(2) Notwithstanding anything contained in sub-section (1),—

(a) where the sale is by a female of land or property to which she has succeeded through her father or brother or the sale in respect of such land or property is by the son or daughter of such female, after inheritance, the right of pre-emption shall vest,—

(i) if the sale is by such female, in her brother or brother's son;

(ii) if the sale is by the son or daughter of such female, in the mother's brother or the mother's brother's sons of the vendor or vendors;

By the Amendment Act, 1964 in the first paragraph of Section 15 (2) (b) between the words "such" and "female" the words "husband of the" were inserted. The result was that after the amendment the portion of clause (b) relevant for our purpose was to read as follows:

"FIRST, in the son or daughter of such husband of the female."

Now if the Amendment Act of 1964 could be regarded as having retrospective operation so as to affect pending proceedings there can be no dispute that the judgment of the Division Bench was right and must be affirmed. The contention which has been raised on behalf of the appellants is that there is no indication in the Amendment Act of 1964 that it was to have retrospective operation and therefore the amendment made by it should be deemed to be only prospective. It may be mentioned that by Section 6 of the

Amendment Act of 1960 a new Section 31 was inserted in the Act. That section provided, "no court shall pass a decree in a suit for pre-emption whether instituted before or after the commencement of the Punjab Pre-emption Amendment Act of 1960 which is inconsistent with the provisions of the said Act". In *Ram Sarup v. Munshi*, (1963) 3 SCR 858=(AIR 1963 SC 553) this Court held that the language used in Section 31 was comprehensive enough so as to require an Appellate Court to give effect to the substantive provisions of the Amending Act whether the appeal before it was one against a decree granting pre-emption or one refusing that relief. Although Section 31 was inserted in the Act for all times the phraseology employed therein does not show that its language was meant to cover those amendments which would be made subsequent to the Amendment Act of 1960. The word "said" can have reference in the context only to the enactment of 1960 and to no other. It would not be legitimate for the courts to give an extended effect to a provision which has retrospective operation unless the language used and words employed warranted such a course being followed. That does not appear to be the case here.

4. It appears to us that the Amendment Act of 1964 was merely of a clarificatory or declaratory nature. Even in the absence of the words which were inserted by the Amendment Act of 1964 in Section 15 (2) (b) the only possible interpretation and meaning of the words "in the son or daughter of such female" could have reference to and cover the son or daughter of the husband of the female. The entire scheme of sub-section (2) of Section 15 is that the right of pre-emption has been confined to the issues of the last male holder from whom the property which has been sold came by inheritance. Looking at clause (a) of sub-section (2) where the property which has been sold has come to the female from her father or brother by succession the right of pre-emption has been given to her brother or brother's son. As has been observed in *Mota Singh v. Prem Parkash Kaur*, ILR (1961) 2 Punj 614 at p. 627, the predominant idea seems to be that the property must not go outside the line of the last male holder and the right has been given to his male lineal descendants. Where the sale is by the son or the daughter of such female the right

is given to the mother's brothers or their sons. The principle which has been kept in view is that the person on whom the right of pre-emption is conferred must be a male lineal descendant of the last male holder of the property sold. This is so with regard to clause (a) of sub-sec. (2). Coming to clause (b) where the sale is by a female of land or property to which she has succeeded through her husband or through her son in case the son has inherited the same from his father the right of pre-emption is to vest firstly in the son or daughter of such female and secondly, in the husband's brother or husband's brother's son of such female. Now if the son or daughter of the female who has sold the property could refer to her son or daughter from a husband other than the one from whom the property devolved on her, it would be contrary to the scheme and purpose of sub-sec. (2) which essentially is to vest the right of pre-emption in the lineal descendants of the last male holder. Similarly it is unthinkable that a husband's brother or husband's brother's son should have reference to a husband to whom the property never belonged. In other words it could never be intended that if a female has had a previous husband who has either died or with whom the marriage has been dissolved and the female has remarried and succeeded to the property of her second husband the brother or the brother's son of her previous husband should be able to claim the right of pre-emption when they had nothing whatsoever to do with the property sought to be pre-empted. It would follow that under clause (b) the right of pre-emption would vest firstly in the son or daughter of the husband of the female meaning thereby either her own off-spring from the husband whom she has succeeded or the son or daughter of that husband even from another wife.

5. If the above discussion is kept in view there is no difficulty in attributing a retroactive intention to the legislature when the Amendment Act of 1964 was enacted. It is well settled that if a statute is curative or merely declares the previous law retroactive operation would be more rightly ascribed to it than the legislation which may prejudicially affect past rights and transactions. We are in entire agreement with the following view expressed in a recent Full Bench decision of the Punjab High Court in ILR (1968) 1 Punj 104 at p. 120=(AIR 1968 Punj 141

at p. 149) in which a similar point came up for consideration:

"A close analysis of paragraphs (First) and (Secondly) of clause (b) of sub-section (2) of Section 15 before the amendment introduced by Punjab Act 13 of 1964 would demonstrate that a son of the husband of a female vendor though not born from her womb would be entitled to pre-empt, particularly when the husband's brother and even the son of the husband's brother of that female are accorded the right of pre-emption. To reiterate, the right of pre-emption is accorded manifestly on the principle of consanguinity, the property of the female vendor being that of her husband, and there is no reason why the step-son should be excluded and the nephew of the husband included. From this alone it must be inferred that the Legislature had intended to include a step-son and consequently retrospective operation had to be given to the amending Act as such a construction appears to be in consonance and harmony with the purpose of the Act".

6. The result, therefore, is that the respondent was entitled to exercise her right of pre-emption under paragraph First of clause (b) of sub-section (2) of Section 15 even before the amendment made in 1964. At any rate, whatever doubts existed they were removed by the Amendment Act of 1964 which must be given retrospective operation.

7. The appeal consequently fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 352 (V 57 C 75)

(From Calcutta: (1965) 1 ITJ 769)

J. C. SHAH, ACTG. C. J., V. RAMASWAMI AND A. N. GROVER, JJ.

The Commissioner of Wealth-tax, West Bengal II, (In all the Appeals), Appellant v. Tungabhadra Industries Ltd., Calcutta, (In all the Appeals), Respondent.

Civil Appeals Nos. 1629 to 1631 of 1968, D/- 8-8-1969.

(A) Wealth Tax Act (1957), Section 7 (2) (a) — Business with regular accounts — Determination of net value of fixed assets — Whether written down value is true value — Onus is on assessee to prove — Failure to show that written down value is true value — Adoption of

value shown in balance-sheet is proper. (1965) 1 ITJ 769 (Cal), Reversed.

Under sub-section (1) of Section 7 of the Act the Wealth-tax Officer is authorised to estimate for the purpose of determining the value of any asset, the price which it would fetch, if sold in the open market on the valuation date. But this rule in the case of a running business may often be inconvenient and may not yield a true estimate of the net value of the total assets of the business. The legislature has, therefore, provided in sub-section (2) (a) that where the assessee is carrying on a business for which accounts are maintained by him regularly, the Wealth-tax Officer may determine the net value of the assets of the business as a whole, having regard to the balance-sheet of such business as on the valuation date and make such adjustments therein as the circumstances of the case may require. The power conferred upon the tax officer to make adjustments as the circumstances of the case may require is also for the purpose of arriving at the true value of the assets of the business. It is of course open to the assessee in any particular case to establish after producing relevant materials that the value given of the fixed assets in the balance-sheet is artificially inflated. It is also open to the assessee to establish by acceptable reasons that the written down value of any particular asset represents the proper value of the asset on the relevant valuation date. In the absence of any material produced by the assessee to demonstrate that the written down value is the real value, the Wealth-tax Officer would be justified in a normal case in taking the value given by the assessee itself to its fixed assets in its balance-sheet for the relevant year as the real value of the assets for the purposes of the wealth-tax. It is a question of fact in each case as to whether the depreciation has to be taken into account in ascertaining the true value of the assets. The onus of proof is on the assessee who must produce reliable material to show that the written down value of the assets and not the balance-sheet value is the true value. (1965) 1 ITJ 769 (Cal), Reversed; AIR 1966 SC 1370, Rel. on. (Para 7)

(B) Wealth Tax Act (1957), Section 27 (6) — Reference by Appellate Tribunal on question of law — Nature of duty of Tribunal to dispose of case after judgment given in reference, pointed out.

Section 27 (6) of the Act requires the Tribunal on receiving a copy of the judg-

ment of the Supreme Court or the High Court as the case may be to pass such orders as are necessary to dispose of the case conformably to such judgment. This clearly imposes an obligation upon the Tribunal to dispose of the appeal in the light and conformably with the judgment of the Supreme Court. Before the Tribunal passes an order disposing of the appeal there would normally be a hearing. The scope of the hearing must of course depend upon the nature of the order passed by the Supreme Court. If the Supreme Court agrees with the view of the Tribunal the appeal may be disposed of by a formal order. But if the Supreme Court disagrees with the Tribunal on a question of law, the Tribunal must modify its order in the light of the order of the Supreme Court. If the Supreme Court has held that the judgment of the Tribunal is vitiated because it is based on no evidence or because the judgment proceeds upon a misconstruction of the statute, the Tribunal would be under a duty to dispose of the case conformably with the opinion of the Supreme Court and on the merits of the dispute and rehear the appeal. In all cases, however, opportunity must be afforded to the parties of being heard. AIR 1968 SC 36 (approving AIR 1956 Bom 509), Rel. on.

(Para 8)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 36 (V 55)=
- (1967) 66 ITR 478, *Esthuri Aswathiah v. Commr. of Income-tax* 8
- (1966) AIR 1966 SC 1370 (V 53)=
- (1966) 59 ITR 767, *Kesoram Industries & Cotton Mills Ltd. v. Commr. of Wealth-tax (Central), Calcutta* 6, 7
- (1956) AIR 1956 Bom 509 (V 43)=
- (1956) 29 ITR 118, *Income-tax Appellate Tribunal Bombay v. S. C. Cambatta & Co. Ltd.* 8

Mr. B. Sen, Senior Advocate, (M/s. T. A. Ramachandran, R. N. Sachthey and B. D. Sharma, Advocates, with him), for Appellant (In all the Appeals); Mr. M. C. Chagla, Senior Advocate (M/s. R. K. Choudhury and B. P. Maheshwari, Advocates, with him), for Respondent (In all the Appeals).

The following Judgment of the Court was delivered by

RAMASWAMI, J.— This appeal is brought by certificate granted under Section 29 (1) of the Wealth Tax Act, 1957 (hereinafter referred to as the Act) against the judgment of the Calcutta High Court

dated January 29, 1966 in Wealth Tax Matter No. 372 of 1961.

2. The respondent is a company which is assessed to wealth-tax for the assessment years 1957-58, 1958-59 and 1959-60. In computing the net wealth of the respondent on the respective valuation dates the Wealth Tax Officer proceeded under Section 7 (2) (a) of the Act and included the full value of the fixed assets as shown by the respondent in the respective balance-sheets without any adjustment, after rejecting its contention that the fixed assets should be assessed at their written down value as computed for the purposes of income-tax. In the assessment order for 1957-58 the Wealth Tax Officer gave his reasons as follows:

"The assessee claimed that since the full amount of depreciation which was admissible under the Income-tax Act was not provided in the balance-sheet the amount of depreciation not provided for earlier should now be deducted from the value of the assets in order to arrive at the net wealth. This contention can hardly be accepted. The depreciation allowable under the Income-tax Act does not determine the market value of the assets. The object of allowing depreciation in the income-tax assessment is quite different. For the purpose of the Wealth Tax assessment the Value of the assets as estimated by the assessee itself in its balance-sheet has been accepted."

3. Similarly in his assessment order for 1958-59 the Wealth Tax Officer stated as follows:—

"Excluding the value of land, the total value of the fixed assets as per balance-sheet amounts to Rs. 60,53,811 whereas the assessee has shown in its return the value of the same at Rs. 7,69,435. These values have been shown by the assessee on the basis of income-tax written down value and not on the basis of the balance-sheet values as required under the global system of valuation. It is common knowledge that the values of imported machinery has increased considerably during the last few years and, on the valuation date, I do not think that their value should be less than that provided for in the balance-sheet."

4. On appeal the Appellate Assistant Commissioner confirmed the valuation of the fixed assets. On further appeal the Income-tax Appellate Tribunal held that it would be fair in the circumstances of the case to adopt the written down value

of the assets as value thereof for all the years under appeal. In the course of its order the Appellate Tribunal said:

"In income-tax assessment depreciation is calculated upon the original cost in a scientific and systematic manner with due regard to the nature of the asset. Therefore, the written down value as determined in the income-tax assessment may be taken as the fair index of the net value of the business assets in most cases It cannot however be laid down as an inflexible rule of law that in every case the written down value must be taken to be the net value of the business assets. If that were so, the Legislature would have said so in clear terms instead of indulging in the circumlocution in Section 7 (2) (a). In this particular case, it appears, the assessee did not make any reserve for depreciation and the assets are old dating back from the inception of the business long ago. In these circumstances, in our opinion, it would be fair to adopt the written down value of the assets as the value thereof for all the years under appeal

At the instance of the Commissioner of Income-tax the Appellate Tribunal stated a case to the High Court under Section 27 (1) of the Act on the following question of law:

"Whether on the facts and in the circumstances of the case, for the purpose of determining the net value of the assets of the assessee under Section 7 (2) of the Wealth-tax Act, 1957 the Tribunal was right in directing that the written down value of the fixed assets of the assessee should be adopted as the value thereof, instead of their balance-sheet value?" By its judgment dated January 29, 1965, the High Court answered the question in the affirmative and in favour of the respondent.

5. Section 7 of the Act stood as follows at the material time:

"(1) The value of any asset, other than cash, for the purposes of this Act, shall be estimated to be the price which in the opinion of the Wealth-tax Officer it would fetch if sold in the open market on the valuation date.

(2) Notwithstanding anything contained in sub-section (1),—

(a) where the assessee is carrying on a business for which accounts are maintained by him regularly, the Wealth-tax Officer may, instead of determining separately the value of each asset held by the as-

sessee in such business, determine the net value of the assets of the business as a whole having regard to the balance-sheet of such business as on the valuation date and making such adjustments therein as the circumstances of the case may require.

6. In *Kesoram Industries & Cotton Mills Ltd. v. Commr. of Wealth-tax (Central)*, Calcutta, (1966) 59 ITR 767 = (AIR 1966 SC 1370) the appellant-company had shown in its balance-sheet for the period ending March 31, 1957, the appreciated value on revaluation of its assets, after making certain adjustments, at Rupees 2,60,52,357 and had introduced in the capital reserve surplus a corresponding balancing figure of Rs. 1,45,87,000 representing the increase in the value of the assets upon re-valuation. For the purposes of wealth-tax officer, took the sum of Rs. 2,60,52,357 as the value of the assets, whereas the company contended that an adjustment ought to be made in view of the increase in the value shown in the balance-sheet on revaluation. It was held by this Court that as no one could know better the value of the assets than the assessee himself, the Wealth-tax Officer was justified in accepting the value of the assets at the figure shown by the appellant-company itself. It was open to the appellant-company to convince the authorities that that figure was inflated for acceptable reasons; but it did not make any such attempt. It was also open to the Wealth-tax Officer to reject the figure given by the appellant-company and to adopt another figure if he was, for sufficient reasons, satisfied that the figure given by the appellant was wrong.

7. It is argued on behalf of the appellant in the present case that the High Court was not right in holding that the principle laid down by this Court in *Kesoram Industries*, 1966-59 ITR 767 = (AIR 1966 SC 1370) case is not applicable. In our opinion there is justification for this argument. Under sub-section (1) of Section 7 of the Act the Wealth-tax Officer is authorised to estimate for the purpose of determining the value of any asset, the price which it would fetch, if sold in the open market on the valuation date. But this rule in the case of a running business may often be inconvenient and may not yield a true estimate of the net value of the total assets of the business. The legislature has, therefore, provided in sub-section (2) (a) that where the

assessee is carrying on a business for which accounts are maintained by him regularly, the Wealth-tax Officer may determine the net value of the assets of the business as a whole, having regard to the balance-sheet of such business as on the valuation date and make such adjustments therein as the circumstances of the case may require. The power conferred upon the tax officer to make adjustments as the circumstances of the case may require is also for the purpose of arriving at the true value of the assets of the business. It is of course open to the assessee in any particular case to establish after producing relevant materials that the value given of the fixed assets in the balance-sheet is artificially inflated. It is also open to the assessee to establish by acceptable reasons that the written down value of any particular asset represents the proper value of the asset on the relevant valuation date. In the absence of any material produced by the assessee to demonstrate that the written down value is the real value, the Wealth-tax Officer would be justified in a normal case in taking the value given by the assessee itself to its fixed assets in its balance-sheet for the relevant year as the real value of the assets for the purposes of the wealth-tax. It is a question of fact in each case as to whether the depreciation has to be taken into account in ascertaining the true value of the assets. The onus of proof is on the assessee who must produce reliable material to show that the written down value of the assets and not the balance-sheet value is the true value. If, therefore, the assessee merely claims that the written down value of the assets should be adopted but fails to produce any material to show that the written down value is the true value, the Wealth-tax Officer is justified in rejecting the claims and adopting the values shown by the assessee himself (sic in) his balance-sheet as the true value of his assets. In our opinion the High Court should have based its decision on the principle of *Kesoram Industries case*, 1966-59 ITR 767=(AIR 1966 SC 1870) and the question of law should be answered in the manner stated by us in this judgment.

8. But it is necessary to give certain effective directions in this case. Section 27 (6) of the Act requires the Tribunal on receiving a copy of the judgment of the Supreme Court or the High Court as the case may be to pass such orders as are necessary to dispose of the

case conformably to such judgment. This clearly imposes an obligation upon the Tribunal to dispose of the appeal in the light and conformably with the judgment of the Supreme Court. Before the Tribunal passes an order disposing of the appeal there would normally be a hearing. The scope of the hearing must of course depend upon the nature of the order passed by the Supreme Court. If the Supreme Court agrees with the view of the Tribunal the appeal may be disposed of by a formal order. But if the Supreme Court disagrees with the Tribunal on a question of law, the Tribunal must modify its order in the light of the order of the Supreme Court. If the Supreme Court has held that the judgment of the Tribunal is vitiated because it is based on no evidence or because the judgment proceeds upon a misconstruction of the statute, the Tribunal would be under a duty to dispose of the case conformably with the opinion of the Supreme Court and on the merits of the dispute and re-hear the appeal. In all cases, however, opportunity must be afforded to the parties of being heard. In *Income-tax Appellate Tribunal, Bombay v. S. C. Cambatta & Co. Ltd.*, (1956) 29 ITR 118 at p. 120=(AIR 1956 Bom 509 at p. 510) the Bombay High Court has explained the procedure followed in the disposal of an appeal conformably to the judgment of the High Court. Chagla, C. J., in delivering the judgment of the Court observed:

"..... when a reference is made to the High Court either under Section 66 (1) or Section 66 (2) the decision of the Appellate Tribunal cannot be looked upon as final; in other words, the appeal is not finally disposed of. It is only when the High Court decided the case, exercises its advisory jurisdiction, and gives directions to the Tribunal on questions of law, and the Tribunal reconsiders the matter and decides it, that the appeal is finally disposed of it is clear that what the Appellate Tribunal is doing after the High Court has heard the case is to exercise its appellate powers under Section 33. The shape that the appeal would ultimately take and the decision that the Appellate Tribunal would ultimately give would entirely depend upon the view taken by the High Court."

This passage was quoted with approval by this Court in *Esthuri Aswathiah v. Commr. of Income-tax*, (1967) 66 ITR 478=(AIR 1968 SC 38). In the present case, therefore, the answer we have fur-

nished to the question in the reference means that the Appellate Tribunal must now, in conformity with the judgment of this Court, act under Section 27 (6) of the Act, that is to say, dispose of the case after rehearing the respondent-company and the Commissioner in the light of the evidence and according to law.

9. There will be no order as to costs.
Order accordingly.

AIR 1970 SUPREME COURT 350
(V 57 C 76)

(From: Bombay)

V. BHARGAVA AND K. S. HEGDE, JJ.

Jotiram Laxman Surange, Appellant v.
State of Maharashtra, Respondent.

Criminal Appeal No. 181 of 1968, D/-
8-10-1969.

Prevention of Corruption Act (1947),
Section 5 (1) (d) — Penal Code (1860),
S. 161 — Secretary of Gram Panchayat
who was also Talati charged for offence
of taking bribe — Plea of accused that
he took money for purchasing small
saving certificates for complainant and
not for substituting his name in revenue
records — Conviction under Section 5 (1)
(d) and Section 161 held proper in view
of circumstances found against him.

The accused, a secretary of a Gram Panchayat and also Talati was alleged to have taken a certain sum as bribe from the complainant for substituting the name of the complainant as the owner of certain plot of land, in the revenue records. The accused raised the plea that the money, he took from the complainant was not by way of bribery but for purchasing the small savings certificates for the complainant and that he was authorised to collect the money for the purpose.

Held, that the accused could be rightly convicted under Section 5 (1) (d) and Section 161 Penal Code as the circumstances found against the accused were (i) that he informed complainant that his name was entered in the records although he kept the entries open and his plea that he did so for demanding money for Small Savings Certificates was wrong. (ii) No receipt was given by the accused to the complainant for the amount received (iii) along with the amount he did not ask for an application signed by the complainant for purchase of certificates which was an essential thing. (iv) On the very

LM/LM/F163/69/MVJ/M

first occasion when the accused was asked by his superior authorities he did not put forward the explanation that the alleged sum was received by him for purchase of certificates (v) the sum was accepted not in the office or in the house of accused but at the house of a third person (vi) there was nothing on the record to show that there was any enmity between the accused and the complainant.
(Para 6)

The following Judgment of the Court was delivered by

BHARGAVA, J.:— This appeal by special leave has been filed by Jotiram Laxman Surange who was convicted by the High Court of Bombay for offences punishable under Section 5 (1) (d) of the Prevention of Corruption Act and Section 161 of the Indian Penal Code read with Section 5 (2) of the said Act in an appeal filled by the State Government against his acquittal by the trial Court.

2. The prosecution case was that one Thakur was the Mukhtiar of a money-lender and landlord Shendure and used to look after his Court work also. In 1946, Shendure had advanced money to one Shindgonda Desai and had obtained a mortgage of Survey Plot No. 78 in village Idarguchi with possession. On 25th June, 1960, Shendure purchased this plot in Court sale after obtaining decree on the basis of his mortgage. In August, 1963, the appellant took charge of the post of Secretary of Gram Panchayat and of Talati of this village. On 9th January, 1964, the appellant sent a letter to Thakur informing him that the entry against this land had been made in the name of his master Shendure. On the same day, one Dundappa presented an application to the appellant objecting to the entry of Shendure's name in the record showing him in possession of this plot. Dundappa was claiming to be cultivating this plot on the basis of sharing of crop with Shendure. On 12th June, 1964, an application was made by Thakur on behalf of his master Shendure for investment of a sum of Rs. 50/- in small savings certificates, because that amount had been paid by Thakur to the appellant for this purpose. There is some dispute as to the date when this sum of Rs. 50/- was paid. According to the prosecution the payment was made in December, 1963, while, according to the appellant, it was made in June, 1964, shortly before this application. In August, 1964, the application

was returned by the Post Office refusing to issue small savings certificates on the ground that the application was signed by Thakur and not by Shendure in whose favour these certificates were to be issued. These proceedings took place because the appellant was also making collections for small savings certificates. About the same time, Shendure wanted that there should be a measurement and demarcation of his plot No. 78 and, for this purpose, he needed an extract of record of rights from the appellant. He directed Thakur to obtain the extract in view of the notice already received by Thakur from the appellant that Shendure's name had been entered against this plot. On 3rd December, 1964, Thakur met the appellant in a witness shed in the Court compound and asked the appellant to issue the extract. The appellant demanded a bribe of Rs. 500/- by informing Thakur that Shendure's name was not yet entered in the papers and that an objection had been filed by Dundappa on 9th January, 1964. The appellant promised to tear off the application of Dundappa if the bribe was paid to him. Ultimately, after negotiations, the amount of bribe was settled at Rs. 200/-. On 7th December, 1964, Thakur informed Shendure about this settlement with the appellant, whereupon Shendure asked Thakur to give information to the police. On 8th December, 1964, Thakur lodged a complaint with the police, as a result of which a trap was laid on 10th December, 1964. A sum of Rs. 150/- in currency notes was marked by putting anthracene powder on them and Thakur was given these notes in order to hand them over to the appellant. The Inamdar was asked to send for the appellant who happened to be busy in some meeting. He met the appellant at about 10.45 a. m. When the appellant came Thakur asked him whether he had brought the requisite register for issuing the extract of the record of rights. The appellant told Thakur that he had brought the extracts, though not the register. The extracts shown to Thakur were, however, undated. The appellant put the date in the presence of Thakur on the extracts and gave the extracts to Thakur after accepting the payment of Rs. 150/-. The arrangement was that this sum of Rs. 150/- together with the sum of Rs. 50/-, which was already with the appellant and which could not be spent for purchase of small savings certi-

ficates, would make up the full amount of bribe money of Rs. 200/- settled between them. After the appellant had received the money, Thakur went down from Inamdar's house and informed the police and other witnesses who were waiting outside. As the appellant attempted to go out, he was stopped and the money was demanded from him. The appellant produced the sum of Rs. 150/- in currency notes which were attached under a Panchanama and, ultimately, a chargesheet was filed against the appellant for acceptance of this bribe.

3. The appellant admitted the receipt of both the sums of Rs. 50/- and Rs. 150/-, but his case was that both the amounts were given to him for purchase of small savings certificates and there was no question of payment of any bribe. He also admitted that the notes for Rs. 150/- were recovered from him after they had been handed over to him by Thakur, but his case was that he did not know that any trap was being laid in order to charge him with the offence of accepting a bribe. According to him, he had been asked by his superior authorities to collect money for small savings certificates with a cautioning note that the efficiency of his work would be judged on the basis of success in making collections for the small savings. He accepted the case of the prosecution that he had kept the entries against Survey Plot No. 78 blank and had not entered the name of Shendure, but, according to him, the object was not to accept the bribe but to bring pressure on Shendure to contribute towards the small savings drive.

4. The trial Court accepted the plea of the appellant and held that it was more likely that he accepted the money for purchase of small savings certificates for Shendure and, though a trap was laid at the instance of Thakur, the appellant was innocent because he at least did not accept the money as a bribe. It was Thakur who had this trap laid in order to get the appellant involved in this criminal case. The High Court, on appeal by the State, differed from the trial Court and held that, on the facts and circumstances of this case, the finding given by the trial Court was entirely wrong and the acquittal of the appellant was totally unjustified. Consequently, the High Court allowed the appeal of the State and convicted and sentenced the appellant as above.

5. In view of the case put forward by the prosecution and the appellant, mentioned above, the only question that really requires examination is whether Thakur's case that he paid this amount as a bribe to the appellant in order to obtain a copy of the extract and to ensure entry of Shendure's name against Plot No. 78 is correct, or whether he made out all this story and, in fact, paid the sum of Rs. 150/- to the appellant in addition to the previous sum of Rs. 50/- for the purchase of small savings certificates for Shendure. The evidence of Thakur has been given on oath in support of the prosecution version, while, on the other side, there is no evidence except that the appellant made his statement, under Section 342 of the Code of Criminal Procedure, giving his version. The High Court believed the evidence of Thakur and, in our opinion, very rightly, because there were a number of circumstances which showed that his version must be correct, while the plea put forward by the appellant cannot be true.

6. The circumstances which corroborate Thakur and show that his version must be correct are:—

(1) The appellant, in January, 1964, informed Thakur that Shendure's name had already been entered, but gave wrong information to Thakur that the name had already been entered, while he kept the entries open by not entering Shendure's name against Plot No. 78. His plea that he kept the entries open for the purpose of demanding money for small savings scheme from January, 1964, till December, 1964, under the instructions from superior authorities has been found to be entirely wrong.

(2) No receipt was given by the appellant to Thakur when he received the sum of Rs. 150/- from him. If the money was really received for purchase of small savings certificates, the appellant would surely have given a receipt to Thakur when he accepted this money for that purpose. The absence of the receipt is only consistent with the acceptance of this money as a bribe.

(3) When the appellant obtained this sum of Rs. 150/- from Thakur, he did not ask Thakur to give an application signed by Shendure for purchase of small savings certificates. Earlier, the application for purchase of small savings certificates of the value of Rs. 50/- had already been returned by the Post Office on the ground that

it required the signature of Shendure. In case, the appellant was really taking this sum of Rs. 150/- for purchase of small savings certificates, he, in the light of that earlier experience, would have certainly insisted on taking a written application from Shendure for purchase of the certificates, because, if no such application was given subsequently by Shendure, the appellant would have been forced to return this money and would have failed to utilise it for the purpose of purchasing the certificates. If such application had been obtained, the appellant could have produced it as proof that the money was received not as a bribe, but for the purpose mentioned by him. The absence of such an application is a very strong circumstance showing that the sum was not received for purchase of certificates, but as a bribe as stated by Thakur.

(4) On the very first occasion when the appellant was questioned by his superior authorities, he did not come forward with the explanation that the sum of Rs. 150/- was received by him for purchase of small savings certificates; and this plea was taken only as an after-thought.

(5) This sum of Rs. 150/- was accepted by the appellant not at his own house or office, but at the house of a third person, viz., the Inamdar. If the money was being received for small savings certificates, he would have obviously accepted the money at his own place of work; and

(6) Nothing has been established on the record to show that Shendure had any enmity with the appellant, so that he could have no motive to make out a false case of bribery against the appellant. Shendure, even according to the appellant, is a rich man and it cannot be expected that he would try to make out a false case simply because a small sum of Rs. 200/- was demanded from him by the appellant for purchase of small savings certificates.

7. On the other hand, there are no circumstances established from the evidence on the record which are inconsistent with the prosecution case and which would show that this sum of Rs. 150/- could not have been paid as a part of the bribe of Rs. 200/- demanded by the appellant. The appellant's case that on the 3rd December, 1964, when there were negotiations between him and Thakur, the meeting took place not in the witness shed of the Court but in the room of the Sheristadar has been rightly rejected by the High Court. The trial Court

wrongly accepted this plea, purporting to rely on some admission made by Thakur which was only to the effect that defence witness Kulkarni used to sit in the Sheristedar's room. There was no admission by Thakur indicating that the meeting between him and the appellant took place in that room. There is the further circumstance that the version of the talk put forward by the appellant in his statement under Section 342, Criminal Procedure Code, is different from the version given by the defence witness Kulkarni in his evidence. Kulkarni says that, in the talk in his presence the only question that arose was of the appellant giving an extract from the records to Thakur if Thakur paid the money for purchase of small savings certificates, while, according to the appellant, he had told Thakur on that very occasion that the entry had been kept blank and that Dundappa's application had been received by him claiming that his name should be entered and not Shendure's.

8. In these circumstances, the High Court was quite right in holding that the trial Court went wrong in accepting the plea of the defence and in rejecting the prosecution case. There is no reason for our interference with the judgment of the High Court. The appeal is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 359
(V 57 C 77)

S. M. SIKRI AND P. JAGANMOHAN REDDY, JJ.

Kantilal Chandulal Mehta, Appellant v. State of Maharashtra and another, Respondents.

Criminal Appeal No. 260 of 1968, D/- 10-10-1969.

(A) Criminal P. C. (1898), Secs. 423 (1) (d), 535, 231 — Charge can be altered at appellate stage — Charge altered and case remanded for fresh argument — Accused given opportunity to adduce evidence — No new trial — No prejudice — Constitution of India, Article 136 — Supreme Court will not interfere with judicial exercise of discretion.

The Criminal Procedure Code gives ample power to the Courts to alter or amend a charge whether by the Trial Court or by the appellate Court provided

that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him. The power of the appellate Court is set out in Section 423, Criminal Procedure Code and invests it with very wide powers. A particular reference may be made to Cl. (d) of sub-section (1) as empowering it even to make any amendment or any consequential or incidental order that may be just or proper. Apart from this power of the appellate Court to alter or amend a charge, Section 535, Criminal Procedure Code further provides that no finding or sentence pronounced or passed shall be deemed to be invalid merely on the ground that no charge has been framed unless the Court of appeal or revision thinks that the omission to do so has occasioned failure of justice and if in the opinion of any of these Courts a failure of justice has been occasioned by an omission to frame a charge, it shall order a charge to be framed and direct that the trial be recommenced from the point immediately after the framing of the charge. AIR 1943 PC 192, Rel. on.

(Para 3)

Held that what the appellate Court did was to amend the charge and remand the case, but did not intend nor did it direct a new trial, but only an opportunity was given to the accused to safeguard himself against any prejudice by giving him an opportunity to recall any witnesses and adduce any evidence on his behalf. The offence with which the accused was charged alternatively was the same namely under Section 406, Indian Penal Code. The entire transaction was one and indivisible inasmuch as he was not only required to answer the charge of misappropriation of money but in the alternative misappropriation of goods which the complainant contended became theirs as soon as the accused purchased them with the moneys it advanced which were alleged to have been misappropriated. No prejudice could be said to have been caused or was likely to be caused to the accused by the amendment of the charge, so as to include misappropriation of goods.

(Para 4)

The Supreme Court would not interfere with the judicial exercise of discretion of the Judge in framing the charge and in giving the accused an opportunity

to recall any witnesses or adduce fresh evidence on his behalf. If no objection could be taken to the trial Court in framing the original charge it is difficult to see how an objection can be taken before the Supreme Court to the framing of an alternate charge on the same allegation in the complaint. (Para 5)

(B) Constitution of India, Article 136 — No ground taken in special leave petition — Cannot be allowed to be raised in argument. (Para 5)

Cases Referred: Chronological Paras
(1943) AIR 1943 PC 192 (V 30) =
70 Ind App 196, Thakur Shah v.
Emperor 4

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.— This appeal is by special leave against the order of the High Court of Bombay dated the 18th October, 1968, allowing the oral application of the learned advocate for the respondent for the amendment of the charge in terms of the draft submitted by him and directing the Chief Presidency Magistrate to assign the case to some Court for holding a new trial in respect of the amended charge. This order was made in the following circumstances:

The appellant was one of the partners of a firm Chandulal Kanji & Co. along with his brother Chandulal K. Mehta. By and under an agreement called the Packing Credit Agreement entered into between the firm and the second respondent, the Union Bank of India, the appellant obtained 75 per cent of the value of groundnut extraction to be purchased by the firm and exported to the United Kingdom and other European countries from the Bank on the condition that immediately after the purchase of the goods and its export the shipping documents would be sent to it. This arrangement required the firm while sending a letter requesting the credit to be given to it, to enclose the contract of sale of groundnut extraction entered into between it and the foreign firm. On receipt of this letter and the agreement the bank would advance 75 per cent of the money required to purchase the groundnut extraction. After the amount was received, goods had to be purchased from the mills and shipped for export and the shipping documents sent to the Bank within a month from the date of such advance. It appears that under this arrangement the

second respondent Bank had advanced under the Cash Credit Agreement and the Packing Credit Agreement nearly rupees 4 lacs on several dates the first of which was March 27, 1965, which was for the purchase of 200 tons of groundnut extraction and with which we are now concerned. The Cash Credit Agreement, the Packing Credit Agreement and the letter requesting the advance of Rs. 60,000/- were all signed on the same date. The advance, as requested, was also made on the 27th March, 1965. Goods were purchased but could not be shipped within a month from the date of the advance because, as stated in the letter of the appellant dated the 27th April, due to change in the schedule of departure of the ships it was not possible to export the goods on the 24th or 25th March as originally planned as such he undertook to ship the goods within a week thereafter. On the same day, the appellant further sent a declaration that the firm had purchased 300 tons from the advance made to it and is holding the stock. On the 6th May the Bank requested the firm to forward the shipping documents in respect of the seven agreements of which one related to the agreement of 27th March. When the shipping documents were not sent to it in conformity with the several documents the bank made certain enquiries from its branch in Vera-val, a port in Kathiawar and received certain information as to the dates on which the various quantities were exported and the ships in which they were sent. As the shipping documents were not sent to the second respondent as required under the agreements entered into with it, it again called on the firm on the 24th May to hand over the documents to it in respect of the groundnut exported. When this request was not complied with, it filed a complaint against the appellant who alone was the active partner of the firm, in the Court of the Presidency Magistrate on the 26th May, alleging against him misappropriation of moneys and goods contrary to the agreement. In support of this complaint the manager of the Bank gave evidence and at the stage of framing the charge the Magistrate heard the lawyers for both sides. He framed only one charge against the accused for misappropriation of the moneys under Section 408, Indian Penal Code advanced by the Bank in respect of which the Magistrate ultimately convicted him on 31st August, 1966 and sentenced him

to 18 months' rigorous imprisonment. Against this conviction the appellant appealed to the High Court and when the case came up for hearing and had been argued for a considerable length, the advocate for the complainant, the second respondent, appears to have made an oral application for amending the charge framed by the Magistrate as per the draft handed over to the learned Judge which was to be added as an alternative charge to the charge already framed. It was contended that the Magistrate had framed a charge merely in respect of the entrustment of the moneys that were advanced by the Bank to the appellant but even so the evidence had been led on behalf of the complainant at the trial to show that apart from the money with which the appellant was said to have been entrusted with, even the goods that were purchased by the appellant with the moneys so advanced had also been entrusted to him and which he had agreed to hold on account of the Bank. This prayer was opposed by the learned Advocate for the appellant who contended that it was open to the complainant to have urged the Magistrate at the time when the charge was being framed to have an alternate charge similar to the one now required to be added. In fact it was stated by the learned advocate that the charge was actually framed by the Magistrate after substantial evidence of the complainant had been recorded by him and after the complainant's advocate in the lower Court had discussions on the question of the framing of charge, but in spite of it only one charge was framed against the appellant for breach of trust in respect of moneys said to have been entrusted to the appellant by the Bank. The charge relating to goods was omitted and not framed. It was also pointed out that the altering or amending of charge at this stage would really amount to the framing of a totally new charge in regard to altogether a new subject-matter, namely, alleged entrustment of goods, which if permitted would prejudice the accused in his defence. The learned Judge, however, after hearing these arguments thought that a charge which would include entrustment of moneys as well as entrustment of goods ought to have been framed by the Magistrate but having regard to the materials which have already been brought on record by the complainant at the trial he thought that it was desirable in the interest of justice to allow the

amendment. The following directions given by the learned Judge are relevant for the determination of the contention urged before us:

"I direct that the charge as framed by the learned Magistrate be altered and amended in terms of the draft amendment submitted and send the case back for a new trial on this amended charge so as to enable the appellant to have full opportunity to meet this case, till which time this appeal is kept pending.

I direct that the papers be sent to the learned Chief Presidency Magistrate forthwith and the learned Chief Presidency Magistrate is further directed to assign the case to some Court for holding the new trial. I further direct that the new trial should be expeditiously completed and preferably within two months from the receipt of the papers by the Court to which the case would be assigned by the learned Chief Presidency Magistrate.

The other two appeals being Criminal Appeals Nos. 1162 and 1163 of 1966 should also be adjourned as part-heard matters and to be put up along with Criminal Appeal No. 1161 of 1965 after the record and the proceedings of the new trial is received by this Court."

2. Mr. Chari on behalf of the appellant construing the above order as a direction for a new trial without disposing of the appeal contends that it is unwarranted, unfair, inequitable and unsupported by any of the provisions of the Code of Criminal Procedure. The learned advocate further submits that it is grossly prejudicial to the accused, for the prosecution to wait till the end of the trial and then say that the charge should be amended. It could have easily insisted at the stage of framing the charge itself that an additional charge should be framed and if the prayer was not accepted it could have come in revision. The prosecution having let the trial proceed to the end without insisting on any additional charge cannot now before an appellate Court ask for its amendment nor should the said amendment be permitted. Secondly, he submits that the learned Judge did not consider the question whether there was or was not a prima facie case of entrustment of goods. In fact it is the contention that the cumulative effect of the agreement and the transaction between the appellant and the second respondent Bank does not disclose en-

trustment of moneys to sustain the charge for which the appellant was convicted and if there can be no question of any entrustment of moneys there can be no entrustment of goods. The learned Judge, it is stated should have adverted his mind to this aspect of the case before he permitted the framing of additional charge and directed the Magistrate to hold a new trial. In fact the learned advocate urged that before the Magistrate the second respondent's advocate had specifically stated that the trial should proceed only on one charge relating to entrustment of moneys as a test case and having taken up this position no prayer for the addition of another charge can be made or ought to have been granted. But Shri Tarkunde appearing on behalf of the second respondent denies that there was any such submission and contends that in fact Tulzapurkar, J., did not direct a new trial as suggested by the advocate on behalf of the appellant though the use of the words "new trial" has unhappily given rise to such a contention. What in fact the learned Judge did was to send the case back to the Magistrate to enable the appellant to have full opportunity to meet the case and return the record to the Court to enable it to dispose of the appeal on both the charges. The learned advocate submits that there is no illegality in the order of the learned Judge because what the appellate Court could have done itself it is directing the Magistrate to do, namely, to give an opportunity to the accused to call the prosecution witnesses if he so desires, obtain his statement under Section 342 in respect of the additional charge and to allow him to record any evidence on his behalf if he is so desirous. It appears to us that the contention of Shri Tarkunde is amply justified by the following observations of the learned Judge allowing the application for amendment made by Mr. Patel on behalf of the second respondent:

"I have therefore asked Mr. Khambata as to whether the appellant would like to have an opportunity of a new trial where he could meet this case and Mr. Khambata has stated that the proper course for the Court, after allowing amendment of the charge in the manner sought by the complainant, would be to order a new trial. Mr. Patel for the complainant, however, has stated before me that even during such new trial that would be ordered by the Court, no fresh evidence would be led on behalf of the

complainant and the complainant would be relying upon the self-same material that has already been brought on record by the complainant at the trial, which is already concluded.

Mr. Khambata also urged before me that if I were inclined to allow the application of Mr. Patel, I should dispose of the appeal which deals with the alleged entrustment of the monies and either accept the findings or set aside the findings and thereafter order a new trial in regard to the alleged entrustment of the goods. I feel that it would be desirable and proper to keep this pending till the opportunity that is being given to the appellant-accused No. 2 to meet this new case is fully availed of by him and the record of such new trial is received by this Court.

I accordingly allow the application of Mr. Patel for amendment of the charge in terms of the draft submitted by him." From the above observations it would be clear that the learned Judge did not intend that the trial should be a new trial in the sense that the Magistrate would record the evidence afresh, see whether there was a prima facie case for framing a charge and if there was, to frame a charge, then permit the complainant to lead evidence, record the statement of the accused under S. 342 and adduce evidence on his behalf after which he would pronounce judgment of conviction or acquittal. If he had so intended and had directed a totally new trial as is alleged, he could not have rejected the contention of Shri Khambata for the appellant that he should dispose of the appeal and order a new trial on the additional charge nor would he have directed that the appeal should be kept pending till the record of the new trial is received back in his Court which could only be after giving the accused appellant an opportunity to meet the case on the additional charge.

3. On this interpretation of the order the question is whether what has been directed by the learned Judge is in conformity with the provisions of the Code of Criminal Procedure. In our view the Criminal Procedure Code gives ample power to the Courts to alter or amend a charge whether by the trial Court or by the Appellate Court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity

of meeting it and putting forward any defence open to him, on the charge finally preferred against him. The power of the Appellate Court is set out in Section 423, Criminal Procedure Code and invests it with very wide powers. A particular reference may be made to Cl. (d) of sub-section (1) as empowering it even to make any amendment or any consequential or incidental order that may be just or proper. Apart from this power of the Appellate Court to alter or amend a charge, Section 535, Criminal Procedure Code further provides that no finding or sentence pronounced or passed shall be deemed to be invalid merely on the ground that no charge has been framed unless the Court of appeal or revision thinks that the omission to do so has occasioned failure of justice and if in the opinion of any of these Courts a failure of justice has been occasioned by an omission to frame a charge, it shall order a charge to be framed and direct that the trial be recommenced from the point immediately after the framing of the charge. The wide and extensive power which an appellate or revisional Court can exercise in this regard has also the support of the Privy Council. Lord Porter who delivered the opinion of the Judicial Committee in *Thakur Shah v. Emperor*, AIR 1943 PC 192 had occasion to point out that while the history of the growth of Criminal Law in England, its line of development and the technicalities consequent thereon would have made it more difficult, and may be impossible, to justify a variation of the charge, Indian Law was subject to no such limitation but is governed solely by the Penal Code and Criminal Procedure Code. In that case the Privy Council was called on to decide whether the alteration of the charge and the conviction from one of abetment of forgery by known person or persons to abetment of forgery by an unknown person or persons vitiated the conviction. It was held that it did not, because an Appellate Court had wide powers conferred upon it by S. 423 and in particular by sub-s. (1) (d) of that Section, which is "always of course subject to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred."

4. In this case Shri Chari contends that (1) what the High Court should have done, if it found that interest of justice required it, either to have recorded the evidence itself or to have asked the trial Court to record it and send it back, but it cannot refuse to give a finding on the charge for which he was convicted and (2) that the prosecution having proceeded with the trial on the charge framed and not having asked for an amendment at that stage cannot ask the appellate Court to amend or add to the charge. It appears to us that both these contentions are based on a misreading of the order of the High Court. As already pointed out the learned Judge of the High Court did not intend nor did he direct a new trial in the sense that it is contended he had done. There was in fact no retrial directed, but only an opportunity was given to the accused to safeguard himself against any prejudice by giving him an opportunity to recall any witnesses and adduce any evidence on his behalf. The appellant has also understood the order not as a retrial is clear from ground (f) of the Special Leave Petition filed before us. It is therefore not necessary for us to examine the scope and extent of the power or circumstances in which a retrial should be ordered. The complainant's Advocate Shri Tarkunde in fact said and even now submits before us that he does not want to lead any evidence and would be satisfied on the same evidence to sustain a conviction on the amended charge, nor does the alternative charge now framed require him to answer a charge against him of a new offence which would cause prejudice. The offence with which he is now charged alternatively is the same namely under Section 406 but as the entire transaction was one and indivisible he is not only required to answer the charge of misappropriation of money but in the alternative misappropriation of goods which the complainant Bank contends became theirs as soon as the accused purchased them with the moneys it advanced. In our view no prejudice is caused or is likely to be caused to the accused by the amendment of the charge as directed by the High Court.

5. It was again contended that the High Court ought to have considered whether there was a *prima facie* case against the accused to justify the framing of the amended charge particularly when it took the view that the first charge could

not be sustained. We do not think the learned Judge expressed any view as to the maintainability or otherwise of the conviction, but thought there should have also been framed an alternate charge in respect of the goods. It is true that the Court did not give any reasons as to why it thinks there was a prima facie case, but being an Appellate Court perhaps it was anxious to avoid giving an impression that it has taken any particular view of the evidence. The accused raised no ground on this account in the Special Leave Petition, nor do we think on this account we should interfere with the judicial exercise of discretion of the learned Judge in framing the charge and in giving the accused an opportunity to recall any witnesses or adduce fresh evidence on his behalf. If no objection could be taken to the trial Court in framing the original charge it is difficult to see how an objection can be taken at this stage to the framing of an alternate charge on the same allegation in the complaint.

6. The appeal is accordingly dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 364 (V 57 C 78)

(From Tripura: AIR 1966 Tripura 8)

J. C. SHAH AND K. S. HEGDE, JJ.

Naresh Chandra Saha, Appellant v. Union Territory of Tripura and others, Respondents.

Civil Appeal No. 2203 of 1966, D/- 6-10-1969.

(A) Constitution of India, Article 311 — Sub-Treasury Officer officiating in post of Superintendent of Surveys — Suspension followed by dismissal of officer — Suspension and dismissal set aside by Judicial Commissioner — Reinstatement to post of Superintendent of Survey — Reversion to the post of Sub-treasury Officer with retrospective effect by same order of reinstatement — Validity.

The appellant who was officiating in the post of Superintendent of Surveys, was suspended on 6th May, 1957. The order of suspension and the order of dismissal which followed it were set aside by the Judicial Commissioner, Tripura. The Chief Commissioner by order dated 7th November, 1960 reinstated the appellant

to the post of Superintendent of Surveys with effect from 7th May, 1957 and by the same order reverted him to his substantive post of Sub-treasury Officer with retrospective effect from 7th June, 1957.

Held that the order dated 7th November, 1960 passed by the Chief Commissioner was not illegal. (Paras 4, 5 and 6)

The reversion of the appellant from June 7, 1957 to his substantive post did not entail forfeiture of his pay or allowances or loss of seniority in his substantive rank or stoppage or postponement of his future chances of promotion. AIR 1958 SC 36, Dist. (Para 5)

It could not be urged that whenever a person was reinstated as from the date on which his services were terminated he must be restored to the same office which he was holding at the date of the termination of employment or suspension and must receive salary upto the date of reinstatement which that office carried. If the appellant had not been suspended, it was open to the Chief Commissioner still to revert him to his substantive post. There was no reason for holding that the Chief Commissioner could not do so when he reinstated the appellant. (Para 6)

There was no ground for thinking that the order was made maliciously, the reason for reversion being that since June 7, 1957 another officer approved by U.P.S.C. was occupying the post of the Superintendent of Surveys. (Para 6)

(B) Constitution of India, Articles 226 and 311 — Order of reversion of civil servant from officiating post to substantive post — Petition challenging validity of order filed nearly after seven years — Refusal to entertain held justifiable. (Para 3)

Cases Referred: Chronological Paras (1958) AIR 1958 SC 36 (V 45) =

1958 SCR 823, Parshotam Lal

Dhingra v. Union of India

5

The following Judgment of the Court was delivered by

SHAH, J.: The appellant joined the Tripura Civil Service on October 30, 1949 and was posted as a probationer Divisional Purchasing Officer, Dharmnagar. In 1953 the Tripura Civil Service was split into two cadres-senior officers being absorbed as Sub-Divisional Officers and junior officers as Sub-Treasury Officers. The appellant was absorbed as Sub-Treasury

Officer with effect from April 1, 1950. On May 10, 1954, the appellant was appointed officiating Sub-Divisional Officer with effect from September 10, 1953. By order dated May 12, 1954, the appellant was reverted to the post of Sub-Treasury Officer with effect from May 6, 1954. The appellant made several representations to the Chief Commissioner but without success. The appellant was suspended by order dated May 6, 1957, for failure to obey the orders of the Additional District Magistrate and he was dismissed with effect from July 3, 1958, by the order of the Chief Commissioner.

2. The appellant moved a petition in the Court of the Judicial Commissioner at Tripura challenging the orders of suspension and dismissal. On February 19, 1960 the Court set aside the impugned orders. By order dated November 7, 1960 the Chief Commissioner reinstated the appellant to the post of Superintendent of Surveys and by the same order reverted him to his substantive post of Sub-Treasury Officer with retrospective effect from June 7, 1957. The appeal of the appellant to the President having been rejected, he moved a petition in the Court of the Judicial Commissioner for a writ quashing the orders dated May 12, 1954 and November 7, 1960. The appellant contended that an order of reversion cannot be made to have retrospective operation.

3. The petition insofar as it relates to the first order was belated. Again there is no ground for holding that retrospective operation was in fact given to that order of reversion. By the order dated May 12, 1954 the appellant was reverted to the post of Sub-Treasury Officer, but the order did not state the date from which the order was to be effective. In summarising the averments made in the petition, the Judicial Commissioner stated that the petitioner had alleged that the order dated May 12, 1954, was to have effect from May 6, 1954. A copy of that petition is not filed in this Court and we are unable to accept, especially having regard to the terms of the order, that any retrospective operation was sought to be given. In any event the Judicial Commissioner was justified in refusing to entertain any contention as to the validity of the order of reversion made nearly seven years before the date on which the petition was filed.

4. The second order dated November 7, 1960, passed by the Chief Commis-

sioner consists of two parts— (i) that the appellant be reinstated in the post of the Superintendent of Surveys with effect from the afternoon of May 7, 1957; and (ii) that the appellant be reverted to the substantive post of Sub-Treasury Officer with retrospective effect from June 7, 1957. The appellant, as already stated, was suspended on May 6, 1957. The order of suspension and the order of dismissal which followed it were set aside by the Judicial Commissioner, and the Chief Commissioner therefore reinstated the appellant with effect from the afternoon of May 7, 1957 to the post occupied by the appellant on the date on which he was suspended. But the appellant was not holding the post of Superintendent of Surveys substantively; he was merely officiating in that post. He was therefore reverted with effect from June 7, 1957 to his substantive post. The order was passed because the post was filled by another officer approved by the U. P. S. C.

5. Counsel for the appellant relied upon the observations made by S. R. Das, C. J. in *Parshotam Lal Dhingra v. Union of India*, 1958 SCR 828 = (AIR 1958 SC 36 at p. 49):

"But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his further chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty."

These observations, in our judgment, do not assist the appellant. The order reverting the appellant from June 7, 1957,

to his substantive post does not entail forfeiture of his pay or allowances or loss of seniority in his substantive rank or stoppage or postponement of his future chances of promotion.

6. Counsel for the appellant urged that whenever a person is reinstated as from the date on which his services were terminated he must be restored to the same office which he was holding at the date of the termination of employment or suspension and must receive salary upto the date of reinstatement which that office carried. We find no warrant for the submission. If the appellant had not been suspended, it was open to the Chief Commissioner still to revert him to his substantive post. We see no reason for holding that the Chief Commissioner could not do so when he reinstated the appellant. There is no ground for thinking that the order was made maliciously. The reason for reversion was that since June 7, 1957 another officer was occupying the post of the Superintendent of Surveys. The post having been already filled, the appellant cannot claim that when he was reinstated he should have been paid emoluments attached to the office of Sub-Divisional Officer on the footing that he continued to occupy that office which he was holding in an officiating capacity.

7. The appeal therefore fails and is dismissed. Having regard to the circumstances of the case there will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 366

(V 57 C 79)

(From Delhi)

S. M. SIKRI, G. K. MITTER AND
JAGANMOHAN REDDY, JJ.

Ram Dayal, Appellant v. Municipal Corporation of Delhi and another, Respondent.

Criminal Appeal No. 80 of 1968, D/- 7-10-1969.

Prevention of Food Adulteration Act (1954), Section 13 — Criminal P. C. (1898), Sections 510 (2), 257 — Report of Public Analyst — Accused has right to call Public Analyst to be examined and cross-examined — The fact that certificate of Director of Central Laboratory supersedes report of Public Analyst and is conclusive

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and final does not limit this right of accused.

Where certificates are not made final and conclusive evidence of the facts stated therein, it will be open to the party against whom certificates which are declared to be sufficient evidence, either to rebut the facts stated therein by his own or other evidence or to require the expert to be produced for cross-examination which prayer the court is bound to consider on merits in granting or rejecting it. There is no presumption that the contents are true or correct though such certificate is evidence without formal proof. In any case where there is evidence to the contra the court is bound to consider that evidence along with such a certificate with or without the evidence of the expert who gave it being called and come to its own conclusion. It is true that sub-section (2) of Section 13 of the Act has given a right both to the accused as well as the complainant on payment of the prescribed fee to apply to the Court after the prosecution has been instituted to send part of the sample preserved as required under sub-clause (i) or sub-cl. (iii) of Clause (c) of sub-section (1) of Section 11 to the Director of the Central Laboratory for a certificate, and the Court is bound to send it under its seal to the said Director who has to submit a report within one month from the date of the receipt. This certificate under sub-section (3) supersedes the Public Analyst's certificate and is conclusive and final under sub-section (5). But nothing contained in these sub-sections relating to certificate of the Director of the Central Food Laboratory in any way limits the right of the accused under Section 257 of the Code of Criminal Procedure to require the Public Analyst to be produced. The court may, reject the prayer for good and sufficient reasons such as for instance where it is made for the purpose of vexation or delay or for defeating the ends of justice. AIR 1968 SC 128 and Cri. Appeal No. 161 of 1966, D/- 3-5-1968 (SC), Relied on. (Para 4)

Where the accused was prosecuted for selling Ladoos which were alleged to have been adulterated with unpermitted colour and the accused knew what colour he had added and could have easily said that the colour was the permitted one but did not say so in his examination under Section 342, Criminal P. C. and he did not even make an application under Section 13 (a) calling for the re-

port of the Director of Central Laboratory, and did not make even before the Supreme Court any attempt why the evidence of the Public Analyst was required and what was the specific point which needed to be elucidated: Held that the application for examination of the Public Analyst was made mere to delay the disposal of the case. (Para 7)

Cases Referred: Chronological Paras

- (1968) Cri. Appeal No. 161 of 1966,
D/- 3-5-1968 (SC), Sukhmal Gupta
v. Corporation of Calcutta 6
- (1966) AIR 1966 SC 128 (V 53) =
1965-2 SCR 894 = 1966 Cri LJ
106, Mangaldas Raghavji v. State
of Maharashtra 5

The following Judgment of the Court was delivered by

JAGANMOHAN REDDY, J.: This appeal by certificate granted by the Delhi High Court under Article 134 (1) (c) of the Constitution is against its judgment which confirmed the conviction of the accused of an offence under Section 9 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) and against the enhancement of the sentence of imprisonment from the one till the rising of the court to six months R. I. which is the minimum prescribed under the Act together with a fine of Rs. 1,000 in default to undergo six months R. I.

2. The appellant is a sweetmeat seller. It is alleged that on September 1, 1965, Shri B. S. Sethi, Food Inspector appointed by the Central Government under Section 9 of the Act visited his shop and found that the appellant was selling coloured laddus. The Food Inspector purchased 1,500 grams of these laddus by way of a sample by paying him Rs. 9 as the price thereof. This sample was subdivided into three parts and was put into three separate bottles as required under Section 11 of the Act. One bottle was given to the accused, another was sent to the Public Analyst and the third was retained by the Food Inspector. The sample sent to the Public Analyst was analysed and a report was received from him on September 10, 1965 to the effect that the laddus were adulterated with unpermitted colour. Thereupon a complaint was filed against the accused and he was convicted by the Magistrate on October 17, 1966 and sentenced to im-

prisonment till the rising of the court and to pay a fine of Rs. 1,000, in default to undergo six months' R. I. It would appear that the Municipal Corporation filed before the Sessions Judge a revision for the enhancement of the sentence because the accused having been found guilty under the provisions of Section 7 read with Section 16 of the Act should have been awarded the minimum sentence of six months and a fine of Rs. 1,000 but instead he was sentenced to imprisonment till the rising of the court and a fine of Rs. 1,000 which was not in accordance with the mandatory provisions of S. 16 of the Act. The Sessions Judge, after hearing the parties accepted the contention of the Municipality and referred the case to the High Court recommending that the accused having been found guilty under the provisions of Section 16 of the Act should have been awarded a minimum sentence of six months and a fine of Rs. 1,000/-. Before the High Court several contentions were raised on behalf of the accused one of which was that as his request for summoning the Public Analyst for cross examination had not been acceded to, he had been prejudiced, as such the entire proceedings against him were vitiated. The High Court however rejected this contention on the ground that Section 510 of the Code of Criminal Procedure had no application in that it only dealt with Chemical Examiner or an Assistant Chemical Examiner and other experts mentioned therein. It was also observed that where the accused desired to challenge the report of the Public Analyst under the Act, he had to follow the procedure provided in Section 13 (2) for sending the sample to the Director of Central Food Laboratory for his examination, because any report given by him will supersede the report of the Public Analyst and would be final and conclusive as to the facts stated therein. Before us also a similar contention was urged by the learned Advocate for the accused Shri Hardev Singh who had produced before us the application made on behalf of the accused under Section 510 (2) for calling the Public Analyst which was summarily rejected on 28th August 1966. This contention urged before us has to be determined in the light of the relevant provisions of the Act.

3. It cannot be disputed that any person selling food with impermissible colouring matter contravenes the provi-

sions of Section 7 which prohibits the selling of any adulterated food and would be punishable under Section 16 of the Act. What is adulterated article of food has been defined in Section 2 (i) and so far as it is related to colouring, sub-cl. (j) of Clause (i) of Section 2 provides that an article of food shall be deemed to be adulterated "if any colouring matter other than that prescribed in respect thereof and in amounts not within the prescribed limits of variability is present in the article". Rules 23 and 27 of the Prevention of Food Adulteration Rules, 1955 prohibit the addition of any colouring matter except permitted by the Rules, and of inorganic colouring matters and pigments to any article of food. What is permitted and to what extent has been stated in Rules 24 to 26 and 28 to 31, but in so far as this case is concerned we may merely refer to Rules 26 and 28 the former of which gives a list of natural colouring matters that can be used and the latter with coal tar dyes. We are told that the Laddus which were being sold by the accused had yellow colour. If so, item 2 of Rule 28 prescribes that the only permitted colours are Tartrazine with colour index 640 belonging to Chemical class of Xanthene and Sunset Yellow FCF belonging to the chemical class Azo, and these alone can be used. It will therefore be incumbent on the Public Analyst to say whether the colour used is that which is permissible under any of the rules and if as in the report he has stated that the sample of the Laddus purchased by the Food Inspector was coloured with unpermitted colour, it would mean that the accused has not used any of the colours permitted under the rules. The report of the Public Analyst is as follows:—

"Butyro Refractometer reading at 40°C of the fat extracted from sweets-50.0 Baudouin test of the extracted fat — Positive Reichert value of the extracted fat 7.59 Colour — unpermitted.

1 1 1 the same is adulterated due to 7.0 excess in Butyro Refractometer reading at 40° C. of the fat extracted from sweets, 20.41 deficiency in Reichert value of the extracted fat, Baudouin test of extracted fat being positive, and also coloured with unpermitted colour."

4. The learned Advocate for the accused submits that the refusal of the court to grant the application of the accused to call the Public Analyst Shri Sudhama Rao for cross-examination has

greatly prejudiced him, as such the conviction ought to be quashed. It is contended that the accused has a valuable right of cross-examination to test the contents of the report given by the Public Analyst and the court has to summon him if so desired. On the other hand it is contended both by Shri Bishan Narain for the Delhi Municipality as well as Dr. Singhvi for the Union of India that no such right has been conferred under the Act when the provisions of S. 13 (5) have not only made the document signed by the Public Analyst to be used in evidence of the facts stated therein in any proceedings under the Act or under Sections 272 to 276 of the Indian Penal Code but has given a right to the accused to have the sample sent to the Director of the Central Food Laboratories under S. 13 (2) whose report supersedes that of the Public Analyst and is final and conclusive. In view of these provisions it is said that the legislature inferentially took away the right of the accused to summon the Public Analyst either for examination or cross examination, as such the analogy of Section 510 (2) of the Criminal Procedure Code which specifically gives a right to summon and examine the chemical examiner and other experts therein stated, as to the subject matter of their respective reports has no relevance. Dr. Singhvi further contends that there are a class of cases which permit of trials by certificates where the general rule of evidence that every document in order to be admissible has to be proved by the person signing it has no application as the statute permits it to be proved without calling the author of it. While it cannot be disputed that there are certain classes of cases where certificates have been treated as conclusive evidence, there were yet others though admissible without calling the functionaries that gave them were none the less only prima facie evidence. In cases where the certificates are not to be treated as conclusive evidence and they are only prima facie evidence, the party against whom they are produced has a right to challenge the subject matter of the certificate. The statutes have also in some cases recognised this right, such as for instance in sub-section (2) of Section 510 Criminal Procedure Code in respect of reports given under the hand of several experts named in sub-section (1) notwithstanding the fact that they may be used in evidence in enquiry trial or other proceedings

under the Code. Sub-section (2) provides: "The court may if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the subject matter of the report." Similarly sub-section (1) of Section 110 of the English Food and Drugs Act, 1955 while providing that the production by one of the parties of the certificate of a Public Analyst in the form prescribed in Section 92 (5) or of a document supplied to him by the other party as being a copy of such certificate shall be sufficient evidence of the facts stated therein unless in the first mentioned case the other party requires that the analyst shall be called as a witness. Sub-section (2) of Section 110 also gives a like opportunity in the case of a certificate of an officer who took a sample of the milk. It appears to us that where certificates are not made final and conclusive evidence of the facts stated therein, it will be open to the party against whom certificates which are declared to be sufficient evidence either to rebut the facts stated therein by his own or other evidence or to require the expert to be produced for cross-examination which prayer the court is bound to consider on merits in granting or rejecting it. There is no presumption that that contents are true or correct though such a certificate is evidence without formal proof. In any case where there is evidence to the contra the court is bound to consider that evidence along with such a certificate with or without the evidence of the expert who gave it being called and come to its own conclusion. It is true that sub-section (2) of Section 13 of the Act has given a right both to the accused as well as the complainant on payment of the prescribed fee to apply to the court after the prosecution has been instituted to send part of the sample preserved as required under sub-clause (1) or sub-cl. (iii) of Clause (c) of sub-section (1) of Section 11 to the Director of the Central Laboratory for a certificate, and the court is bound to send it under its seal to the said Director who has to submit a report within one month from the date of the receipt. This certificate under sub-section (3) supersedes the Public Analyst's certificate and is conclusive and final under sub-section (5). But nothing contained in these sub-sections relating to certificate of the Director of the Central Food Laboratory in any way limits the right of the accused under Section 257

of the Code of Criminal Procedure to require the Public Analyst to be produced. The court may, as we said earlier, reject the prayer for good and sufficient reasons such as for instance where it is made for the purpose of vexation or delay or for defeating the ends of justice.

5. In *Mangaldas Raghavji v. State*, 1965-2 SCR 894 = (AIR 1966 SC 128) this Court held that where the accused had not done anything to call the Public Analyst the court could legally act on the report of the Public Analyst. Mudholkar, J. speaking for the court observed at p. 900 (of SCR) = (at p. 132 of AIR).

"It is true that the certificate of the Public Analyst is not made conclusive but this only means that the court of fact is free to act on the certificate or not as it thinks fit."

Again at p. 902 (of SCR) = (at p. 132 of AIR) it was said, "As regards the failure to examine the Public Analyst as a witness in the case no blame can be laid on the prosecution. The report of the Public Analyst was there and if either the court or the appellant wanted him to be examined as a witness appropriate steps would have been taken. The prosecution cannot fail solely on the ground that the Public Analyst had not been called in the case."

6. In *Sukhmal Gupta v. Corporation of Calcutta* (unreported, Criminal Appeal No. 161 of 1966, D/- 3-5-1968 (SC)) the Assistant Public Analyst who had analysed the sample was examined and was cross examined by the defence. It was contended that the Public Analyst was not called. There does not appear to have been any attempt to have him called, nor was any prejudice shown. On the other hand, the accused could have availed of the valuable right given to him under Section 13 (2) but he did not do so, nor did he put any question in cross-examination that the tea was liable to deterioration and could not be analysed by the Director of Central Food Laboratory. In these circumstances the evidence of the Assistant Public Analyst and the report of the Public Analyst were accepted in maintaining the conviction.

7. In this case we would have remanded it to give the accused an opportunity to examine the Public Analyst, but it appears to us that even before us no attempt was made as to why the evidence was required and what is the specific point which needs to be elucidated.

The accused knows what colour he added, he could have easily said that that colour was one of the permitted colours, but he did not say so in his examination under Section 342, nor did he produce any evidence of those whom he employed as to the colour which was added. In our view, the application was made mere to delay the disposal of the case otherwise he could have easily made an application under Section 13 (a) as soon as a complaint was lodged against him on 19th January 1966 which was within 3½ months from the purchase of the sample and the receipt of the report. There is nothing to show that either the Laddus or the colour would have deteriorated even if he had made his application under Section 13 (2) when he made the application under Section 510 (2) on 29th August 1966.

8. In these circumstances, we do not consider this to be a fit case for interference. The appeal is accordingly dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 370

(V 57 C 80)

(From: Patna)

M. HIDAYATULLAH, C. J., S. M. SIKRI, G. K. MITTER, A. N. RAY AND P. JAGANMOHAN REDDI, JJ.

Chandramouleshwar Prasad, Petitioner v. The Patna High Court and others, Respondents.

Writ Petn. No. 349 of 1968, D/- 7-10-1969.

(A) Civil Services — Bihar Superior Judicial Service Rules, Rules 5, 16 (b), 16 (d) — High Court has no power to fix gradation of judicial officers — Seniority, how fixed — Constitution of India, Articles 309, 233 and 234.

The gradation of the judicial officers by the High Court or maintaining any list showing such gradation is not sanctioned by any service rules. The Bihar Superior Judicial Service Rules do not contain any provision which would entitle the High Court to make such a gradation or act thereon. Rule 5 of the said Rules prescribes that ordinarily appointments to the post of Additional District and Sessions Judges shall be made by the Government in consultation with the High Court and under Rule 8 a per-

son appointed either on substantive or officiating basis to the post of Additional District and Sessions Judge shall draw pay on the lower time basis. Rule 16 (b) provides that seniority inter se of promoted officers shall be determined in accordance with the dates of their substantive appointments to the service and Rule 16 (d) lays down that when more than one appointment is made by promotion at one time, the seniority inter se of the officers promoted shall be in accordance with the respective seniority in the Bihar Civil Service (Judicial Branch). The question of seniority therefore has to be determined when the persons appointed either temporarily or on an officiating basis are given substantive appointment. (Para 5)

The position of a person in a Civil List gives no indication of his intrinsic quality as an officer. The list merely shows the length of service of the officers according to the dates of their appointment, their posting at the time when the list is published and their designation and scale of pay at that time. (Para 9)

(B) Constitution of India, Article 233 — Appointment of District Judge by Government without consultation of High Court is not valid.

The appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the Article is that the Governor should make up his mind after there has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits. This does not mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court about B's claims vis-a-vis A's to promotion, B's

appointment cannot be said to be in compliance with Article 233 of the Constitution. Consultation with the High Court under Article 233 is not an empty formality. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In the absence of consultation the validity of the notification by the Governor appointing a person as a District Judge cannot be sustained.

(Para 7)

(C) Constitution of India, Articles 233, 235 — Right of High Court to transfer District Judges.

The right to transfer judicial officers including District Judges after their first appointment and posting rests with the High Court. AIR 1967 SC 903, Rel. on. (Para 8)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 903 (V 54) =
1967-1 SCR 454, State of Assam
v. Ranga Mahammad 8

The following Judgment of the Court was delivered by

MITTER, J.: By this petition under Article 32 of the Constitution the petitioner, at present an Additional District and Sessions Judge in the State of Bihar, challenges the validity of (1) the order of the Patna High Court by Notification No. 333 dated 25th October, 1968 transferring him from Arrah and posting him as Additional District and Sessions Judge at Singhbhum, and (2) the direction or, as he calls it, the order of the Patna High Court dated September 23, 1968 declaring respondents 3 to 5 as senior to him in the gradation list of Additional District and Sessions Judges maintained by the High Court. He also prays that the High Court be directed to allow him to take over charge as officiating District and Sessions Judge at Arrah in terms of Government notification dated October 17, 1968. According to him the direction or order of September 23, 1968 was in contravention of R. 16 (b) and R. 16 (d) of the Bihar Superior Judicial Service Rules. He

takes his stand on the notification of the Government of Bihar dated October 17, 1968 purporting to appoint him temporarily as officiating District and Sessions Judge of Arrah and contends that the order of the High Court dated October 25, 1968 following close to the heels of the said Government notification amounted to his reduction in rank and was otherwise penal in nature. His further complaint is that the direction of the High Court requiring S. C. Chakravarty, the retiring District Judge of Arrah in September 1968 to hand over charge of his office to Govind Mohan Misra, respondent No. 3, by purporting to appoint him as officiating District and Sessions Judge was a discriminatory order contravening Articles 14, 16 and 311 of the Constitution. The respondents to the petition are (1) the High Court of Judicature at Patna through its Registrar, (2) the State of Bihar through its Chief Secretary, (3) Govind Mohan Misra, at present Additional District and Sessions Judge of Arrah (4) Choudary Sia Saran Sinha, at present Additional District and Sessions Judge, Gaya and (5) Jagannath Prasad Singh, at present Secretary, Legislative Assembly, Patna.

2. The controversy arose in the following way. In September 1968 S. C. Chakravarty, District and Sessions Judge at Arrah was due to retire on September 30. The petitioner was then working there as the First Additional District and Sessions Judge. Respondent No. 3, G. M. Misra was another Additional District and Sessions Judge at Arrah designated as the Third Additional District and Sessions Judge. On the retirement of Chakravarty someone had to take charge from him and act as District and Sessions Judge either temporarily or on a permanent basis. The High Court was of opinion that Misra, respondent No. 3 was the senior Additional District and Sessions Judge at Arrah and as such should be directed to officiate in the vacancy. The High Court wanted to post one M. P. Singh as the District Judge there but there was some difficulty in the way of his taking over charge immediately. The petitioner who had joined the judicial service some years before respondent No. 3 considered this as supersession of his claims. The Government of Bihar also appears to have felt that the petitioner should be appointed to act temporarily as the District and Sessions Judge at Arrah. Before the difference in the

points of view of the High Court and the Government could be effectively discussed or resolved, the High Court directed Chakravarty to make over charge to respondent No. 3 which was complied with. While the Government was still undecided as to the course to be adopted it received a representation from the petitioner alleging wrongful supersession by the High Court and claiming seniority over Misra and respondents 4 and 5. This appears to have stirred the Government into immediate action by the issue of a notification of October 17, 1968 appointing the petitioner as officiating District and Sessions Judge at Arrah temporarily. This not being to the liking of the High Court, the latter transferred the petitioner to the District of Singhbhum as Additional District and Sessions Judge on 25th October, 1968. The petitioner filed this Writ Petition on 29th October 1968 claiming the reliefs mentioned.

3. In order to appreciate the respective contentions of the parties, it is necessary to note a few facts happening before the above controversy. The petitioner as well as respondents 3, 4 and 5 all belong to the Judicial Service of Bihar. They all joined service as Munsifs, the petitioner doing so in 1941 while the respondents 3, 4 and 5 did so in 1944. Later they were all appointed as Additional Subordinate Judges, the petitioner in 1949 and the said respondents in 1951-52. The Bihar Civil List published in March 1968 shows the petitioner at serial No. 10, one Dharm Deva Narain Sinha at No. 11, Govind Mohan Misra, respondent No. 3 at No. 12, Choudhary Sia Saran Sinha, respondent No. 4 at No. 13 and Jagannath Prasad Singh, respondent No. 5 at No. 14. The question of these persons being selected and posted as Additional District and Sessions Judges engaged the attention of the High Court as early as March 1962 when two vacancies occurred in that rank. In considering the claims of these persons to promotion the Registrar of the High Court wrote to the Chief Secretary, Government of Bihar pointing out that three officers including the petitioner had been passed over only about a month back and the question of re-considering their cases did not at the moment arise. Among the four officers immediately below the said three persons, the High Court considered the respondents 3 and 4 to be fit for promotion in preference to the other two for reasons

given. The High Court recommended G. M. Misra, respondent No. 3 and C. S. S. Sinha, respondent No. 4 as fit for promotion and suggested their posting as Additional District and Sessions Judges at Hazaribagh and at Arrah. As Misra was then acting as Deputy Secretary Legislative Assembly and C. S. S. Sinha was functioning as Under Secretary, Law Department, the High Court requested that they might be released to enable them to join their new posts. The Secretariat record of April 1962 shows that the matter was considered in detail and that High Court's recommendation which involved the supersession of the petitioner and two other officers by respondents 3 and 4 met with the approval of the Secretary subject to the acceptance of the Chief Minister. The suggestion for the posting of the said respondents on promotion was also accepted and the Secretary asked for the sanction of the Chief Minister to the proposed promotion and request to the Assembly and Law Department for release of respondents 3 and 4 to give effect to their proposed posting. This proposal of the Secretary was accepted by the Chief Minister. However effect could not be given to the above for reasons which it is not necessary to note. The Registrar of the High Court wrote to the Secretary to the Government of Bihar on May 5, 1962 to keep the notification appointing respondents 3 and 4 as Additional District and Sessions Judges in abeyance until receipt of further communication. The matter came up before the High Court once more in September 1962 and the Registrar wrote to the Secretary intimating that the forthcoming vacancy in the rank of Additional District and Sessions Judge on 12th October, 1962 by retirement of an officer should be filled up by promoting Misra then Deputy Secretary, Legislative Assembly to act as Additional District and Sessions Judge of Hazaribagh with effect from the said date. Request was also made to take steps to get Misra relieved from the post he was then holding. Within the space of a few days the matter was considered at the Secretariat and a note was put up by the Secretary for the Chief Minister to the effect that if the latter agreed, the Legislative Assembly would be asked to accord its approval to relieve Misra whereupon he would be posted as Additional District Judge, Hazaribagh. The Chief Minister agreed to this proposal on 14th September. Soon thereafter the

Registrar informed the Secretary that another vacancy had already occurred on 14th September 1962 and recommended Misra's appointment as Additional District and Sessions Judge of Hazaribagh in the earlier vacancy. The recommendation apparently could not be given effect to. It appears that the High Court recommended respondent No. 4 to act as Additional District and Sessions Judge on 4th October, 1962 when he was still serving the Bihar State Electricity Board as its Deputy Secretary. The subject of promotion of these officers again came up before the High Court in November, 1962. On a re-consideration of the cases of the petitioner and D. N. Sinha as a result of the enquiry made through District and Sessions Judges the Court found them fit for promotion, and by letter dated November 21 recommended that the petitioner who was then acting as Subordinate Judge, Gaya, be appointed to act as Additional District and Sessions Judge in place of respondent No. 4 and posted at Darbhanga. The Court also suggested that D. N. Sinha should be appointed to act as Additional District and Sessions Judge at Hazaribagh. Government accepted this recommendation and made the necessary notification of posting the petitioner and D. N. Sinha as Additional District and Sessions Judges on 7th January, 1963. As respondents 3 and 4 could not then take up their appointments as Additional District and Sessions Judges because they were not released from the Assembly and State Electricity Board the Government by letter dated 7th November, 1963 addressed to the Accountant General Bihar allowed respondents 3 and 4 to draw pay in the scale admissible to Additional District and Sessions Judges with effect from 15th January, 1963. The petitioner started functioning as additional District and Sessions Judge at Darbhanga on January 23, 1963.

4. It would therefore appear that although the High Court wanted respondents 3 and 4 to function as Additional District and Sessions Judges ahead of the petitioner on more than one occasion and its recommendation on that behalf was accepted by the Government of Bihar by a fortuitous combination of circumstances the petitioner and D. N. Sinha started acting as such earlier than the said respondents 3, 4 and 5. As the recommendations of the High Court were probably not unknown to them respondents 3, 4 and 5 made a representation to

the High Court in August in connection of their gradation in the so as to rank them over the and D. N. Sinha in the cadre of Additional District and Sessions Judges the High Court by letter dated 23 September 1968 accepted the representation and sent copies thereof to the petitioner and D. N. Sinha for their information.

5. It may be noted at this stage that the gradation of the officers by the High Court or maintaining any list showing such gradation is not sanctioned by any service rules. The Bihar Superior Judicial Service Rules to which our attention was drawn do not contain any provision which would entitle the High Court to make such a gradation or act thereon. Rule 5 of the said Rules prescribes that ordinarily appointments to the post of Additional District and Sessions Judges shall be made by the Government in consultation with the High Court and under Rule 8 a person appointed either on substantive or officiating basis to the post of Additional District and Sessions Judge shall draw pay on the lower time basis. Rule 16 (b) provides that seniority inter se of promoted officers shall be determined in accordance with the dates of their substantive appointments to the service and R. 16 (d) lays down that when more than one appointment is made by promotion at one time, the seniority inter se of the officers promoted shall be in accordance with the respective seniority in the Bihar Civil Service (Judicial Branch). The question of seniority therefore has to be determined when the persons appointed either temporarily or on an officiating basis are given substantive appointments. So far as the petitioner and the three respondents are concerned that time is yet to come.

6. We may now proceed to note the events in the crucial days of September and October 1968. Towards the end of September 1968 the High Court had to consider the question of someone taking charge as District and Sessions Judge from the retiring incumbent, S. C. Chakravarty. The High Court, as already noted wanted to fill that post by M. P. Singh who was an Additional District Judge at Singhbhum but for some reason or other was not free to join immediately and it became necessary to make some temporary arrangement. The Registrar wrote a letter to the Secretary that the senior

Additional District Judge of Arrah be temporarily appointed to act as District and Sessions Judge with effect from 1st October, 1968 and as in the view of the High Court Misra was the senior officer in that cadre the Court recommended his appointment to the Government. The Secretary wrote back to the Registrar on 30th September that Government had no objection to notify the Senior Additional District Judge as temporary District and Sessions Judge of Shahabad but from the records at the Secretariat it appeared that Misra was not the senior officer. On 2nd October 1968 the Registrar wrote to the Secretary that as Chakravarty had already retired it was necessary to appoint Misra the Senior Additional District Judge to act temporarily as District and Sessions Judge without any loss of time so that any urgent bail applications etc. might be disposed of and requested that necessary notification be issued immediately. There was no response from the Secretariat. The Registrar followed his memorandum of October 2 by writing to the Secretary again on October 4, the subject matter of the letter being:

"Correction of the Bihar Civil List so as to rank Govind Mohan Misra, C. S. S. Sinha and J. N. Singh No. 1 above C. M. Prasad and D. N. Sinha".

The Registrar forwarded copies of the representations of the three respondents and gave the Court's view that there was justification for correcting the civil list as suggested in the representations. Reference was made to the letters of 4th October, 1962 and 21st November 1962 mentioned above and it was pointed out that the decision of the Government to give respondents 3 and 4 the status of Additional District and Sessions Judges with effect from 15th January 1963 by upgrading the posts they were holding was based on the fact that they had been recommended earlier than the petitioner and D. N. Sinha to officiate as Additional District and Sessions Judges and that the last two officers had started to function as such from 23rd January, 1963. It was further pointed out that J. P. Singh, respondent No. 5 could not take over charge earlier than 6th February 1963 because the Court had required him to finish the part-heard Sessions Case which he was then trying as Assistant Sessions Judge before joining his post on promotion. The Court therefore requested the Government to correct the Bihar Civil

List as suggested. Government does not seem to have taken any action on the letters of 2nd and 4th October. On receipt of a copy of the Court's direction on the representation of respondents 3, 4 and 5 the petitioner started moving on his own behalf and addressed a memorial to the Chief Secretary to the Government of Bihar through the Registrar of High Court on October 15, 1968. In substance the complaint of the petitioner was that the High Court was not right in accepting the representation of respondents 3, 4 and 5 and placing them above him in the gradation list. He prayed that the order of the High Court in this respect might not be implemented until the disposal of his appeal by the Government and that promotion to the senior scale of Bihar Superior Judicial Service be kept pending until then. Government reacted to this by a notification dated 17th October 1968 appointing the petitioner as temporary District and Sessions Judge Shahabad until the appointment of a permanent officer in the vacancy caused by the retirement of Chakravarty. The letter of the Secretary to the Registrar of even date was to the effect that Government was until then not able to consider the recommendation of the High Court forwarded in its letter of October 4, 1968 regarding revision of seniority and it could not accept the position that the petitioner should be treated as junior to Misra and therefore it would not be desirable to notify Misra as officiating District and Sessions Judge pending finalisation of the posting of a regular District and Sessions Judge. With regard to the High Court's recommendation of 4th October Government stated that it would take time to examine the same. It is obvious that Government was moved by the representation of the petitioner.

7. The question arises whether the action of the Government in issuing the notification of October 17, 1968 was in compliance with Article 233 of the Constitution. No doubt the appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the Article is that the Governor should make up his mind after there has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as

District Judges. The High Court alone knows their merits as also demerits. This does not mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court about B's claims vis-a-vis A's to promotion, B's appointment cannot be said to be in compliance with Article 233 of the Constitution. The correspondence noted above which passed between the High Court and the Secretariat from 28th September 1968 to 7th October 1968 shows that whereas the High Court had definitely taken the view that Misra as the Senior Additional District and Sessions Judge should be directed to take charge from Chakravarty, the Government was not of the view that according to the records in its appointment department Misra was the senior officer at Shahabad among the Additional District and Sessions Judges. Government never suggested to the High Court that the petitioner was senior to Misra or that the petitioner had a better claim than Misra's and as such was the person fit to be appointed temporarily as District and Sessions Judge. Before the notification of October 17, 1968 Government never attempted to ascertain the views of the High Court with regard to the petitioner's claim to the temporary appointment or gave the High Court any indication of its own views with regard thereto excepting recording dissent about Misra's being the senior officer in the cadre of Additional District and Sessions Judges at Arrah. Consultation with the High Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion. The Governor cannot discharge his function under Article 233 if he makes an appointment of a person without ascertaining the High Court's views in regard thereto. It was strenuously contended on behalf of the State of Bihar that the materials

before the Court amply demonstrate that there had been consultation with the High Court before the issue of the notification of October 17, 1968. It was said that the High Court had given the Government its views in the matter; the Government was posted with all the facts and there was consultation sufficient for the purpose of Article 233. We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In our opinion, the notification of October 17, 1968 was not in compliance with Article 233 of the Constitution. In the absence of consultation the validity of the notification of 17th October, 1968, cannot be sustained.

8. If the notification of October 17, 1968 be not valid the High Court was within its rights to transfer the petitioner to the District of Singhbhum as an Additional District and Sessions Judge. It was pointed out by this Court in *State of Assam v. Ranga Mahammad* 1967-1 SCR 454=(AIR 1967 SC 903) that the right to transfer judicial officers including District Judges after their first appointment and posting rested with the High Court.

9. The correspondence between the High Court and the Secretariat in the years 1962, 1963 and 1968 was placed before us in detail. We were also shown the notes prepared at the Secretariat and the Chief Minister's views thereon from time to time. Having considered all this material and the affidavits affirmed in this case, our definite conclusion is that there was no foundation for the petitioner's charge of mala fides against the High Court or the veiled insinuations against its present Chief Justice. Supersession of the petitioner by Misra and others had been decided upon as far back as 1962 and 1963 when the High Court had a different Chief Justice. In making its recommendation in 1963 the High Court was merely attempting to give effect to a decision arrived at in 1962 and 1963. The cause of the supersession of the petitioner was the adverse remarks

against him by some of the former Judges of the High Court. Whatever be the effect of these remarks the petitioner may be considered to have outlived them by reason of the fact that the High Court recommended his case for posting as an Additional District and Sessions Judge in November 1962. The position of a person in a Civil List gives no indication of his intrinsic quality as an officer. The list merely shows the length of service of the officers according to the dates of their appointment, their posting at the time when the list is published and their designation and scale of pay at that time. The gradation list of the High Court has no legal basis and its preparation is not sanctioned by the Bihar Superior Judicial Service Rules. The seniority inter se of the petitioner and the three respondents will have to be determined when the question of their confirmation comes up for consideration. At the present moment the question does not arise and M. P. Singh who now holds the office of the District and Sessions Judge at Arrah is undoubtedly senior to them all. We only hope that there will be no such misunderstanding between the High Court and the Secretariat in the future and if there ever be any difference of opinion attempts will be made to resolve them by mutual deliberation without one or the other making an order or giving a direction contrary to the views of the other before deliberation.

10. In the result we hold that the Government notification of October 17, 1968 was not in terms of Article 233 of the Constitution and consequently the question of quashing the High Court's order dated October 25, 1968, does not arise. We also hold that the Gradation List of Additional District and Sessions Judges prepared by the High Court has no legal sanction and that the seniority of the petitioner and respondents 3 to 5 can only be determined in the superior judicial service where they are now all holding officiating posts when the occasion arises. There will be no order as to costs.

Order accordingly.

AIR 1970 SUPREME COURT 376
(V 57 C 81)

J. C. SHAH AND K. C. HEGDE, JJ.

C. K. Subramonia Iyer and others, Appellants v. T. Kunhikuttan Nair and others, Respondents.

Civil Appeal No. 2227 of 1966, D/- 8-10-1969.

(A) Fatal Accidents Act (1855), Secs. 1A and 2 — Damages under — Assessment of — Principles stated — (Torts — Accidents — Damages).

Compulsory damages under Section 1A of the Fatal Accidents Act for wrongful death must be limited strictly to the pecuniary loss to the beneficiaries and that under Section 2, the measure of damages is the economic loss sustained by the estate. There can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations but the amount recoverable depends on the particular facts and circumstances of each case. The life expectancy of the deceased or of the beneficiaries whichever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the designated beneficiaries are necessarily personal to each case, in the very nature of things, there can be no exact or uniform rule for measuring the value of human life. In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable. As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased minor child. In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority. Case law discussed. (Para 14)

In an action under the Act, it is not sufficient for the plaintiff to prove that he lost by the death of the deceased a mere speculative possibility of pecuniary benefit. In order to succeed, it is necessary for him to show that he has lost a reasonable probability of pecuniary advantage. (Para 8)

(B) Civil P. C. (1908), Secs. 100-101 — Constitution of India, Article 133 (1) — Ascertainment of damages under Fatal Accidents Act — Second appeal — Appellate Court should be slow in disturbing findings reached by lower Courts, if they

have taken all relevant facts into consideration — (Fatal Accidents Act (1855), Sections 1A, 2). (Para 14)

| Cases Referred: | Chronological | Paras |
|---|---------------|-------|
| (1962) AIR 1962 SC 1 (V 49)= 1962-1 SCR 929, Gobald Motor Service Ltd. v. R. M. K. Velu- swami | | 13 |
| (1955) (1955) 1 WLR 553=1955-2 All ER 166, Dolbey v. Godwin | | 11 |
| (1951) 1951 AC 601=1951-2 All ER 448, Nance v. British Columbia Electric Rly Co. Ltd. | | 12 |
| (1942) 1942 AC 601=111 LJKB 418, Davies v. Powell Duffryn Associat- ed Collieries | | 5 |
| (1921) 1921-2 KB 461=125 LT 733, Barnett v. Cohen | | 8 |
| (1917) 1917 AC 38=116 LT 34, Admiralty Commrs. v. S. S. Amerika | | 5 |
| (1915) 9 BWCC 188=114 LT 264, Price v. Glynea & Castle Coal Co. | | 10 |
| (1913) 1913 AC 1=107 LT 564, Taff Vale Railway Co. v. Jenkins | 7, 8, 9 | |
| (1888) 13 AC 800, Grand Trunk Rly. Co. of Canada v. Jennings | | 5 |
| (1884) 9 PD 96, Vera Cruz (No. 2) | | 5 |
| (1862) 157 ER 3 H & N 448 Franklin v. South Eastern Railway Co. | | 6 |
| (1858) 4 CB (N. S.) 296 = 140 ER 1098, Dalton v. South Eastern Rly. Co. | | 8 |

The following Judgment of the Court was delivered by

HEGDE, J.:— The question for deci- sion in this appeal by certificate is short but important and that question is what are the principles governing the assess- ment of damages under Sections 1-A and 2 of the Fatal Accidents Act (Act XIII of 1855) (to be hereinafter referred to as the Act)?

2. One Krishnamoorthy son of plain- tiffs 1 and 2 aged about 8 years was hit by a bus owned by the 1st defendant (who died during the pendency of this suit) and driven by the second defendant on February 26, 1956. As a result of that accident Krishnamoorthy sustained very severe injuries. He became unconscious almost immediately after the accident and died in the hospital on the early morning of February 28, 1956. Krishnamoorthy was the eldest son of plaintiffs 1 and 2. Both the Courts have come to the con- clusion that he was a bright boy and was at the top of his class in his school. At the time of his death he was in Standard

III. His parents are affluent. They could have afforded to give him good educa- tion. Hence there was a bright future for him. The plaintiffs claimed a sum of Rs. 30,000/- as damages under Secs. 1A and 2 of the Act. The District Judge computed the damages under Sections 1A and 2 at Rs. 5,000/-. In appeal the High Court determined the damages under Section 1A at Rs. 5,000/- and under Sec- tion 2 at Rs. 1,000/-. Aggrieved by that decision, the plaintiffs have brought this appeal.

3. We shall first read Sections 1A and 2 for the purpose of ascertaining the principles governing the assessment of the damages under those sections. Section 1A reads:

“Whenever the death of a person shall be caused by wrongful act, neglect or default and the act, neglect or default is such as would (if death had not en- sued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensu- ed shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

Every such action or suit shall be for benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the exe- cutor, administrator or representative of the person deceased;”

Section 2 reads thus:

“Provided always that not more than one action or suit shall be brought for, and in respect of the same subject matter of complaint. Provided that, in any such action or suit, the executor, administrator or representative of the deceased may in- sert a claim for and recover any pecuniary loss to the estate of the deceased occa- sioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.”

4. The rights under the two provisions are quite distinct and independent. Under the former section the damages are made payable to one or the other relations enu- merated therein whereas the latter sec- tion provides for the recoupment of any pecuniary loss to the estate of the deceased by the wrongful act complained of. Sometimes, the

beneficiaries under the two provisions may be the same. Section 1-A is in substance a reproduction of the English Fatal Accidents Acts 9 and 10 Vict. Ch. 93 known as the Lord Campbell's Acts. Section 2 corresponds to one of the provisions in the English Law Reform (Miscellaneous Provisions) Act, 1934.

5. The scope of Section 1 of the Campbell's Acts was considered by the House of Lords in *Davies v. Powell Dufferyn Associated Collieries Ltd.*, (1942 AC 601). Dealing with the mode of assessment of damages under that Section Lord Russell of Killowen observed:

"The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Act is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately."

Lord Wright stated the law on the point thus:

"The general nature of the remedy under the Fatal Accidents Acts has often been explained. These Acts 'provided a new cause of action and did not merely regulate or enlarge an old one', as Lord Sumner observed in *Admiralty Commissioners v. S. S. Amerika*, 1917 AC 38 at p. 52. The claim is, in the words of Bowen, L. J., in the *Vera Cruz* (No. 2), (1884) 9 PD 96 for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own life time, because it is for damages suffered not by himself, but by his family after his death. The Act of 1846, Section 2 provides that the action is to be for the benefit of the wife or other members of the family, and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death. The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered: *Grand Trunk Rly. Co. of Canada v. Jennings*, (1888) 13 AC 800 at p. 804. The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one

hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death."

6. In ascertaining pecuniary loss caused to the relations mentioned in Section 1A, it must be borne in mind that these damages are not to be given as solatium but are to be given with reference to a pecuniary loss. The damages should be calculated with reference to a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased—see *Franklin v. South Eastern Railway Co.*, (1862) 157 ER 3 H & N 448. In that case Pollock, C. B., observed:

"We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough and such reasonable expectation might well exist, though from the father, not being in need, the son had never done anything for him. On the other hand a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from the continuance of the life."

7. In *Taff Vale Railway Company v. Jenkins*, 1913 AC 1, the Judicial Committee observed that it is not a condition precedent to the maintenance of an action under the Fatal Accidents Act, 1846, that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of the death provided that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life. Therein Lord Atkinson stated the law thus:

"I think it has been well established by authority that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact — there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past, and second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only,

pieces of evidence; and the necessary inference can I think be drawn from circumstances other than and different from them."

8. In an action under the Act, it is not sufficient for the plaintiff to prove that he lost by the death of the deceased a mere speculative possibility of pecuniary benefit. In order to succeed, it is necessary for him to show that he has lost a reasonable probability of pecuniary advantage. In *Barnett v. Cohen*, 1921-2 KB 461, McCardie, J., speaking for the Court quoted with approval the following observations of Lord Haldane in his judgment in 1913 AC 1 (*supra*).—

"The basis is not what has been called solatium that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. But then loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you examine them. I have already indicated that in my view the real question is that which Willes, J., defines in one of the cases quoted to us, *Dalton v. South Eastern Rly. Co.*, (1858) 4 CB (NS) 296, Aye or No, was there a reasonable expectation of pecuniary advantage?"

9. Proceeding further the learned judge referred to the observations of Pollock, C. B. in 1913 AC 1 (*supra*):

"It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs."

10. Dealing with the facts of the case before him McCardie, J., observed:

"In the present action the plaintiff has not satisfied me that he had a reasonable expectation of pecuniary benefit. His child was under four years old. The boy was subject to all risks of illness, disease, accident and death. His education and upkeep would have been a substantial burden to the plaintiff for many years if

he had lived. He might or might not have turned out a useful young man. He would have earned nothing till about sixteen years of age. He might never have aided his father at all. He might have proved a mere expense. I cannot adequately speculate one way or the other. In any event he would scarcely have been expected to contribute to the father's income, for the plaintiff even now possesses 1,000 l, a year by his business and may increase it further, nor could the son have been expected to aid in domestic service. The whole matter is beset with doubts, contingencies and uncertainties. Equally uncertain, too, is the life of the plaintiff himself in view of his poor health. He might or might not have survived his son. That is a point for consideration, for, as was pointed out by Bray, J., when sitting in the Court of Appeal in *Price v. Glynea and Castle Coal Co.*, (1915) 9 BWCC 188 at p. 198: "Where a claim is made under Lord Campbell's Acts, as it is here, it is not only a question of the expectation of the life of the claimant". Upon the facts of this case the plaintiff has not proved damage either actual or prospective. His claim is pressed to extinction by the weight or multiplied contingencies. The action therefore fails."

11. The mode of assessment of damages is not free from doubt. It is beset with certain difficulties. It depends on many imponderables. The English Courts have formulated certain basis for calculating damages under Lord Campbell's Acts. The rules ascertained by the English Courts are set out in Winfield on Torts 7th Edn. at pp. 135 and 136 as follows:

"The starting point is the amount of wages which the deceased was earning the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a number of years' purchase. That sum, however, has to be taxed down by having regard to the uncertainties, for instance, that the widow might have again married and thus ceased to be dependant, and other like matters of speculation and doubt". The number of years' purchase is left fluid, from twelve to fifteen has been quite a common multiple in the case of a healthy man, and the number should not be

materially reduced by reason of the hazardous nature of the occupation of the deceased man. These principles are, however, only appropriate where the deceased was the bread-winner of the family. Obviously they cannot be applied, for example, where the claim is in respect of a mere expectation of pecuniary benefit from the deceased or where the deceased's contribution to the family was in kind and not in cash. In truth, each case must depend upon its own facts. In *Dolbey v. Godwin*, 1955-1 WLR 553 at p. 1103, the plaintiff was the widowed mother of the deceased, an unmarried man 29 years of age, and he had contributed substantially to her upkeep. The Court of Appeal held that it would be wrong to assess the damages on the same basis as if the plaintiff were the widow of the deceased, principally on the ground that it was likely that he would have married in due course and that then his contributions to his mother would have been reduced."

12. The mode and manner of ascertainment of damages in fatal accidents cases came up for consideration in *Nance v. British Columbia Electric Rly. Co. Ltd.*, 1951 AC 601. In that case Viscount Simon formulated the following tests for ascertaining the damages. — (1) First estimate what was the deceased man's expectation of life if he had not been killed when he was and (2) What sums during those years, he would have probably applied to the support of the dependant. In fixing the expectation of life of the deceased regard must be had not only to his age and bodily health but premature termination of his life by a later accident. In estimating future provision for his dependant the amounts he usually applied in this way before his death are obviously relevant, and often the best evidence available though not conclusive, since if he had survived his means might have expanded or shrunk, and his liberality might have grown or wilted. After making the calculations on the basis of the two tests, his Lordship observed that deduction must further be made for the benefit accruing to the dependant from the acceleration of his interest in his estate and further allowance must be made for the possibility that the dependant himself might have died before he died.

13. In *Gobald Motor Service Ltd. v. R. M. K. Veluswami*, 1962-1 SCR 929= (AIR 1962 SC 1), this Court held that the

actual extent of the pecuniary loss to the aggrieved party may depend on a data which cannot be ascertained accurately but must necessarily be an estimate, or even partly a conjecture. Shortly stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever sources comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained. Therein it was further observed that where the Courts below have on relevant material placed before them ascertained the amount of damages under the head of pecuniary loss to the dependants of the deceased, such findings cannot be disturbed in second appeal except for compelling reasons.

14. The law on the point arising for decision may be summed up thus: Compulsory damages under Section 1A of the Act for wrongful death must be limited strictly to the pecuniary loss to the beneficiaries and that under Section 2, the measure of damages is the economic loss sustained by the estate. There can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations but the amount recoverable depends on the particular facts and circumstances of each case. The life expectancy of the deceased or of the beneficiaries whichever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the designated beneficiaries are necessarily personal to each case, in the very nature of things, there can be no exact or uniform rule for measuring the value of human life. In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable. As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased minor child. In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority. In the matter of ascertainment of damages, the appellate Court should be slow in disturbing the findings reached by the Courts below, if they have taken all the relevant facts into consideration.

15. Now applying the above rules to the facts of the present case, it is seen that the deceased child was only 8 years old at the time of his death. How he would have turned out in life later is at best a guess. But there was a reasonable probability of his becoming a successful man in life as he was a bright boy in the school and his parents could have afforded him a good education. It is not likely that he would have given any financial assistance to his parents till he was at least 20 years old. As seen from the evidence on record, his father was a substantial person. He was in business and his business was a prosperous one. As things stood he needed no assistance from his son. There is no material on record to find out as to how old were the parents of the deceased at the time of his death. Nor is there any evidence about their state of health. On the basis of the evidence on record, we are unable to come to the conclusion that the damages ordered by the High Court are inadequate.

16. In the result this appeal fails and the same is dismissed. But in the circumstances of the case we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 381
(V 57 C 82)

(From: Mah. R. T. Bombay)*

V. RAMASWAMI AND I. D. DUA, JJ.

Shyamsunder Tikam Shet and another, Appellants v. State of Maharashtra and another, Respondents.

Civil Appeal No. 744 of 1966, D/- 15-10-1969.

Tenancy Laws—Bombay Khoti Abolition Act (6 of 1950), Sections 12 and 10 (as amended by Maharashtra Act 43 of 1963) — Payment of compensation for loss of share in forest revenue — Khoti is not entitled to, unless Government has expressly granted proprietary rights over the soil — Bombay Land Revenue Code (5 of 1879), Section 41.

In the absence of a sanad or a deed or a grant granting proprietary rights over the soil a Khoti is not the proprietor of the lands constituted as reserved forest in the khoti village and is not entitled to any proprietary right in the uncultivated or forest land. The question whether a

*(Revenue Appeal No. 40 of 1962—Mah. R. T. Bombay.)

Khoti has got the proprietary or any other limited right to the trees standing or growing on lands in his khoti village depends (1) upon the khoti's interest in the soil (2) upon any express grant or concession, and (3) upon the customary user, if any. In the first case, if the khoti is the proprietor of the soil, which is very hardly the case, he is the proprietor of all the trees standing or growing on the lands in his khoti village. The trees upon the land, and the right to cut down and sell those trees is incident to proprietorship of the land. In such a case the principle is *quicquid plantatur solo solo cedit*. Ordinarily the khoti having no ownership over the soil, he is not entitled to cut timber either on uncultivated or on forest lands. Government has the right to take such lands to make a forest reserve under the customary law as well as under positive enactments. There is an undoubted presumption that forest tracts and old waste belong to Government unless the presumption is displaced by positive evidence that Government has granted rights in any particular tract or piece of land or has consciously allowed adverse rights to grow therein. AIR 1924 PC 150 & 3 Bom HC AC 132 & AIR 1925 Bom 44 & AIR 1917 Bom 38, Rel. on.

(Para 9)

Cases Referred: Chronological Paras

(1925) AIR 1925 Bom 44 (V 12)=
26 Bom LR 754, Ganpati Gopal
Risbud v. Secy. of State for India 7

(1924) AIR 1924 PC 150 (V 11)=
51 Ind App 257, K. Ambu Nair
v. Secy. of State for India 9

(1917) AIR 1917 Bom 38 (V 4)=
20 Bom LR 141, Sadashiv Parsh-
ram Rishbud v. Secy. of State for
India 10

(1868-69) 3 Bom HC AC 132, Tajubai
v. Sub-Collector of Kulaba 6

The following Judgment of the Court was delivered by

RAMASWAMI, J.:— This appeal is brought by special leave from the judgment of the Maharashtra Revenue Tribunal, Bombay in Revenue Appeal No. 40 of 1962, whereby the Trial Court set aside the award of the Special Deputy Collector, (Khoti) Kolaba under Section 12 of the Bombay Khoti Abolition Act, 1949 directing the amount of Rs. 837.94 to be paid to the appellants for their share of Re. 0-12-1 1/3 share in village Kotheri, Taluka Mahal, District Kolaba and remanded the case for retrial stating the

points for decision by the Special Deputy Collector.

2. On October 9, 1950 the appellants made an application before the Collector of Kolaba for obtaining compensation for Khoti rights in respect of reserved forest and unassessed lands in accordance with the provisions of the Bombay Khoti Abolition Act, 1949 (Act No. VI of 1950) (hereinafter referred to as the Act). In the application, the appellants stated that the village Kotheri in Taluka Mahal was a Khoti village of Pat (leasehold) and that the appellant had a Khoti share of Re. 0-12-1½ in the village. The appellants said that the total compensation which they claimed for the entire village came to Rs. 17,615/- and that the share of Re. 0-12-1 1/3 came to Rs. 13,333-9-0. The appellants further claimed a sum of Rs. 7,480/- in respect of loss under the reserved forest (74 acres 32 gunthas) and a sum of Rs. 6,850/- being the one-third share of "the price at the present market rate of the trees etc., that at present stand in the reserved forest". On January 31, 1962 the appellants filed before the Special Deputy Collector, Kolaba a preliminary statement. In that statement the appellants contended that the Khots used to guard the forest in their proprietary rights in about the year 1860 A. D. and that the said land had been taken to the reserved forest. The appellants further contended that they had a partnership with the State in respect of forest income, that is, in the division of agricultural produce and that the "partnership in the forest income has not been abolished under the Khoti Abolition Act and the partnership is still subsisting." The appellants said that "the question of determining compensation for the forest partnership cannot, therefore, arise." On May 15, 1962 the Special Deputy Collector (Khoti) Kolaba made his award granting a sum of Rs. 837.94 as compensation. Aggrieved by the award the appellants preferred an appeal before the Maharashtra Revenue Tribunal being Revenue Appeal No. REV.A 40 of 1962. On September 16, 1963, the appellants submitted before the Tribunal their written arguments. On September 18, 1964, November 21, 1964 and February 1, 1965, the appellants filed before the Tribunal further supplementary arguments in writing. On February 21, 1965 the Tribunal delivered its judgment holding that the Khoti in the Kolaba cannot claim proprietary rights in the village or in the reserv-

ed forest unless he proves that he has separate sanad or grant conveying to him these proprietary rights. The Tribunal, however, took the view that the appellants were not bound by any compromise decree and the Special Deputy Collector has dealt with the matter in a perfunctory manner. The Tribunal therefore, set aside the award and remanded the case for retrial setting out the points to be decided by the Special Deputy Collector.

3. The Bombay Khoti Abolition Act, 1949 came into force with effect from April 12, 1959. Section 2 (1) (iv) of the Act defines the word "Khot" as including a mortgagee lawfully in possession of a Khotki. Section 2 (1) (vii) of the Act defines the words "Khoti Khasgi land" as follows:

"(a) in the Ratnagiri District Khoti land held by and in possession of a Khot other than kothi nisbat land and land held by a privileged occupant as defined in the Khoti Act;

(b) in the Kolaba District —

(i) land which is entered in the Khot's own name as Khoti or in that of a co-sharer in a khotki in the records of the original survey; and

(ii) land acquired since the original survey by the Khot by purchase or other lawful transfer otherwise than in his capacity as a khot;"

Section 2 (1) (viii) defines the words "khoti land" as follows:

"'Khoti land' means land in respect of which a khot had, as such, any right or interest in the district of Ratnagiri according to the provisions of the Khoti Act and in the district of Kolaba according to the custom of the tenure;"

Section 3 of the Act provides for the abolition of the Khoti tenure and states:

"3. With effect from and on the date on which this Act comes into force, —

(1) the khoti tenure shall, wherever it prevails in the districts of Ratnagiri and Kolaba, be deemed to have been abolished; and

(2) save as expressly provided by this Act, all the incidents of the said tenure shall be deemed to have been extinguished, notwithstanding any law, custom, or usage or anything contained in any sanad, grant, kabulayat, lease, decree or order of any Court or any other instrument." Section 10 deals with the right to trees and states:

"The rights to trees specially reserved under the Indian Forest Act, 1927, or any

other law for the time being in force except those the ownership of which has been transferred by Government under any contract, grant or law for the time being in force shall vest in Government." Section 12 of the Act before its amendment by the Maharashtra Act 43 of 1963 stood as under:

"(1) If a khot or any other person is aggrieved by any of the provisions of this Act as extinguishing or modifying any of his rights in land and if such person proves that such extinguishment or modification amounts to transference to public ownership of any land or any right in or over such land, such person may apply to the Collector for compensation.

(2) Such application shall be made in the form prescribed by rules made under this Act on or before the 31st day of March, 1952.

(3) The Collector shall after holding a formal inquiry in the manner provided by the Code award such compensation as he deems reasonable and adequate;

Provided that—

(a) the amount of compensation for the extinguishment of the right of reversion in lands in a khoti village in the district of Ratnagiri shall not exceed the amount calculated at the rate of Rs. 2 per 100 acres of such land;

(b) the amount of compensation for the extinguishment of any right to appropriate any uncultivated and waste lands not appropriated by any khot and not entered in the revenue or survey records as khoti khasgi immediately before the 1st day of August, 1949, shall not exceed the amount calculated at the rate of Rs. 5 per 100 acres of such land:

Provided further that in the case of the extinguishment or modification of any other right of a khot or any right of any other person the Collector shall be guided by the provisions of sub-section (1) of Section 23 and Section 24 of the Land Acquisition Act, 1894:

Provided also that if any question arises whether any land is dhara, khoti khasgi or khoti nisbat or is held by a permanent tenant or other tenant, the Collector shall after holding a formal inquiry in the manner provided by the Code decide the question.

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(4) Subject to the provisions of sub-section (5), the award or decision of the Collector shall be final.

(5) Any person aggrieved by the award or decision of the Collector may appeal to

the Bombay Revenue Tribunal constituted under the Bombay Revenue Tribunal Act, 1939."

4. The Act was amended by the Maharashtra Act 43 of 1963 by which payment of compensation was provided to any loss of share in the forest revenue and the *Amending Act came into force on October 6, 1963*, and it was provided that the claim for compensation can be entertained upto March 31, 1964.

5. On behalf of the appellants Mr. S. T. Desai did not press the argument that the Act is ultra vires of the Constitution of India or that the Act did not apply to the village of Kotheri or to the survey plots in dispute. Learned Counsel said that the appellant should be given sufficient opportunity of proving by oral and documentary evidence that they had proprietary rights in Survey Plots Nos. 130 and 132 of Mauja Kotheri in the status of Khoti.

6. The legal position is well established that khotis in the district of Kolaba are hereditary farmers of land revenue and are entitled to hold villages as khotis on their entering every year into the customary kabulayat. According to Molesworth's Dictionary 'khot' means:

"a renter of a village, a farmer of land or revenue, a farmer of the customs, a contractor or monopolist; an hereditary officer whose duty it is to collect the revenue of the village for Government, also an officer appointed for this office; a tribe of Brahmins in the Southern Konkan."

In *Tajubai v. Sub-Collector of Kolaba*, (1868-69) 3 Bom HC AC 132 it was held by the majority of the Full Bench that the khotis have no proprietary right in the soil of their village but only hereditary right to farm the revenue and that if the "khot's right is the hereditary farming of the revenue, the living principle of that right would not be property inherent in the khot, but a perpetually running contract with the State." At p. 149, Newton, J., observed in the course of his judgment:

"Do these facts establish more than is admitted, namely, that the plaintiff had an hereditary right of farming the half of the village of Pegode, as long as she continued annually to enter into the customary agreement? Do they prove that she as khot had any such proprietary interest in the village, as would authorise her to claim restitution of the half-share unconditionally, after failure during seve-

ral years to discharge the office of khot? We think not. We think, further, that some of the above facts militate against the title alleged by the plaintiff."

7. In Ganapati Gopal Risbud v. The Secretary of State for India, 26 Bom LR 754=(AIR 1925 Bom 44) the Bombay High Court reiterated that khots in the district of Kolaba are hereditary farmers of the revenue and are entitled to hold their villages as Khotis on their entering every year into the customary Kabulayats. At p. 768 (of Bom LR)=(at pp. 48-49 of AIR) Macleod, C. J., stated:

"The relationship between the Khot and the Government to my mind, is perfectly clear. As stated in Mr. Candy's report it is indubitably established that a Khot's interest in his village is limited, not absolute; he possesses in some measure a proprietary right; in fact he is an occupant with all the rights and liabilities affecting such a status. The Khot has to secure to Government the payment of the village revenue, while the village lands which he has to manage in accordance with the restrictions mentioned in the Kabulayat fall under three distinct classes. These are (1) Dharekari lands the tenants of which have a transferable and heritable right paying Dhara alone to the Khot; (2) Khot-nisbat lands which are either in the hands of permanent occupancy tenants or tenants with less permanent right paying Fayda to the Khot and the Government assessment; and (3) Khoti Khasgi lands, private lands, in the possession of the Khot of which he can make such use as he pleases."

8. It was contended on behalf of the appellants that the Sud of 1869 at p. 124-A of the paper book was an important document and the Tribunal has not correctly appreciated the meaning of the words Khalsa and Varkas. We do not wish to express at this stage any concluded opinion on the construction of this document. We wish to make it clear that it will be open to the appellants to show before the Special Deputy Collector how far this document has a bearing on their claim to proprietary right of Survey Plots Nos. 130 and 132.

9. It is clear that in the absence of a sanad or a deed or a grant granting proprietary rights over the soil a Khoti is not the proprietor of the lands constituted as reserved forests in the Khoti village and is not entitled to any proprietary right in the uncultivated or forest land. The

legal position is correctly summarised in Dandekar's Law of Land Tenures, Vol. 1, pp. 287-288 as under:

"Section 41 of the Land Revenue Code declares that the right to all trees, bush-wood, Jungle or other natural product, wherever growing, except in so far as the same may be the property of individuals capable of holding property, vests in Government. Government proprietorship of all trees is the rule and private rights or proprietorship, if any, are merely exceptions to the rule. The question whether a Khot has got the proprietary or any other limited right to the trees standing or growing on lands in his Khoti village depends (1) upon the Khot's interest in the soil (2) upon any express grant or concession, and (3) upon the customary user, if any. In the first case, if the Khot is the proprietor of the soil, which is very hardly the case, he is the proprietor of all the trees standing or growing on the lands in his Khoti village. The trees upon the land, and the right to cut down and sell those trees is incident to proprietorship of the land. In such a case the principle is quicquid plantatur solo solo cedit. Ordinarily the khot having no ownership over the soil, it has been held that he is not entitled to cut timber either on uncultivated or on forest lands. Government has the right to take such lands to make a forest reserve under the customary law as well as under positive enactments."

It is necessary in this context to refer to the presumption that forest tracts and old waste belong to Government unless the presumption is displaced by positive evidence that Government has granted rights in any particular tract or piece of land or has consciously allowed adverse rights to grow therein. (See K. Ambu Nair v. Secretary of State for India, 51 Ind App 257 = (AIR 1924 PC 150)).

10. In Sadashiv Parshram Risbud v. Secretary of State for India, 20 Bom LR 141 = (AIR 1917 Bom 38) the question arose whether the khots were entitled to recover the sale proceeds of certain teak trees sold by Government grown on Varkas lands. In the alternative the khots claimed one-third share of the sale proceeds relying upon the clause in the Kabulayat. It was held by the Bombay High Court that as between the khots and the Government the matter in dispute was concluded by the kabulayat and the khot could not obtain more than one-third of the proceeds of the sale of

the trees. It was held by Shah, J., that the Dunlop's Proclamation could apply to Varkas lands in a khoti village; but if any person claimed the benefit of the Proclamation he should prove that the land, on which the trees stood, was his in a popular sense, that is, it was sufficiently marked out as being in his permanent occupation in his own right so as to make it properly describable as his land. On the facts of that case it was held that the khots had no claim to the teak trees under Section 40 of the Land Revenue Code and they had failed to prove that they were entitled to the benefit of Dunlop's Proclamation in respect of the Varkas lands in question.

11. In the present case the Maharashtra Revenue Tribunal has remanded the case for retrial to the Special Deputy Collector, Kolaba for decision on the following points:

(1) Whether the appellants prove that they are the proprietors of the lands in the village of Kotheri or in the lands attached as a reserved forest to the said village;

(2) Whether the appellants are entitled to any compensation for the village gaathan lands or lands under the rivers and nallas. This claim is based on the allegation of the appellants that they are the proprietors of the village;

(3) Whether the appellants are entitled, as a customary incident of the Khoti, to a share in the forest revenues of the village;

(4) What is the market value of the loss or such share or right, if any, in the gaathan and river and nalla lands.

12. We affirm the above order of remand and further direct that an opportunity should be given by the Special Deputy Collector to both sides to adduce such evidence as they choose on these points. After taking such evidence the Special Deputy Collector will pronounce the award in the light of the law laid down in this judgment. Subject to these observations we affirm the order of the Maharashtra Revenue Tribunal dated February 25, 1965 and dismiss the appeal. There will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 385 (V 57 C 83)

(From Kerala: AIR 1966 Ker 5)
J. C. SHAH, ACTG. C. J., V. RAMASWAMI AND A. N. GROVER, JJ.

The Income-tax Officer, Alleppey, (In both the Appeals), Appellant v. I. M. C. Ponnose and others, (In C. A. No. 942 of 1966), 2. Excel Productions, Alleppey and others, (In C. A. No. 943 of 1966), Respondents.

Civil Appeals Nos. 942 and 943 of 1966, D/- 28-7-1969.

Income-tax Act (1961), Section 2 (44) (ii) (as substituted by Section 4 of Finance Act, 1963) — Notification under — State Government investing Tahsildar with powers of Tax Recovery Officer — Authorisation cannot be made retrospectively — Retrospective legislation by delegated authority — Principle — Legal fiction created by Section 4 of Finance Act (1963) — Construction of.

By issuing notification in exercise of powers conferred under Section 2 (44) (ii), the State Government cannot invest the Tahsildar with the powers of a Tax Recovery Officer with effect from a date prior to the date of the notification i.e., retroactively or retrospectively. Consequently, attachment of shares belonging to assessee in order to recover arrears, by the Tahsildar, subsequent to 1st April 1962, i.e., commencement of the Act of 1961 but prior to the date of notification empowering him as a Tax Recovery Officer is invalid. AIR 1966 Ker 5, Affirmed.

(Paras 6, 7)

It is open to a sovereign legislature to enact laws which have retrospective operation. The Courts will not ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts

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that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect.

(Para 5)

It can hardly be said that the notification empowering Tahsildar to act as Tax Recovery Officer, promulgates any rule, regulation or bye-law all of which have a definite signification. The exercise of the power under sub-clause (ii) of cl. (44) of Section 2 is more of an executive than a legislative act. The only effect of the substitution made by the Finance Act is to make the new definition a part of the Act from the date it was enacted. The legal fiction cannot be extended beyond its legitimate field and the words "shall be and shall be deemed always to have been substituted" occurring in Section 4 of the Finance Act 1963 cannot be construed to embody conferment of a power for a retrospective authorisation by the State in the absence of any express provision in Section 2 (44) of the Act itself. Case law discussed. (Paras 6, 7)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 118 (V 56)=

1969 Lab IC 100=(1968) 3 SCR 575, B. S. Vadera v. Union of India

(1963) AIR 1963 SC 274 (V 50)=

(1963) 1 SCR 721, Dr. Indramani Pyarelal Gupta v. W. R. Nathu

(1960) AIR 1960 Mys 326 (V 47)=

ILR (1959) Mys 688, India Sugars and Refineries Ltd. v. State of Mysore

(1959) AIR 1959 Punj 453 (V 46)=

61 Pun LR 514 (FB), General S. Shivdev Singh v. State of Punjab

(1956) AIR 1956 All 35 (V 43)=

ILR (1955) 2 All 612, Modi Food Products Ltd. v. Commr. of Sales Tax U. P.

(1953) AIR 1953 SC 95 (V 40)=

1953 SCR 439, Strawboard Manufacturing Co. Ltd. v. Gutta Mill Workers' Union

(1870) 40 LJQB 28 = 6 QB 1,

Phillips v. Eyre

Mr. Jagdish Swarup, Solicitor General of India (M/s. T. A. Ramachandran and B. D. Sharma, Advocates, with him), for Appellant (In both the Appeals); Mr. S. T. Desai, Senior Advocate (M/s. M. C. Chacko and A. K. Verma, Advocates, and M/s. J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co. with him), for Respondent No. 1 (In C. A. No. 942 of 1966); Mr. A. G. Pudis-

sery, Advocate, for Respondents Nos. 2 and 3; M/s. J. B. Dadachanji and Co., for Respondents Nos. 1 and 2 (In C. A. No. 943 of 1966); Mr. A. G. Pudisery, Advocate, for Respondents Nos. 7 and 8 (In C. A. No. 943 of 1966).

The following Judgment of the Court was delivered by

GROVER, J.: These two appeals by special leave involve a common question relating to the validity of a notification issued by the Government of Kerala in August 1963 empowering certain revenue officials including the Taluka Tahsildar to exercise the powers of a Tax Recovery Officer under the Income-tax Act, 1961, hereinafter called the Act. The notification was expressly stated to be effective from 1st April, 1962—a date prior to the date of the notification.

2. The facts in one of the appeals (C. A. 942/66) may be stated: One Kunchacko of Alleppey allowed the income-tax dues from him to fall into arrears. The Income-tax Officer took steps to recover the arrears through the Tahsildar. Certain shares standing in the name of the assessee were attached by the Tahsildar. The first respondent Ponnose claimed to have obtained a decree for a certain sum against the assessee. He also got the shares standing in the name of the assessee attached in execution proceedings. Ponnose filed a petition under Art. 226 of the Constitution in the High Court of Kerala in which he challenged the action taken by the revenue officials including the Tahsildar for getting the shares, which had been attached, sold for satisfaction of the income-tax dues of the assessee.

3. The learned Single Judge held that the notification empowering the Tahsildar to exercise the powers of a Tax Recovery Officer under the Act with retrospective effect was invalid. Consequently the attachments made by the Tahsildar were quashed. This view was affirmed by a Division Bench in appeal.

4. The Act came into force on first April, 1962. Section 2 (44) defined the expression "Tax Recovery Officer" in the following terms:—

"Tax Recovery Officer" means—

(i) a Collector;

(ii) an Additional Collector or any other officer authorised to exercise the powers of a Collector under any law relating to land revenue for the time being in force in a State; or

(iii) any gazetted officer of the Central or a State Government who may be authorised by the Central Government by notification in the Official Gazette, to exercise the powers of a Tax Recovery Officer."

Section 4 of the Finance Act, 1963 substituted a new definition for the original definition of Tax Recovery Officer. It was provided that the new definition "shall be and shall be deemed always to have been substituted". The new definition was as follows.

"Tax Recovery Officer' means—

(i) a Collector or an Additional Collector;

(ii) any such officer empowered to effect recovery of arrears of land revenue or other public demand under any law relating to land revenue or other public demand for the time being in force in the State as may be authorised by the State Government, by general or special notification in the Official Gazette, to exercise the powers of a Tax Recovery Officer;

(iii) any Gazetted Officer of the Central or a State Government who may be authorised by the Central Government, by general or special notification in the Official Gazette, to exercise the powers of a Tax Recovery Officer."

The impugned notification dated August 14, 1963 which was published in the Kerala Gazette dated August 20, 1963 referred to the powers conferred by sub-clause (ii) of Clause (44) of Section 2 of the Act read with sub-rule (2) of Rule 7 of the Income-tax (Certificate Proceedings) Rules, 1962 and authorised the various revenue officials mentioned therein including the Taluka Tahsildar to exercise the powers of a Tax Recovery Officer under the Act in respect of the arrears etc. The concluding portion was: "This notification shall be deemed to have come into force on the first day of April 1962". The Tahsildar had effected attachment of the shares subsequent to first April 1962 but prior to August 14, 1963. In other words on the date on which he had effected attachment he was not a Tax Recovery Officer but he got the powers of a Tax Recovery Officer by virtue of the notification dated August 14, 1963. The short question for determination, therefore, was and is whether the State Government could invest the Tahsildar with the powers of a Tax Recovery Officer under the aforesaid provisions of the Act with effect from a date prior to

the date of the notification i. e., retroactively or retrospectively.

5. Now it is open to a sovereign legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are—in the words of Willes, J. in *Phillips v. Eyre*, (1870) 40 LJ QB 28 at p. 37—"no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the Courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect: (See *Subba Rao J.*, in *Dr. Indramani Pyarelal Gupta v. W. R. Nathu*, (1963) 1 SCR 721 = (AIR 1963 SC 274)—the majority not having expressed any different opinion on the point; *Modi Food Products Ltd. v. Commr. of Sales Tax, U. P.*, AIR 1956 All 85; *India Sugar Refineries Ltd. v. State of Mysore*, AIR 1960 Mys 326 and *General S. Shivdev Singh v. State of Punjab*, (1959) 61 Pun LR 514 = (AIR 1959 Punj 453) (FB)).

6. It can hardly be said that the impugned notification promulgates any rule, regulation or bye-law all of which have a definite signification. The exercise of the power under sub-clause (ii) of Clause (44) of Section 2 of the Act is more of an executive than a legislative act. It becomes, therefore, all the more necessary to consider how such an act which has retrospective operation can be valid in the absence of any power confer-

red by the aforesaid provision to so perform it as to give it retrospective operation. In *Strawboard Manufacturing Co. Ltd. v. Gutta Mill Workers' Union*, 1953 SCR 439 = (AIR 1953 SC 95) an industrial dispute had been referred by the Governor to the Labour Commissioner or a person nominated by him with the direction that the award should be submitted not later than April 5, 1950. The award, however, was made on April 13, 1950. On April 26, 1950 the Governor issued a notification extending the time up to April 30. It was held that in the absence of a provision authorising the State Government to extend from time to time the period within which the Tribunal or the adjudicator could pronounce the decision, the State Government had no authority to extend the time and the award was, therefore, one made without jurisdiction and a nullity. This decision is quite apposite and it is difficult to hold in the present case that the Taluka Tahsildar could be authorised by the impugned notification to exercise powers of a Tax Recovery Officer with effect from a date prior to the date of the notification.

7. It may next be considered whether by saying that the new definition of "Tax Recovery Officer" substituted by S. 4 of the Finance Act 1963 "shall be and shall be deemed always to have been substituted" it could be said that by necessary implication or intendment the State Government had been authorised to invest the officers mentioned in the notification with the powers of a Tax Recovery Officer with retrospective effect. The only effect of the substitution made by the Finance Act was to make the new definition a part of the Act from the date it was enacted. The legal fiction could not be extended beyond its legitimate field and the aforesaid words occurring in Sec. 4 of the Finance Act 1963 could not be construed to embody conferment of a power for a retrospective authorisation by the State in the absence of any express provision in Section 2 (44) of the Act itself. It may be noticed that in a recent decision of the Constitution Bench of this court in *B. S. Vadera v. Union of India*, AIR 1969 SC 118 it has been observed with reference to rules framed under the proviso to Article 309 of the Constitution that these rules can be made with retrospective operation. This view was, however, expressed owing to the language employed in the proviso to Arti-

cle 309 that "any rules so made shall have effect subject to the provisions of any such Act". As has been pointed out the clear and unambiguous expressions used in the Constitution, must be given their full and unrestricted meaning unless hedged in by any limitations. Moreover when the language employed in the main part of Article 309 is compared with that of the proviso it becomes clear that the power given to the legislature for laying down the conditions is identical with the power given to the President or the Governor, as the case may be, in the matter of regulating the recruitment of Government servants and their conditions of service. The legislature, however, can regulate the recruitment and conditions of service for all times whereas the President and the Governor can do so only till a provision in that behalf is made by or under an Act of the appropriate legislature. As the legislature can legislate prospectively as well as retrospectively there can be hardly any justification for saying that the President or the Governor should not be able to make rules in the same manner so as to give them prospective as well as retrospective operation. For these reasons the ambit and content of the rule-making power under Article 309 can furnish no analogy or parallel to the present case. The High Court was consequently right in coming to the conclusion that the action taken by the Tahsildar in attaching the shares was unsustainable.

8. The appeals therefore fail and are dismissed with costs. One hearing fee.

Appeals dismissed.

AIR 1970 SUPREME COURT 388 (V 57 C 84)

(From Calcutta: (1965) 2 ITJ 710)

J. C. SHAH, A. C. J., V. RAMASWAMI
AND A. N. GROVER, JJ.

The Commissioner of Income-tax, W. B. II, Calcutta (In all the Appeals), Appellant v. Nalin Behari Lal Singha, etc., Respondents.

Civil Appeals Nos. 736 to 739, 913 and 1621 of 1968, D/- 25-7-1969.

(A) Income-tax Act (1922), Sec. 2 (6A) Proviso to Explanation (as it stood before amendment by Finance Act 3 of 1956) and Section 12 — "Dividend" — Meaning of — Proportionate share of

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capital gains arising to Company on or after 1-4-1948 — Its distribution to shareholders — Not liable to tax as dividend.

In view of the Proviso to Explanation of Section 2 (6A) the proportionate share of the capital gains arising to the Company on or after 1-4-1948, out of which the dividend is distributed to the shareholders of the Company must be deemed exempt from liability to pay tax under Section 12 as dividend income liable to tax. (1965) 2 ITJ 710 (Cal), Affirmed.

(Para 6)

'Dividend' in its ordinary connotation means the sum paid to or received by a shareholder proportionate to his shareholding in a company out of the total sum distributed. Dividend distributed by a Company being a share of its profits declared as distributable among the shareholders, is not impressed with the character of the profits from which it reaches the hands of the shareholders. From the mere fact that a distribution has been made out of the capital gains, it cannot, therefore, be said that it has the attributes of capital gains in the hands of the shareholders. However, the proviso to the Explanation clearly enacts that capital gains arising after March 31, 1948 are not liable to be included within the expression "dividend". The definition of 'dividend' in Section 2 (6A) is an inclusive definition and a receipt by a shareholder which does not fall within the definition may possibly be regarded as dividend within the meaning of the Act unless the context negatives that view. But on that account it cannot be said that capital gains excluded from the definition of dividend by express enactment still fall within the charge of tax. According to the definition in Section 2 (6A) only the proportionate share of the member out of the accumulated profits (excluding capital gains arising in the excepted period) distributed by the Company, alone will be deemed the taxable component. (Paras 3, 4)

(B) Constitution of India, Article 136 — Plea that certain share of dividend taxable as income other than dividend — Plea not raised before High Court or Tribunal — Not entertained in Supreme Court. (Para 7)

Mr. Jagdish Swarup, Solicitor General of India (M/s. T. A. Ramachandran, R. N. Sachthey and B. D. Sharma, Advocates with him), for Appellant (In all the Appeals); P. Barman, Senior Advocate (M/s.

Ranjit Ghose and Sukumar Ghose, Advocates with him), for Respondents (In all the Appeals).

The following Judgment of the Court was delivered by

SHAH, Ag. C. J.: In a proceeding for assessment to income-tax for the year 1949-50 the respondents in these appeals claimed that the dividend distributed by the Ukhra Estate Zamindaries Ltd. was exempt from tax, because the fund out of which the dividend was distributed did not form part of the "accumulated profits" of the Company. The Income-tax Officer rejected the contention and brought the dividend to tax in the hands of the respondents. The Appellate Assistant Commissioner held that Rs. 1,12,500 out of a total amount of Rs. 2,24,000 distributed by the Company, represented capital gains arising to the Company on or after April 1, 1948 and not being dividend within the meaning of S. 2 (6A) of the Income-tax Act, 1922, the share distributed to the shareholders out of that amount was exempt from income-tax. The order of the Appellate Assistant Commissioner was reversed in appeal by the Tribunal. In the view of the Tribunal the definition of 'dividend' in S. 2 (6A) in force in the year of assessment was not exhaustive, and if the amount distributed was "dividend in ordinary parlance it became chargeable under the general charging section", and that Clause 2 (6A) "was concerned with deemed dividends, and exclusion of certain capital gains by the proviso had no bearing on the issue raised by the revenue".

2. The following question referred by the Tribunal to the High Court of Calcutta under Section 66 (1) of the Indian Income-tax Act:

"Whether on the facts and in the circumstances of the case the amount of Rs. 28,125 was rightly included as dividend in the total income of the assessee for the assessment year 1949-50?" was answered in the negative. The Commissioner has appealed to this Court with certificates granted by the High Court.

3. 'Dividend' in its ordinary connotation means the sum paid to or received by a shareholder proportionate to his shareholding in a company out of the total sum distributed. The relevant part of the definition contained in S. 2 (6A) of the Income-tax Act, 1922, in the year of assessment 1949-50 was as follows:—

* 'Dividend' includes—

(a) any distribution by a company of accumulated profits whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;

Explanation.—The words 'accumulated profits' wherever they occur in the clause, shall not include 'capital profit':

Provided further that the expression 'accumulated profits', wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946 or after the 31st day of March 1948."

Dividend distributed by a company being a share of its profits declared as distributable among the shareholders, is not impressed with the character of the profits from which it reaches the hands of the shareholders. It would be therefore difficult to hold that the mere fact that a distribution has been made out of the capital gains, it has the attributes of capital gains in the hands of the shareholders. But that does not assist the case of the Revenue, for the Legislature has expressly excluded from the content of dividend, capital gains arising after March 31, 1948.

4. The proviso to the Explanation clearly enacted that capital gains arising after March 31, 1948 are not liable to be included within the expression "dividend". The definition is, it is true, an inclusive definition and a receipt by a shareholder which does not fall within the definition may possibly be regarded as dividend within the meaning of the Act unless the context negatives that view. But it is difficult on that account to hold that capital gains excluded from the definition of dividend by express enactment still fall within the charge of tax. According to the definition in Section 2 (6A) of the Income-tax Act only the proportionate share of the member out of the accumulated profits (excluding capital gains arising in the excepted period) distributed by the Company, alone will be deemed the taxable component.

5. There is no warrant for the view expressed by the Tribunal that the definition of 'dividend' only includes deemed dividend. To hold that the capital gains within the excepted period are not part of the accumulated profits for the purpose of the definition under Section 2 (6A) and a distributive share thereof does not on that account fall within the defini-

tion of 'dividend' and therefore of income chargeable to tax and still to regard them as a part of accumulated profits for the purpose of dividend in the popular connotation and to bring the share to tax in the hands of the shareholders is to nullify an express provision of the statute. We do not see any reason why such a strained construction should be adopted.

6. We agree with the High Court that the proportionate share of the capital gains out of which the dividend was distributed to the shareholders of the Company must be deemed exempt from liability to pay tax under Section 12 as dividend income liable to tax.

7. Counsel for the Revenue sought to argue that share of dividend which is not chargeable to tax by virtue of the exemption clause is still liable to tax as income other than dividend. But no such contention was raised before the Tribunal or the High Court and no question was raised in that behalf. We will not be justified in entering upon the question which was not raised or argued before the Tribunal and before the High Court.

8. The appeals fail and are dismissed with costs. One hearing fee.
Appeals dismissed.

AIR 1970 SUPREME COURT 390
(V 57 C 85)

(From: Addl. I. T. Delhi)*

J. C. SHAH AND G. K. MITTER, JJ.

The Management of M/s. Gaziabad Engineering Co. Private Ltd., Appellant v. Its Workmen, Respondents.

Civil Appeal No. 1408 of 1966, D/- 18-7-1969.

(A) Constitution of India, Article 136 — Industrial Disputes Act (1947), Sch. III, Entries 2 and 5 — Finding of Tribunal as to financial position of a Company — Jurisdiction of Supreme Court to interfere.

Where the Industrial Tribunal has on appreciation of evidence come to the conclusion that the financial position of a company is sound, assuming that the Tribunal is governed by the strict rules prescribed by the Evidence Act, sitting in

* (Industrial Dispute No. 109 of 1965, D/- 19-5-1965; 23-2-1966—Addl. Ind. Tribunal —Delhi.)

LM/AN/D382/69/CWM/P

appeal with special leave the Supreme Court will not be justified in interfering with the finding of the Tribunal even if it be open to the criticism that a part of the evidence relied upon is not in law relevant. (Para 3)

(B) Industrial Disputes Act (1947), Sch. III, Entry 2 — Industrial dispute between Company and its workmen relating to dearness allowance and introduction of scheme of gratuity — Award of Tribunal giving dearness allowance at the flat rate of Rs. 3 for every 10 points rise in cost of Consumer Price Index — Rise in Index will not operate to give workmen besides additional dearness allowance, a percentage increase in dearness allowance already paid as part of the consolidated wages — Rise is not related to the quantum of basic wage or consolidated wage. (Para 6)

(C) Industrial Disputes Act (1947), Sch. III, Entry 5 — Gratuity Scheme — Quantum of gratuity is related to basic wage — Departure from normal rule when permissible.

The normal rule is that the quantum of gratuity is related not to the consolidated wage packet but to the basic wage. A departure may be made from the normal rule, if there be some strong evidence or precedent in the industry, or conduct of the employer or other exceptional circumstances to justify that course. In the absence of such evidence, gratuity should be related to the basic wage and not to the consolidated wage packet. (Para 11)

Where it is found that the financial position of the Company is sound but there is no evidence that the company is "making abnormally high profits" nor is there any evidence that in its sister concerns or in other similar concerns in the region there is a practice of awarding gratuity related to consolidated wages,

"(1) On death or retirement on attaining the age of superannuation or on becoming mentally or physically unfit for further service.

(2) On termination after five years' service for any cause whatsoever except by way of retrenchment or resignation.

(3) On resignation after 10 years of service.

the gratuity scheme framed by the Industrial Tribunal, relating quantum of gratuity to the total pay packet of the workman including dearness allowance, is liable to be modified to that extent. (Paras 11, 13)

Cases Referred: Chronological Paras

(1968) C. A. No. 2168 of 1967 D/- 27-9-1968 = 36 FJR 247 (SC), Delhi Cloth & General Mills Co. Ltd. v. The Workmen 9

(1967) AIR 1967 SC 678 (V 54) = (1961) 2 Lab LJ 94, May and Baker (India) Ltd. v. Their Workmen 7

(1967) AIR 1967 SC 948 (V 54) = (1967) 1 Lab LJ 114, Hindustan Antibiotics Ltd. v. Their Workmen 7

(1967) C. A. No. 2105 of 1967, D/- 11-8-1967 = (1968) 1 SCR 164, Remington Rand of India Ltd. v. The Workmen 9

(1966) AIR 1966 SC 732 (V 53) = (1966) 2 SCR 523, British Paints (India) Ltd. v. Its Workmen 7

(1965) 10 Fac LR 244 = (1965) 2 Lab LJ 556 (SC), British India Corporation v. The Workmen 7

Mr. H. R. Gokhale, Senior Advocate (M/s. G. L. Sanghi and K. P. Gupta, Advocates, with him), for Appellant; Mrs. Urmila Kapur and Miss Bhajan Ramrakhiani Advocates, for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.: By order dated February 24, 1965 the Chief Commissioner of Delhi referred for adjudication, industrial disputes between the appellant company and its workmen relating to dearness allowance and introduction of a scheme of gratuity for the benefit of the workmen. The Industrial Tribunal Delhi framed the following "gratuity scheme":

One month's wages for each year of service or part thereof in excess of six months subject to a maximum of 15 months' wages. In case of death of employee the gratuity shall be payable to his nominee or if there is no nominee to his legal heirs.

15 days' wages for each year of service or part thereof in excess of six months subject to a maximum of 15 months' wages.

15 days' wages for each year of service or part thereof in excess of six months subject to a maximum of 15 months' wages.

Provided that if termination is for any misconduct causing financial loss to the company, the amount of loss shall be deducted from the gratuity payable. The word 'wages' in this Scheme shall mean the total pay packet of the workman including dearness which he was last drawing."

2. The Tribunal also directed that "all workmen who were appointed in 1960 or earlier should get dearness allowance at Rs. 3 for every ten point rise in the cost of Consumer Price Index base 1960 over and above their existing wages with effect from 1st January, 1965. In case of workmen appointed after 1960, the Consumer Price Index base 1960 on the date of his appointment shall be found out and he shall be given Rs. 3 as dearness for every ten point rise in cost of Consumer Price Index base 1960 above it with effect from 1st January, 1965 or such later date on which the limit of 10 point rise in cost of Consumer Price Index base is crossed". The Tribunal also directed that dearness allowance will not be enhanced till the limit of ten points be "crossed", and that dearness allowance once granted will not be reduced till the Consumer Price Index falls by more than 10 points. The Company has appealed to this Court with special leave.

3. In the view of the Tribunal, the financial position of the company "is very sound" and that it has "financial capacity and stability to bear the additional burden of dearness allowance and of the gratuity scheme." In reaching that conclusion the Tribunal relied upon a news item published in the newspapers that 2000 Russian Tractors were being immediately imported by the company even though the agency of the Company was being terminated. In relying upon newspaper reports the Tribunal may have erred. But the conclusion of the Tribunal is founded upon a review of several other circumstances. It is true that one of the primary lines of business of the company was of selling tractors as agents of Russian manufacturers. That agency was in danger of being terminated because the State Trading Corporation had arranged to take over the agency. But the balance sheets of the company show that the agency was only one of the many lines of business and the closure of the agency of the tractor manufacturers was not likely to affect the financial structure of the Company seriously. The Tribunal has on appreciation of evidence come to the conclusion that

the financial position of the company was sound and assuming that the Tribunal is governed by the strict rules prescribed by the Evidence Act, sitting in appeal with special leave we will not be justified in interfering with the finding of the Tribunal even if it be open to the criticism that a part of the evidence relied upon is not in law relevant.

4. The company had on its roll 244 workmen out of whom 118 entered employment after 1960. The company has been paying to its workmen wages consisting of two components—basic wages and 50 per cent of the basic wages as dearness allowance. Payment of wages is made in this form to all workmen whether their employment commenced before the year 1960 or thereafter. It is true that before 1960 the company used to make a consolidated payment without specifying any amount of basic salary or dearness allowance. Since 1960 in every appointment letter it was expressly recited that the employee will get a consolidated salary consisting of 2/3rd of the consolidated salary as basic wages and the balance as dearness allowance. The company has produced before the Tribunal 118 such letters of appointment in respect of all employees employed after the year 1960. In respect of the employees appointed prior to the year 1960 in the salary register basic salary and dearness allowance was separately entered though at the time of appointment of employees there was no allocation as basic wages and dearness allowance.

5. There is no dispute that since the year 1960 there has been a rise in the cost of living. The Consumer Price Index for Industrial Workers which was 100 in 1960, had risen to more than 130 in 1965. The management of the company granted dearness allowance to employees in other concerns under its management even though those other concerns were not financially very sound. No serious argument has been advanced before us that the rise in dearness allowance is not justified. The only ground of complaint is that by relating the dearness allowance to the total wage packet the workmen are given a rise both in the dearness allowance and in the basic wage.

6. The Tribunal has awarded dearness allowance at the flat rate of Rs. 3 for every 10 point rise in the cost of Consumer Price Index. The rise is not related to the quantum of basic wage or consolidated wage. It is a flat uniform rate applicable to every workman. The Tri-

bunal was of the view that the allocation between the basic wage and the dearness allowance was "not fair", but for the purpose of the present reference, the question is academic because dearness allowance is not related to the quantum of salary that the workmen receive. The argument that the rise will operate to give to the workmen besides the additional dearness allowance, a percentage increase in dearness allowance already paid as part of the consolidated wage cannot be accepted. We do not therefore see any reason to interfere with the order passed by the Tribunal with regard to the dearness allowance "at the rate of Rs. 3 for every 10 point rise in the Consumer Price Index".

7. Gratuity payable to a workman on termination of employment is to be computed on the total wage packet of the workman including dearness allowance which he has last drawn. This order makes a departure from the normal rule which is adopted in industrial awards. In *British Paints (India) Ltd. v. Its Workmen*, (1966) 2 SCR 523=(AIR 1966 SC 732) this Court while introducing a gratuity scheme for the first time in the concern directed that the amount of gratuity shall be related to the basic wage or salary and not to the consolidated wage including dearness allowance. A similar order was made in *May and Baker (India) Ltd. v. Their Workmen*, (1961) 2 Lab LJ 94=(AIR 1967 SC 678). It is true that in *British Indian Corporation v. The Workmen*, (1965) 10 Fac LR 244 (SC), an award made by the Tribunal fixing the quantum of gratuity on gross salary i.e., basic wage plus dearness allowance was upheld by this Court. The Court affirmed that the usual pattern in fixing the gratuity is to relate it to the basic wage, but refused to interfere with the order because the practice in that concern was to fix gratuity on the consolidated wage.

8. Similarly, in *Hindustan Antibiotics Ltd. v. Their Workmen*, (1967) 1 Lab LJ 114=(AIR 1967 SC 948), the Tribunal directed the employer to pay gratuity at the rate of one half of wages for each month including dearness allowance but excluding house rent and all other allowances for each completed year of service subject to a maximum of wages for ten months. In rejecting the claim of the employers for relating gratuity to the basic wage, this Court observed:

"If the industry is a flourishing one, we do not see any reason why the labour

shall not have the benefit of both the schemes i.e., the employees' provident fund and the gratuity scheme. Gratuity is an additional form of relief for the workmen to fall back upon. If the industry can bear the burden, there is no reason why he shall not be entitled to both the retirement benefits. The Tribunal considered all the relevant circumstances: the stability of the concern, the profits made by it in the past, its future prospects and its capacity and came to the conclusion that, in the concern in question, the labour should be provided with a gratuity scheme in addition to that of a provident fund scheme. There was no justification to disturb this conclusion."

9. In *The Remington Rand of India Ltd. v. The Workmen*, C. A. No. 2105 of 1967, D/- 11-8-1967 (SC) this Court declined to interfere with the order of the Tribunal awarding gratuity related to the consolidated wage including dearness allowance "in view of the flourishing nature of the concern, the enormous profits it was making, the reserves it had built up as also in view of the fact that it was paying gratuity to executives on the basis of consolidated wages." In *Delhi Cloth & General Mills Co., Ltd. v. The Workmen*, C. A. No. 2168 of 1967, D/- 27-9-1968 (SC) this Court had to consider whether gratuity payable to workmen in the textile industry in the Delhi region should be related to the consolidated wage. After referring to the decisions which were brought to the notice of the Court, it was observed that:

"it is not easy to extract any principle from these cases: as precedents they are conflicting. The Tribunal has failed to take into account the prevailing pattern in the textile industry all over the country. It is a countrywide industry: and in that industry, except in one case to be presently noticed, gratuity has never been granted on the basis of consolidated wages."

10. The Court after referring to the schemes framed in respect of the industries in Bombay and Ahmedabad and other industries concluded that "determination of gratuity is not based on any definite rules. In each case it must depend upon the prosperity of the concern, needs of the workmen and the prevailing economic conditions examined in the light of the auxiliary benefits which the workman may get on determination of employment."

11. There is no clear evidence on the record, and no precedents have been

brought to our notice, to justify a departure from the normal rule that the quantum of gratuity is related not to the consolidated wage packet but to the basic wage. A departure may be made from the normal rule, if there be some strong evidence or precedent in the industry, or conduct of the employer or other exceptional circumstances to justify that course. In the absence of such evidence, we are of the view that gratuity should be related to the basic wage and not to the consolidated wage packet. In the present case it is found that the financial position of the Company is sound but there is no evidence that the company is "making abnormally high profits" nor is there any evidence that in its sister concerns or in other engineering concerns in the region there is a practice of awarding gratuity related to consolidated wages.

12. It was urged on behalf of the company that even though the workmen had, in the claim made by them, demanded a scheme of gratuity benefit at the rate of 15 days' wages for each year of service in case of death or retirement on attaining the age of superannuation or on becoming mentally or physically unfit for further service, the Tribunal had awarded gratuity at the rate of one month's wages for each year of service subject to a maximum of 15 months' wages. But the claim was made on the footing that the wages were to include dearness allowance. When that claim is not accepted, we cannot hold the workmen bound by the multiples.

13. We make no modification in cl. (1) of the scheme. We modify the scheme in so far as it relates to the dearness allowance and direct that for the last sentence of the gratuity scheme the following shall be substituted:

"The word 'wages' in the scheme shall mean basic salary or emoluments excluding dearness allowance and other allowances and benefits payable to the workman which he had last drawn."

14. Subject to the above modification, the appeal fails and is dismissed. There will be no order as to costs in the appeal.

Order accordingly.

AIR 1970 SUPREME COURT 394
(V 57 C 86)

(From: Calcutta)*

J. C. SHAH, ACTG. C. J., V. RAMA-SWAMI AND A. N. GROVER, JJ.

Star Company Ltd., Appellant v. The Commissioner of Income-tax (Central), Calcutta, Respondent.

Civil Appeal No. 1635 of 1968, D/- 7-8-1969.

Income-tax Act (1922), Section 66 (1) — Appellate Tribunal not accepting certain findings of Income-tax Officer and Appellate Authority though coming to the same conclusions in favour of the department — Question referred to High Court, framed in light of final conclusions of Tribunal, couched in general terms and not limited to or circumscribed by reasons given by Tribunal against the assessee — The findings of fact of Tribunal in favour of assessee can be reversed by High Court even though not challenged by department by following proceeding for reference of a question challenging those findings. I. T. Ref. No. 205 of 1961, D/- 7-5-1965 (Cal), Affirmed. (Para 6)

Cases Referred: Chronological Paras (1969) AIR 1969 SC 460 (V 56)=

72 ITR 408, Oriental Investment

Co. P. Ltd. v. Commr. of I. T.

(1968) 68 ITR 200 (SC), Commr. of

I. T. Bombay v. Greaves Cotton and Co., Ltd.

M/s. S. Ray, R. K. Choudhury and B. P. Maheshwari, Advocates, for Appellant; Mr. Jagdish Swarup, Solicitor-General of India and Mr. S. G. Manchanda, Senior Advocate, (M/s. R. N. Sachthey and B. D. Sharma, Advocates, with them), for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.:— This is an appeal by certificate from a judgment of the Calcutta High Court answering the following question referred to it in the negative and against the assessee:

"Whether on the facts and in the circumstances of the case, the loss of Rupees 1,11,816 suffered by the assessee on the sale of shares of Fort William Jute Company Limited was a loss that arose in its share dealing business."

The assessee is a public limited company. It carries on, inter alia, business of deal-

(*I. T. Ref. No. 205 of 1961, D/- 7-5-1965 — Cal.)

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ing in shares and securities. The profits and losses arising from transactions in shares in the ordinary course of the assessee's business have always been treated as profits or losses of the share dealing business. During the assessment year 1954-55, relevant accounting period being the financial year 1953-54 the assessee suffered a loss of Rs. 1,11,816 on the sale of 1575 preference shares of Fort William Jute Company Ltd. These shares were purchased on May 22, 1952 at the rate of Rs. 186 per share from Mugneeram Bangur and Co. and were sold on December 23, 1953 at the rate of Rs. 115 per share to the same company.

2. The background in which these transactions took place may be noticed. Kettlewell Bullen and Co., were the managing agents of Fort William Jute Co. Ltd. On May 21, 1952 an agreement was entered into between Kettlewell Bullen and Co. and Mugneeram Bangur and Co. according to which the entire holdings of Kettlewell Bullen and Co. in the managed company (Fort William Jute Co. Ltd.) consisting of 6920 tax-free cumulative preference shares and 600 ordinary shares were to be sold to Mugneeram Bangur and Co. or their nominees at the agreed price of Rs. 185 per preference share and Rs. 400 per ordinary share. Pursuant to this agreement Kettlewell Bullen and Co. issued a circular letter to all shareholders of Fort William Jute Co. Ltd. informing them of the terms of the agreement and pointing out that Kettlewell Bullen and Co. would tender resignation from the office of the managing agents with effect from July 1, 1952. It was stated in this letter "the purchase price of each ordinary share was Rs. 400 and of each preference share Rs. 185. It was further condition of the agreement that M/s. Mugneeram Bangur and Co. would offer to all shareholders of the company (ordinary and preference) to purchase their shares at the same price on the terms hereinafter referred to". It was intended that M/s. Bangur Brothers Ltd. would be appointed managing agents.

3. At the time of the agreement, namely, May 21, 1952 the market price of the preference shares ranged between Rs. 119 and Rs. 122 per share but the shares were purchased by the assessee on May 22, 1952 at the rate of Rs. 186 per share. A large part of the preference shares of Fort William Jute Co. Ltd. were transferred to three Companies by

Mugneeram Bangur and Co., who had to take over 8617 preference shares in terms of the agreement. The Companies to which these shares were transferred were (1) Marwar Textile Agency Ltd.; (2) Union Co. Ltd.; and (3) Star Co. Ltd. — the assessee. M/s. Bangur Bros., were appointed as the managing agents of Fort William Jute Company for a period of ten years with effect from July 1, 1952. The total number of preference shares of Fort William Jute Company Ltd., which were acquired by the assessee from Mugneeram Bangur and Co. was 1670. One lot of 1620 shares was purchased on May 22, 1952 at Rs. 186 per share and the second lot of 50 shares was purchased at Rs. 184 on May 27, 1952. For the acquisition of these shares the assessee had to overdraw on its Bank account. On December 23, 1953, 1575 shares were sold to Mugneeram Bangur and Co., at Rs. 115 per share resulting in a loss of Rs. 1,11,816 which was included in the loss of Rupees 1,30,152 debited to the profit and loss account under the head "loss on sale of investment". The assessee claimed this as a loss arising in the ordinary course of its business.

4. The Income-tax Officer and the Appellate Assistant Commissioner rejected the assessee's claim on the ground that the shares were purchased as a contribution to the scheme of acquisition of the managing agency of the Fort William Jute Co. Ltd., by Mugneeram Bangur and Co. or its nominee. The loss, therefore, did not arise in the course of the assessee's normal business of dealing in shares. The Appellate Tribunal found that there was no evidence that the assessee had been made a pawn in the scheme of acquisition of the managing agency of Fort William Jute Co., Ltd., by Mugneeram Bangur and Co. or that the shares were acquired by the assessee to relieve the latter of the load of their shares in pursuance of that scheme. The Tribunal was further of the view that even if Mugneeram Bangur and Co., had a controlling interest in the assessee firm by having a majority of the shares in it no such inference could necessarily be raised that the assessee did not purchase the shares of Fort William Jute Co. Ltd. as a measure of its own activity as a dealer in shares. The Tribunal, however, held that the shares were not acquired in the course of the assessee's share dealing business for the reason that in the profit and loss account for the year ending

March 31, 1954, the assessee had made a distinction between its transactions as a dealer and as an investor in shares. The Tribunal found that while the profit on sale of shares out of its stock in trade had been shown and described as such in the profit and loss account, the loss on sale of investment had been shown in the profit and loss account as a loss in investment. From the treatment of the loss given by the assessee in its own profit and loss account the Tribunal came to the conclusion that the shares of Fort William Jute Co. Ltd., were acquired by the assessee as a measure of investment and not as stock in trade of the assessee's share dealing business.

5. The High Court, while dealing with the question which had been referred at the instance of the assessee, was of the opinion that the Tribunal had not properly considered the primary facts which had been found by the Income-tax Officer and the Appellate Assistant Commissioner. It proceeded to refer to some of the proved and admitted facts which were:

(1) The profits and loss account relating to the sale of shares showed that the transactions in Fort William Jute Co., shares stood apart from the other transactions. While the other transactions were of a few thousand rupees only rising to nearly 30,000 in one case the transaction in Fort William Jute Co., shares involved the payment of nearly Rs. 3,00,000.

(2) These shares were acquired in one lot from Mugneeram Bangur and Co., and sold back to the same concern in one lot which was altogether unusual.

(3) The shares in question were purchased by the assessee one day after the agreement was entered into between Kettlewell Bullen and Co., and Mugneeram Bangur and Co.

(4) The preference shares of the face value of Rs. 100 were purchased at Rs. 186 per share on May 22, 1952 when on the previous day the quotation in the market was Rs. 119 per share only. Taking the over-all picture the High Court felt that there could be only one inference that the assessee — an associate of Mugneeram Bangur and Co. — had entered into the transaction relating to preference share at the bidding of the Bangurs B., for the purpose of helping them. It was observed that the Tribunal was wrong in holding that there was no evidence that these associates had been

made pawns in the transaction. The conclusion of the High Court was "on the facts and circumstances of the case it is impossible to hold that the assessee bought shares in the ordinary course of business or would have bought them but to help Mugneeram Bangur and Co. in their scheme of acquisition of the managing agency rights". It appears that the High Court was not impressed with the view of the Tribunal that on the basis of entries in the profit and loss account it could be held that the share transactions in question related to the capital account, the shares having been acquired as a measure of investment.

6. The first contention raised on behalf of the assessee, which is the appellant before us, is that the High Court was not entitled to reverse the findings of fact of the Appellate Tribunal since the department had not challenged the same by means of appropriate proceedings for reference of a question challenging those findings. It is pointed that the Tribunal had come to the conclusion that there was no evidence to show that the assessee had been made a pawn in the scheme of acquisition of the managing agency of Fort William Jute Co. by Mugneeram Bangur and Co. or that the preference shares had been acquired by the assessee pursuant to that scheme. It is submitted that the Tribunal had thus reversed the view which had commended itself to the Income-tax Officer and the Appellate Assistant Commissioner and to that extent the Tribunal's decision was in favour of the assessee and could not be reversed or set aside by the High Court in the absence of any reference at the instance of the department. It is noteworthy that the question which was referred is couched in general terms and was not limited to or circumscribed by the reasons which had been given by the Tribunal against the assessee. The question of law on which reference can be made must arise out of the order of the Tribunal. The order which was made in the present case was in favour of the department and against the assessee. It is true that certain reasons which had appealed to the Income-tax Officer and the Appellate Assistant Commissioner were not accepted by the Appellate Tribunal but it had come to the following conclusion which was material for the disposal of the appeal:

"We accordingly uphold the view taken by the authorities below that the loss of

Rs. 1,11,818 incurred on the sale of 1575 preference shares of Fort William Jute Co., Ltd. was not a loss that arose in course of the appellant's business in share dealing though for different reasons." The question which was referred was framed in the light of the final conclusion and in our judgment it was not necessary for the department to apply for and obtain a reference on a question arising from the reasons given by the Tribunal in support of its conclusion in favour of the department.

7. It has next been contended on behalf of the appellant that where a question is one of mixed facts and law the facts as found by the Tribunal must be accepted as correct. The Tribunal had negatived the finding of the Income-tax Officer and the Appellate Assistant Commissioner that the preference shares had been acquired by the assessee as a pawn in the scheme of transfer of the managing agency of Fort William Jute Co. Ltd. It was, therefore, not open to the High Court to come to the same conclusion by not treating the finding of the Appellate Tribunal as final. Our attention has been invited to the observations in Commissioner of Income-tax, Bombay City I v. Greaves Cotton and Co., Ltd., (1968) 68 ITR 200 (SC), that it is not open to the High Court in a reference under Section 66 (1) of the Income-tax Act 1922 to embark upon a re-appraisal of the evidence and to arrive at findings of fact contrary to those of the Tribunal. The finding of fact will be defective in law if there is no evidence to support it or if the finding is unreasonable or perverse, but it is not open to a party to challenge such a finding unless reference has been made of a specific question concerning that finding. In Oriental Investment Co., P. Ltd. v. Commissioner of Income-tax, 72 ITR 408=(AIR 1969 SC 460) it has been reiterated that in dealing with findings on questions of mixed law and fact, the High Court must accept the findings of the Tribunal on the primary question of fact as final although it is open to the High Court to examine whether the Tribunal had applied the relevant legal principles correctly. It is argued that the High Court has not characterised the aforesaid finding of the Appellate Tribunal as perverse or arbitrary and once that finding is accepted, there would be no justification for holding that the assessee had been made a pawn in the matter of the scheme of transfer of the managing agency of

Fort William Jute Co., Ltd., by Mugneeram Bangur and Co., or Bangur Brothers Ltd. In any case there were several facts which showed that the assessee was not privy or party to the aforesaid scheme. It did not acquire any interest in the managing agency nor was it a subsidiary or associate of Mugneeram Bangur group of concerns. The assessee was connected with the Bangurs only to the extent that out of its four Directors two of the Directors were Bangurs.

8. In our opinion even if the conclusion of the High Court on the point mentioned above is not taken into consideration the question which was referred had to be answered against the assessee. On admitted and proved facts there can be no manner of doubt that the assessee did not acquire the preference shares in the ordinary course of business. These facts may be restated as follows:

(1) The market rate of the preference shares remained constant at the figure of Rs. 119 between April 16, 1952 and May 21, 1952.

(2) On May 21, 1952 the agreement between Mugneeram Bangur and Kettlewell Bullen & Co. was entered into for purchasing the entire holding of the managing agency company in the managed company.

(3) On May 22, 1952, 1620 shares were acquired by the assessee from Mugneeram Bangur and Co., at the rate of Rs. 186 per share. 50 more shares were acquired on May 27, 1952 at Rs. 184 per share. The shares were obviously acquired at a price which was very much higher than the market price which prevailed only a day before they were purchased by the assessee.

(4) Out of 1670 shares taken over by the assessee from Mugneeram Bangur and Co. 1575 were sold back to the same company at the rate of Rs. 115 per share.

(5) The profit and loss account for the assessment year 1954-55 showed that the dealings in other shares were of comparatively much lesser value than the shares in question. The profits and losses which had been made and incurred on account of the other shares were also comparatively of minimal nature.

(6) The shares of Fort William Jute Co. Ltd., were purchased by the assessee by obtaining an overdraft from a Bank.

9. All the above facts and circumstances which have some extraordinary fea-

tures lead to the irresistible conclusion that whatever the motives which entered into the acquisition of the shares, they were certainly not bought and sold in the ordinary course of business of the assessee as a dealer in shares. The answer to the question must, therefore, be in the negative and against the assessee and it was rightly so returned by the High Court.

10. The appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 398 (V 57 C 87)

(From Orissa: ILR (1967) Cut 333)

J. C. SHAH AND C. A.
VAIDIALINGAM, JJ.

The State of Orissa, Appellant v. Chandrasekhar Singh Bhoi, etc., Respondents.

Civil Appeals Nos. 1017 to 1027, 1029 to 1032, 1034 to 1037, 1901 to 1906 of 1968, D/- 15-7-1969.

Tenancy Laws — Orissa Land Reforms Act (16 of 1960) (as amended by Act 15 of 1965), Ss. 1 (3), 45, 47 — Provisions regarding ceiling and disposal of excess land in Ch. IV inserted by Amending Act — Are not unconstitutional. ILR (1967) Cut 333, Reversed.

Section 1 (3) of Act 16 of 1960 is undoubtedly a law in force, but until the power is exercised by the State Government to issue an appropriate notification, the provisions of Ch. IV could not be deemed to be law in force, and since no notification was issued before Ch. IV of the principal Act i.e., Act 16 of 1960 was repealed, there was no ceiling limit applicable to the landholders under any law for the time being in force which attracted the application of the second proviso to Article 31-A. The right to compensation which is not less than the market value under any law providing for the acquisition by the State of any land in an estate in the personal cultivation of a person is guaranteed by the second proviso to Article 31-A only where the land is within the ceiling limit applicable to him under any law for the time being in force. A law cannot be said to be in force unless it is brought into operation by legislative enactment, or by the exercise of authority by a delegate empowered

ed to bring it into operation. The theory of a statute being "in operation in a constitutional sense" though it is not in fact in operation has no validity. ILR (1967) Cut 333, Reversed. (Paras 5 & 9)

By the amendments made in the Constitution by the 17th Amendment Act the principal Act i.e., Act 16 of 1960 is incorporated in the Ninth Schedule to the Constitution with effect from June 20, 1964. The Act is therefore not liable to be attacked on the plea that it is inconsistent with or takes away or abridges any of the fundamental rights conferred by Part III of the Constitution. But the power of the competent Legislature to repeal or amend the Act incorporated in the Ninth Schedule is not thereby taken away. The Amending Act passed after the enactment of the Constitution (Seventeenth Amendment) Act, 1964 does not therefore qualify for the protection of Article 31-B. AIR 1969 SC 168 & AIR 1959 SC 459, Rel. on. (Para 2)

Chapter IV incorporated in the principal Act by Amending Act 13 of 1965 when brought into force is liable to be challenged on the ground that it is inconsistent with or takes away or abridges any of the fundamental rights conferred by Part III of the Constitution. By virtue of Section 45 of the principal Act "the interests of persons to whom the surplus lands relate and of all land-holders immediately or immediately under whom the surplus lands were being held stand extinguished and the lands vest absolutely in the Government free from all encumbrances". This is clearly compulsory acquisition of land within the meaning of Article 31 (2) of the Constitution and the compensation determined merely at fifteen times the fair and equitable rent may not, prima facie, be regarded as determination of compensation according to the principles specified by the Act. Article 31-A proviso 2, guarantees to a person, for compulsory acquisition of his land, the right to compensation which is not less than the market value, when the land is within the ceiling limit applicable to him under a law for the time being in force. On the plain words of the proviso the law prescribing the ceiling limit must be in force at the date of acquisition. In the present case the law relating to the ceiling limit viz., Ch. IV of the principal Act was never made operative by a notification, and was repealed by Act 15 of 1965. The ceiling limit under Section 47 of the principal

Act was on that account inapplicable to the landholders who challenge the validity of Sec. 45 of the amending Act. AIR 1956 SC 246, Expl. (Paras 3, 4, 6)

Cases Referred: Chronological Paras (1969) AIR 1969 SC 168 (V 56)=

Civil Appeals Nos. 1751 to 1773

of 1966, D/- 19-4-1968, Ramanlal

Gulabchand Shah v. State of Gujarat 2

(1959) AIR 1959 SC 459 (V 46)=

(1959) Supp (1) SCR 489, Sri Ram

Ram Narain Medhi v. State of

Bombay

(1956) AIR 1956 SC 246 (V 43)=

(1955) 2 SCR 1196, Thangal Kunju

Musaliar v. M. Venkitachalam

Potti

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7, 8

Mr. C. B. Agarwala, Senior Advocate (Mr. R. N. Sachthey, Advocate, with him), for Appellant (In all the Appeals); Mr. H. R. Gokhale, Senior Advocate (Mr. Santosh Chatterjee, Advocate, and Mr. G. S. Chatterjee, Advocate of M/s. Kshatriya and Chatterjee, with him), for Respondents (In all the Appeals).

The following Judgment of the Court was delivered by

SHAH, J.:— The State of Orissa has appealed to this Court against the judgment of the State High Court declaring “unconstitutional and invalid” Chapter IV of the Orissa Land Reforms (Amendment) Act 15 of 1965.

2. The Orissa Land Reforms Act 16 of 1960 (hereinafter called the principal Act) received the assent of the President on October 17, 1960. By Section 1 (3) of the principal Act it was provided that the Act shall come into force in whole or in part, on such date or dates as the Government may from time to time by notification appoint and different dates may be appointed for different provisions of the Act. By a notification issued on September 25, 1968 certain provisions of the principal Act other than those contained in Chapters III and IV were brought into force. By a notification dated December 9, 1965 Chapter III (Sections 24 to 37 dealing with resumption for personal cultivation of any land held by a tenant and related matters) was brought into force. But Chapter IV (Sections 38 to 52 dealing with ceiling of holdings of land and disposal of excess land) was not brought into operation. The Legislature of the State of Orissa amended the principal Act by Act 13 of 1965. By Act 13 of 1965 amendments were made in the principal Act: the expressions “ceiling area” and

“privileged raiyat” were defined by Cls. (5) and (24) of Section 24 and the expression “classes of land” was defined in Section 2 (5-a). The original Chapters III and IV of the principal Act were deleted and were substituted by fresh provisions. Nothing need be said about the amendments made in Chapter III because in these groups of appeals the validity of these provisions is not in issue. It may suffice to say that Chapter III (Sections 24 to 36) as amended deals with the right of the landlord to resume land for personal cultivation, the extent of that right, and the proceedings for resumption of land. Chapter IV as amended deals with ceiling and disposal of excess land. By Section 37 it is provided:

“(1) No person shall hold after the commencement of this Act lands as landholder or raiyat under personal cultivation in excess of the ceiling area determined in the manner hereinafter provided.

* * * * *

By Section 38 the Government is authorised to grant exemption from the operation of the ceiling in respect of certain classes of land. Section 39 deals with the principles for determining the ceiling area. Sections 40, 41 and 42 deal with the filing of returns in respect of lands in excess of the ceiling area on the date of commencement of the Act and the consequences of failure to submit the return. Section 43 provides for the preparation and publication of draft statements showing ceiling and surplus lands by the Revenue Officer and Section 44 provides for the publication of the final statement of ceiling and surplus lands after hearing objections, if any, received and after making enquiries as the Revenue Officer may deem necessary. Section 45 provides that:

“With effect from the beginning of the year next following the date of the final statement referred to in sub-section (3) of Section 44 the interests of the person to whom the surplus lands relate and of all landholders mediately or immediately under whom the surplus lands were being held shall stand extinguished and the said lands shall vest absolutely in the Government free from all encumbrances.” Section 46 provides for determination of compensation. Section 47 sets out the principles for determining compensation. It provides that the compensation in respect of the interest of the landholders mediately or immediately under whom

the surplus lands are being held as a landholder or raiyat shall be fifteen times the fair and equitable rent. It also provides for payment of market value of tanks, wells and of structures of a permanent nature situate in the land, determined on the basis of fair rent in the manner prescribed therein. Sections 48 and 49 deal with the preparation and publication of draft compensation assessment roll and the final compensation assessment roll. By Section 51 provision was made for settlement of surplus lands vested in the Government under Section 45 with persons as raiyats in the order of priority mentioned therein and Section 52 imposes a ceiling on future acquisitions. It is provided thereby:

"The foregoing provisions of this Chapter shall, mutatis mutandis, apply where lands acquired and held under personal cultivation subsequent to the commencement of this Act by any person through inheritance, bequest, gift, family settlement, purchase, lease or otherwise, together with the lands in his personal cultivation at the time of such acquisition exceeds his ceiling limit."

By the amendments made in the Constitution by the 17th Amendment Act the principal Act is incorporated in the Ninth Schedule to the Constitution with effect from June 20, 1964. The Act is therefore not liable to be attacked on the plea that it is inconsistent with or takes away or abridges any of the fundamental rights conferred by Part III of the Constitution. But the power of the competent Legislature to repeal or amend the Act incorporated in the Ninth Schedule is not thereby taken away. The amending Act passed after the enactment of the Constitution (Seventeenth Amendment) Act, 1964 does not therefore qualify for the protection of Article 31-B. See *Ramanlal Gulabchand Shah v. State of Gujarat*, Civil Appeals Nos. 1751 to 1773 of 1966, D/- 19-4-1968 = (AIR 1969 SC 168); *Sri Ram Ram Narain Medhi v. State of Bombay*, (1959) Supp (1) SCR 489 = (AIR 1959 SC 459). This position is not disputed.

3. Chapter IV incorporated in the principal Act by Orissa Act 13 of 1965 when brought into force is liable to be challenged on the ground that it is inconsistent with or taken (sic takes?) away or abridges any of the fundamental rights conferred by Part III of the Constitution. It was urged however, and that plea has

found favour with the High Court, that Section 47 incorporated by Act 13 of 1965 which provided for compensation not based on the market value of the land but at fifteen times the fair and equitable rent is inconsistent with Article 31-A, proviso 2, and is on that account void. To appreciate the contention the constitutional provisions relating to protection guaranteed by the Constitution against compulsory acquisition of property may be noticed. By Article 31 (2) as amended by the Constitution (Fourth Amendment) Act, 1955, insofar as it is material, it is provided:

"No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which and the manner in which, the compensation is to be determined and given;

* * * * *

Clause (2A) of Article 31 which in substance defines the expression "law" providing for compulsory acquisition enacts that:

"Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

By Article 31 (2) read with Article 31 (2A) property may be compulsorily acquired only for a public purpose and by authority of a law which provides for compensation for the property so acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given. In order that property may be validly acquired compulsorily the law must provide for the transfer of ownership or right to possession of any property to the State or to a corporation owned or controlled by the State.

4. By virtue of Section 45 of the principal Act "the interest of person to whom the surplus lands relate and of all land-holders mediately or immediately under whom the surplus lands were being held stand extinguished and the lands vest absolutely in the

opportunity to cross-examine Cooper and Bosby constituted harmless error under the rule of Chapman.

10. Rhone, whom Harrington cross-examined, placed him in the store with a gun at the time of the murder. Harrington himself agreed he was there. Others testified he had a gun and was an active participant. Cooper and Bosby did not put a gun in his hands when he denied it (2). They did place him at the scene of the crime. But others, including Harrington himself, did the same. Their evidence, supplied through their confessions, was of course cumulative. But apart from them the case against Harrington was so overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt, unless we adopt the minority view in Chapman. (1967) 386 US 42-45, 17 L Ed 2d 720-723 that a departure from constitutional procedures should result in an automatic reversal, no matter the weight of the evidence.

11. It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We of course, do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury. We admonished in Chapman, (1967) 386 US, at 23, 17 L Ed 2d at 710, against giving too much emphasis to "overwhelming evidence" of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless. By that test we cannot impute reversible weight to the other two confessions.

12. We do not depart from Chapman; nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed.

(2) "All persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design." California v. Washington, 62 Cal 2d 777, 781-782, 44 Cal Rptr 442, 445 (1966).

13. Affirmed.

SEPARATE OPINION

Mr. Justice BRENNAN, with whom The CHIEF JUSTICE and Mr. Justice MARSHALL join, dissenting:

14. The Court today overrules Chapman v. California, (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, the very case it purports to apply. Far more fundamentally, it severely undermines many of the Court's most significant decisions in the area of criminal procedure.

15. In Chapman, we recognized that "harmless-error rules can work very unfair and mischievous results" unless they are narrowly circumscribed. Id., at 22, 17 L Ed 2d at 710. We emphasized that "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to the litigant cannot . . . be conceived of as harmless. Id., at 23-24, 17 L Ed 2d at 710. Thus, placing the burden of proof on the beneficiary of the error, we held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id., at 24, 17 L Ed 2d at 710, 711. And, we left no doubt that for an error to be "harmless" it must have made no contribution to a criminal conviction. Id., at 26, 17 L Ed 2d at 711.

16. Chapman, then, meant no compromise with the proposition that a conviction cannot constitutionally be based to any extent on constitutional error. The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided "overwhelming" support for the conviction puts aside the firm resolve of Chapman and makes that compromise. As a result the deterrent effect of such cases as Mapp v. Ohio, (1961) 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933; Griffin v. California, (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229; Miranda v. Arizona, (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR3d 974; United States v. Wade, (1967) 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926; and Bruton v. United States, (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620, on the actions of both police and prosecutors, not to speak of trial courts, will be significantly undermined.

17. The Court holds that constitutional error in the trial of a criminal offence may be held harmless if there is "overwhelming" untainted evidence to support the conviction. This approach, however, was expressly rejected in Chapman, supra, at 23, 17 L Ed 2d at 710, and with good reason, for where the inquiry concerns the extent of accumulation of

untainted evidence rather than the impact of tainted evidence on the jury's decision, convictions resulting from constitutional error may be insulated from attack. By its nature, the issue of substantiality of evidence admits of only the most limited kind of appellate review. Thus, the Court's rule will often effectively leave the vindication of constitutional rights solely in the hands of trial judges. If, instead, the task of appellate courts is to appraise the impact of tainted evidence on a jury's decision, as Chapman required, these courts will be better able to protect against deprivations of constitutional rights of criminal defendants. The focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence.

18. The instant case illustrates well the difference in application between the approach adopted by the Court today and the approach set down in Chapman. At issue is the evidence going to Harrington's participation in the crime of attempted robbery not the evidence going to his presence at the scene of the crime. Without the admittedly unconstitutional evidence against Harrington provided by the confessions of co-defendants Bosby and Cooper, the prosecutor's proof of Harrington's participation in the crime consisted of the testimony of two victims of the attempted robbery and of co-defendant Rhone. The testimony of the victims was weakened by the fact that they had earlier told the police that all the participants in the attempted robbery were Negroes. Rhone's testimony against Harrington was self-serving in certain aspects. At the time of his arrest, Rhone was found in possession of a gun. On the stand, he explained that he was given the gun by Harrington after the attempted robbery, and that Harrington had carried the gun during the commission of the robbery. Thus, although there was more than ample evidence to establish Harrington's participation in the attempted robbery, a jury might still have concluded that the case was not proved beyond a reasonable doubt. The confessions of the other two co-defendants implicating Harrington in the crime were less self-serving and might well have tipped the balance in the juror's minds in favour of conviction. Certainly, the State has not carried its burden of demonstrating beyond a reasonable doubt that these two confessions did not contribute to Harrington's conviction.

19. There should be no need to remind this Court that the appellate role in applying standards of sufficiency or substantiality of evidence is extremely limit-

ed. To apply such standards as threshold requirements to the raising of constitutional challenges to criminal convictions is to shield from attack errors of a most fundamental nature and thus to deprive many defendants of basic constitutional rights. I respectfully dissent.

AIR 1970 U. S. S. C. 18 (V 57 C 4)

(1969-23 L Ed 2d 117)*

BRENNAN, STEWART, HARLAN,
BLACK AND DOUGLAS, JJ.

The National Board of Young Men's Christian Associations et al., Petitioners v. United States, Respondents.

(No. 517) Decided on 19-5-1969.

†Constitution of India, Art. 31 — Case from America — Damage caused to buildings by rioters after buildings had been occupied by troops to defend building against the rioters — Buildings already under attack by rioters before army occupation — Owners of buildings are not entitled to compensation — There is no 'taking' within the meaning of the Fifth Amendment of the American Constitution — (Constitution of America, Fifth Amendment).**

Owners of buildings instituted an action seeking to recover compensation from the Federal Government under the 5th Amendment for damages caused to the buildings by rioters after the buildings had been occupied by Army troops. The buildings had been under attack of rioters even before the troops had arrived. After expelling the rioters the troops deployed outside the buildings to defend against the attack which was renewed. The troops were forced to retreat into the buildings for protection, after suffering considerable damage. The troops were forced to evacuate the building and the building along with other buildings which were not occupied by the troops continued to be under heavy attack of the rioters and were destroyed.

Held (Per Majority), that the action of the army did not amount to 'taking' within the meaning of the 5th Amendment

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†Reference is given to a parallel Indian Provision for the convenience of Indian Lawyers.

**The relevant portion of the Fifth Amendment runs: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

LM/LM/E631/69/RGD/P

and that the owners of the building were not entitled to compensation even if the damage inflicted by the rioters occurred because of the presence of the troops, because the troops acted primarily in defence of the buildings with the owners as the particular intended beneficiaries of the governmental activity and the buildings had not been entered into as part of a general defence of the zone as a whole or as part of the advance plans to use the buildings as fortresses in case of a riot. The physical occupation by the troops did not deprive owners of any use of their buildings. At the time the troops entered, the riot was already well underway, and buildings were already under heavy attack. Throughout the period of occupation, the buildings could not have been used by the owners in any way. Thus, the owners could only claim compensation for the increased damage by rioters resulting from the presence of the troops. But such a claim would not seem to depend on whether the troops were positioned in the buildings. Troops standing just outside a building could as well cause increased damage by rioters to that building as troops positioned inside. In either case — and in any case where government action is causally related to private misconduct which leads to property damage — a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment. The temporary, unplanned occupation of the buildings in the course of battle did not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment.

(Para 12)

Cases Referred: Chronological Paras

- (1968) 393 U. S. 959=21 L Ed 2d
372 = 89 S Ct 399 1
- (1960) 364 U. S. 40=4 L Ed 2d
1554=80 S Ct 1563, *Armstrong v. United States* 7, 11
- (1952) 344 U. S. 149=97 L Ed 157,
=73 S Ct 200, *Cf. United States v. Caltex* 22, 27
- (1945) 323 U. S. 373=89 L Ed 311
=65 S Ct 357, *United States v. General Motors* 12
- (1939) 308 U. S. 256=84 L Ed 230
=60 S Ct 225, *United States v. Spontenbarger* 7, 11

Ronald A. Jacks, for Petitioners; Peter L. Strauss, for Respondent.

SUMMARY

The owners of buildings located in the Canal Zone instituted an action in the Court of Claims seeking to recover compensation from the Federal Government under the Fifth Amendment for damage

to the buildings caused by Panamanian rioters after the buildings had been occupied by United States Army troops. The evidence showed that the buildings had been under attack by the rioters before the troops arrived, that the troops, after expelling rioters from the buildings, deployed outside the buildings to defend against a renewed attack, but were forced to retreat into the buildings for protection from sniper fire after suffering considerable losses, that the troops were forced to evacuate the buildings, that the buildings continued to be under heavy attack following such withdrawal, and that other buildings which had not been occupied by troops were destroyed by the rioters. The Court of Claims held that the actions of the Army did not constitute a "taking" within the meaning of the Fifth Amendment, and entered summary judgment for the United States. (184 Ct Cl 427, 396 F 2d 467).

On certiorari, the Supreme Court of the United States affirmed. In an opinion by Brennan, J., expressing the view of five members of the court, it was held that the building owners were not entitled to compensation under the Fifth Amendment, since even if it had been shown that the damage inflicted by the rioters occurred because of the presence of the troops, (1) the record showed that the troops had been acting primarily in defense of the buildings with the owners as the particular intended beneficiaries of the governmental activity, and that the buildings had not been entered as part of a general defense of the Canal Zone as a whole, or as part of advance plans to use the buildings as fortresses in case of a riot, (2) the owners were not deprived of any use of their buildings by the occupation by the troops, since at the time the troops entered, the riot was underway and the buildings were under attack and could not have been used by the owners in any way, any claim for compensation thus being restricted to increased damage by rioters resulting from the presence of the troops, which turned not on whether the troops were positioned inside or outside the buildings, but on whether the Government's involvement was sufficiently direct and substantial to require compensation, and (3) the temporary, unplanned occupation of the buildings in the course of battle did not constitute direct and substantial enough Government involvement to warrant compensation under the Fifth Amendment.

STEWART, J., concurred in the judgment and opinion, expressing the view that if Government Military Forces should use a building for their own purposes—as a defense bastion or command post, for example — it would be a Fifth Amendment taking, even though the owner him-

self was not actually deprived of any personal use of the building, and that the majority opinion was not understood as holding otherwise.

HARLAN, J., concurred in the result, stating that (1) in riot control situations, the Fifth Amendment could only be properly invoked when the military had reason to believe that its action placed the property in question in greater peril than if no form of protection had been provided at all, the record in the case at bar leaving little doubt that if the Army had completely abandoned the area to the rioters, the buildings would have been subjected to greater damage than that which was in fact suffered, (2) the government could not be required to guarantee fully effective protection during serious civil disturbances when it was apparent that the police and the military were unable to defend all the property which was threatened by a mob, and a property owner could not recover on a bare showing that he was afforded "inadequate" protection, it not being proper to require courts to determine the adequacy of military or police protection, (3) it was only the military or other protective action foreseeably increased the risk of damage that compensation should be required, and (4) it was for Congress to decide the extent to which those injured in a riot should be compensated, regardless of the extent to which the police or military attempted to protect the particular property which each individual owned.

BLACK, J., joined by **DOUGLAS, J.**, dissented, expressing the view that (1) the record showed that the Army selected the buildings to protect themselves while carrying out their mission of safeguarding the entire Canal Zone from the rioters, rather than to save the buildings, (2) the taking of the buildings by the Army was for the benefit of the public generally, not for the good of the owners, and (3) the guiding principle should be that whenever the government determined that one person's property was essential to the war effort and appropriated it for the common good, the public purse, rather than the individual, should bear the loss.

OPINION OF THE COURT

Mr. Justice **BRENNAN** delivered the opinion of the Court.

1. Petitioners brought this suit against the United States in the Court of Claims (1) seeking just compensation under the Fifth Amendment for damages done by rioters to buildings occupied by United States troops during the riots in Panama in January 1964. The Court of Claims held

that the actions of the Army did not constitute a "taking" within the meaning of the Fifth Amendment and entered summary judgment for the United States. (1968) 396 F.2d 467. We granted certiorari. (1968) 393 US 959=21 L Ed 2d 372 =89 S Ct 399. We affirm.

2. Petitioners' buildings, the YMCA Building and the Masonic Temple, are situated next to each other on the Atlantic side of the Canal Zone at its boundary with the Republic of Panama. Rioting began in this part of the Zone at 8 p.m. on January 9, 1964. Between 9:15 and 9:30 p.m., an unruly mob of 1,500 persons marched to the Panama Canal Administration Building, at the center of the Atlantic segment of the Zone and there raised a Panamanian flag. Many members of the mob then proceeded to petitioners' buildings — and to the adjacent Panama Canal Company Office and Storage Building. They entered these buildings, began looting and wrecking the interiors, and started a fire in the YMCA Building.

At 9:50 p.m., Colonel Sachse, the commander of the 4th Battalion, 10th Infantry, of the United States Army, was ordered to move his troops to the Atlantic segment of the Zone with the mission of clearing the rioters from the Zone and sealing the border from further encroachment. The troops entered the three buildings, ejected the rioters, and then were deployed outside of the buildings. The mob began to assault the soldiers with rocks, bricks, plate glass, Molotov cocktails, and intermittent sniper fire. The troops did not return the gunfire but sought to contain the mob with tear gas grenades. By midnight, one soldier had been killed and several had been wounded by bullets; many others had been injured by flying debris. Shortly after midnight, Colonel Sachse moved his troops inside the three buildings so that the men might be better protected from the sniper fire.

3. The buildings remained under siege throughout the night. On the morning of January 10, the YMCA building was the subject of a concentrated barrage of Molotov cocktails. The building was set afire, and in the early afternoon the troops were forced to evacuate it and take up positions in the building's parking lot which had been sandbagged during the night. Following the evacuation, the YMCA Building continued to be a target for Molotov cocktails. The troops also withdrew from the Masonic Temple on the afternoon of January 10, except that a small observation post on the top floor of the building was maintained. The Temple, like the YMCA Building, continued to be under heavy attack following withdrawal of the troops, the greatest damage

1. Jurisdiction in the Court of Claims was based upon 28 USC S. 1491.

being suffered on January 12 as a result of extensive fire bomb activity. The third building under heavy attack in the area—the Panama Canal Company Office and Storage Building—was totally destroyed on January 11 by a fire started by Molotov cocktails.

4. On January 13, the mob dispersed, and all hostile action in the area ceased. The auditorium-gymnasium in the YMCA Building had been destroyed, and the rest of the building was badly damaged. The Masonic Temple suffered considerably less damage because of its predominantly concrete and brick construction. Other buildings in the Atlantic segment of the Canal Zone were also damaged or destroyed. These buildings were all located along the boundary between the Zone and the Republic of Panama, and none, except the Office and Storage Building, had been occupied by troops during the riot.

5. Petitioners' suits in the Court of Claims sought compensation for the damages done to their building by the rioters after the troops had entered the buildings. The basic facts were stipulated, and all parties moved for summary judgment. The court found it "abundantly clear from the record. . . . that the military units dispatched to the Atlantic side of the Zone by General O'Meara were not sent there for the purpose or with the intention of requisitioning or taking [petitioners'] buildings to house soldiers. Both buildings had previously been looted and damaged by the rioters. Colonel Sachse's men were ordered to remove the Panamanians from the buildings in order to prevent further loss or destruction and then to seal off the border from further incursions by the rioters into the Atlantic portion of the Canal Zone." 396 F 2d, supra, at 473—474. Accordingly, the court held that "the temporary occupancy of [petitioners'] buildings and the damage inflicted on them by the rioters during such occupancy did not constitute a taking of the buildings for use by the Army within the contemplation of the fifth amendment." Id., at 473. The Government's motion for summary judgment was granted, petitioners' motion for summary judgment was denied, and the case was dismissed.

6. At the outset, we note that although petitioners claim compensation for all the damages which occurred after the troops retreated into the buildings in the early hours of January 10, there was no showing that any of these damages occurred because of the presence of the troops. To the contrary, the record is clear that buildings which were not occupied by troops were destroyed by rioters, and that petitioners' very buildings were under severe attack before the troops even

arrived. Indeed, if the destroyed buildings have any common characteristic, it is not that they were occupied by American soldiers, but that they were on the border and thus readily susceptible to the attacks of the mobs coming from the Republic of Panama. We do not rest our decision on this basis, however, for petitioners would not have a claim for compensation under the Fifth Amendment even if they could show that damages inflicted by rioters occurred because of the presence of the troops.

7. The Just Compensation Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, (1960) 364 US 40, 49, 4 L Ed 2d 1554, 1561, 80 S Ct 1563 see also *United States v. Sponenbarger*, (1939) 308 US 256, 266, 84 L Ed 230, 237, 60 S Ct 225.(2) Petitioners argue that the troops entered their buildings not for the purpose of protecting those buildings but as part of a general defense of the Zone as a whole. Therefore, petitioners contend, they alone should not be made to bear the cost of the damages to their buildings inflicted by the rioters while the troops were inside. The stipulated record, however, does not support petitioners' factual premise; rather, it demonstrates that the troops were acting primarily in defense of petitioners' buildings.

8. The military had made no advance plans to use petitioners' buildings as fortresses in case of a riot. Nor was the deployment of the troops in the area of petitioners' buildings strategic to a defense of the Zone as a whole. The simple fact is that the troops were sent to that area because that is where the rioters were. (3) And once the troops arrived in the area, their every action was designed to protect the buildings under attack. First, they expelled the rioters from petitioners' buildings and the Office and Storage Building, putting out the

2. For a general discussion of the purposes of the Just Compensation Clause, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv L Rev 1165 (1967); Sax, *Takings and the Police Power*, 74 Yale LJ 36 (1964).

3. It is significant that at the outset of the rioting Colonel Sachse sent one of his companies—"B" Company—to an area several blocks away from petitioners' buildings. It was only because "[t]he number of rioters in the 'B' Company area was practically none" that "B" Company was subsequently sent to the area near petitioners' buildings.

fire started by the rioters in the YMCA Building. Then they stood guard outside to defend the buildings from renewed attack by the 2,000 to 3,000 Panamanian rioters who remained in the area. In this defense of petitioners' property the troops suffered considerable losses and were forced to retreat into the buildings.

9. It is clear that the mission of the troops forced inside the buildings continued to be the protection of those buildings. In a fact sheet, to which the parties have stipulated, the General Counsel of the United States Department of the Army stated that:

"[T]he troops had occupied the buildings in the YMCA-Masonic Temple vicinity 'under instructions to protect the property,' [and] their actions, according to all statements taken, were consistent with instructions. A captain, in his affidavit, states that he was given a message by the battalion commander to convey to the officer who had been placed in charge of the Masonic Temple. The order was, in the captain's words, '... that if the rioters attempted to enter the building with the intent to do damage to persons or property that appropriate action... could be used. ...' According to the captain, the order went on to state, '... Those people on the 1st floor could assume that rioters forcibly entering the building had the intent to do damage to either property or persons'. The officer in charge received the order, and it was passed along to the men. One sergeant's affidavit names the officer, and recounts receiving the order from him, in the sergeant's own words, 'The building would be defended at all costs.'"

"Other statements by individual soldiers describe actions taken to minimize damage which the rioters were attempting to cause. Several soldiers describe throwing and firing rifle-launched tear gas grenades at rioters who were hurling Molotov cocktails at the buildings. Another describes using similar agents 'to keep the crowd from entering the YMCA,' while still others describe action by themselves or other soldiers in physically routing Panamanians from the YMCA after they had come in through the windows."

(Italics (here in' ') supplied.)

10. Colonel Sachse, the commanding officer in the Atlantic riot area, testified to the same effect:

"The YMCA building was on fire from Molotov cocktails being thrown from the Republic of Panama side into the front of it. We were unable to protect it due to the fact that it is set on the border between the Canal Zone and the Republic of Panama. Therefore we lost most of this building by Molotov cocktails."

11. Thus, there can be no doubt that the United States Army troops were attempting to defend petitioners' buildings. Of course, any protection of private property also serves a broader public purpose. But where, as here, the private party is the particular intended beneficiary of the governmental activity, "fairness and justice" do not require that losses which may result from that activity "be borne by the public as a whole," even though the activity may also be intended incidentally to benefit the public. See *supra*, (1960) 364 U. S. 40 at 49=4 L Ed 2d 1554 at 1561; *supra*, (1939) 308 U. S. 256 at 266=84 L Ed 230 at 237. Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside.

12. Petitioners' claim must fail for yet another reason. On oral argument, petitioners conceded that they would have had no claim had the troops remained outside the buildings, even if such presence would have incited the rioters to do greater damage to the buildings. We agree. But we do not see that petitioners' legal position is improved by the fact that the troops actually did occupy the buildings. Ordinarily, of course, governmental occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation. See, e.g., *United States v. General Motors*, (1945) 323 US 373, 378 =89 L Ed 311, 318 = 65 S Ct 357. There are, however, unusual circumstances in which governmental occupation does not deprive the private owner of any use of his property. For example, the entry by firemen upon burning premises cannot be said to deprive the private owners of any use of the premises. In the instant case, the physical occupation by the troops did not deprive petitioners of any use of their buildings. At the time the troops entered, the riot was already well underway, and petitioners' buildings were already under heavy attack. Throughout the period of occupation, the buildings could not have been used by petitioners in any way. Thus, petitioners could only claim compensation for the increased damage by rioters resulting from the presence of the troops. But such a claim would not seem to depend on whether the troops were positioned in the buildings. Troops standing just outside a building could as well cause increased damage by rioters to that building as troops positioned inside. In either case—and in any case where government action is causally related to private misconduct which leads to property damage—a determination must be made

whether the Government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment. The Constitution does not require compensation every time violence aimed against Government officers damages private property. Certainly, the Just Compensation Clause could not successfully be invoked in a situation where a rock hurled at a policeman walking his beat happens to damage private property. Similarly, in the instant case, we conclude that the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment. We have no occasion to decide whether compensation might be required where the Government in some fashion not present here makes private property a particular target for destruction by private parties.

13. Affirmed.

Mr. Justice STEWART, concurring.

14. If United States military forces should use a building for their own purposes — as a defense bastion or command post, for example—it seems to me this would be a Fifth Amendment taking, even though the owner himself were not actually deprived of any personal use of the building. Since I do not understand the Court to hold otherwise, I join its judgment and opinion.

SEPARATE OPINIONS

Mr. Justice HARLAN, concurring in the result.

15. At the time the military retreated into the YMCA and the Masonic Temple, three alternative courses of action were open to the army commander. First, the troops could have continued their prior strategy and stood their ground in front of the buildings without returning the rioters' hostile sniper fire; second, the troops could have stood their ground and attempted to repel the mob by the use of deadly force; third, the troops could have retreated from the entire area, leaving the mob temporarily in control. The petitioners argue that if the troops had adopted either of the first two of these alternative strategies, their buildings would not have suffered the damage which resulted from the military's occupation.

16. But what if the military had adopted the third strategy open to it? If the army had completely abandoned the area to the rioters, and regrouped for a later counter-attack, there can be little doubt on this record that the rioters would have subjected the buildings to greater damage than that which was in fact suffered. I believe this fact to be decisive. For it

appears to me that, in riot control situations, the Just Compensation Clause may only be properly invoked when the military had reason to believe that its action placed the property in question in greater peril than if no form of protection had been provided at all.

I.

17. I start from the premise that, generally speaking, the Government's complete failure to provide police protection to a particular property owner on a single occasion does not amount to a "taking" within the meaning of the Fifth Amendment. Every man who is robbed on the street cannot demand compensation from the Government on the ground that the Fifth Amendment requires fully effective police protection at all times. The petitioners do not, of course, argue otherwise. Yet surely the Government may not be required to guarantee fully effective protection during serious civil disturbances when it is apparent that the police and the military are unable to defend all the property which is threatened by the mob. If the owners of unprotected property remain uncompensated, however, there seems little justice in compensating petitioners, who merely contend that the military occupation of their buildings provided them with inadequate protection.

18. Petitioners' claim that they may recover on a bare showing that they were afforded "inadequate" protection has an additional defect which should be noted. If courts were required to consider whether the military or police protection afforded a particular property owner was "adequate," they would be required to make judgments which are best left to officials directly responsible to the electorate. In the present case, for example, petitioners could argue that it was possible for the troops to maintain their position in front of the buildings if they had been willing to kill a large number of rioters. In rebuttal, the Government could persuasively argue that the indiscriminate use of deadly force would have enraged the mob still further and would have increased the likelihood of future disturbances. Which strategy is a court to accept? Clearly, it is far sounder to defer to the other duly constituted branches of government in this regard.

19. It is, then, both unfair and unwise to favor those who have obtained some form of police protection over those who have received none at all. It is only if the military or other protective action foreseeably increased the risk of damage that compensation should be required. Since, in the present case, the military reasonably believed that petitioners' property was better protected if the troops retreated into the buildings, rather than from

the entire area, the property owners have no claim to compensation on the ground that the protection afforded to them was "inadequate."

20. I must emphasize, however that the test I have advanced should be applied only to Government actions taken in an effort to control a riot. The Army could not, for example, appropriate the YMCA today and claim that no payment was due because the building would have been completely demolished if the military had not intervened during the riot. Once tranquillity has been restored, property owners may legitimately expect that the Government will not deprive them of the property saved from the mob. But while the rioters are surging through the streets out of control, everyone must recognize that the Government cannot protect all property all of the time. I think it appropriate to say, however, that our decision today does not in any way suggest that the victims of civil disturbances are undeserving of relief. But it is for the Congress, not this Court, to decide the extent to which those injured in the riot should be compensated, regardless of the extent to which the police or military attempted to protect the particular property which each individual owns.

II.

21. While I agree with the Court that no compensation is constitutionally available under the facts of this case, I have thought it appropriate to state my own views on this matter since the precise meaning of the rules the majority announces remain obscure at certain critical points. Moreover, in deciding this particular case we should spare no effort to search for principles that seem best calculated to fit others that may arise before American democracy once again regains its equilibrium.

22. The Court sets out two tests to govern the application of the Just Compensation Clause in riot situations. It first denies petitioners recovery on the ground that each was the "particular intended beneficiary" of the Government's military operations. Ante, at —, 23 L Ed 2d at 124. I do not disagree with this formula if it means that the Fifth Amendment does not apply whenever the policing power reasonably believes that its actions will not increase the risk of riot damage beyond that borne by the owners of unprotected buildings. But the language the Court has chosen leaves a good deal of ambiguity as to its scope. If, for example, the military deliberately destroyed a building so as to prevent rioters from looting its contents and burning it to the ground, it would be difficult indeed to call the building's owner the "particular intended beneficiary" of the

Government's action. Nevertheless, if the military reasonably believed that the rioters would have burned the building anyway, recovery should be denied for the same reasons it is properly denied in the case before us. Cf. *United States v. Caltex*, (1952) 344 US 149, 97 L Ed 157, 73 S Ct 200.

23. Moreover, the Court's formula might be taken to indicate that if the military's subjective intention was to protect the building, the courts need not consider whether this subjective belief was a reasonable one. While the widest leeway must, of course, be given to good-faith military judgment, I am not prepared to subscribe to judicial abnegation to this extent. If a Court concludes, upon convincing evidence, that the military had good reason to know that its actions would significantly increase the risk of riot damage to a particular property, compensation should be awarded regardless of governmental good faith.

24. While I accept the Court's "intended beneficiary" test with these caveats, I cannot subscribe to the second ground the majority advances to deny recovery in the present case. The majority analogizes this case to one in which the military simply posted a guard in front of petitioners' properties. It is said that if the rioters had damaged the buildings as a part of their attack on the troops standing in front of them, the property damage caused would be too "indirect" a consequence of the military's action to warrant awarding Fifth Amendment compensation. It follows, says the Court, that even if the military's occupation of the buildings increased the risk of harm far beyond any alternative military strategy, the Army's action is nevertheless too "indirect" a cause of the resulting damage.

25. This argument, however, ignores a salient difference between the case the Court hypothesizes and the one which we confront. If the troops had remained on the street, they would not have obtained any special benefit from the use of petitioners' buildings. In contrast, the military did in this instance receive a benefit not enjoyed by members of the general public when the troops were ordered to occupy the YMCA and the Masonic Temple. As the Court's statement of the facts makes clear, the troops retreated into the buildings to protect themselves from sniper fire. Ordinarily, the Government pays for private property used to shelter its officials, and I would see no reason to make an exception here if the military had reason to know that the buildings would have been exposed to a lesser risk of harm if they had been left entirely unprotected.

26. On the premises set forth in this opinion, I concur in the judgment of the Court.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

27. The Court says that "shortly after Midnight, Colonel Sachse moved his troops inside the three buildings [which included the two buildings for which compensation is here sought] so that the men might be better protected from the sniper fire." Ante, p. —, 23 L. Ed. 2d p. 121 = (Ante, P. AIR 1970 U.S.S.C. P. 20). The Army selected those two buildings to protect themselves while carrying out their mission of safeguarding the entire zone from the rioters. Thus, the Army made the two buildings the particular targets of the rioters, and the buildings suffered heavy damage. The Army's action was taken not to save the buildings but to use them as a shelter and fortress from which, as the Court of Claims found, "to seal off the border from further incursions by the rioters into the Atlantic portion of the Canal Zone." (1968) 396 F. 2d 467, 474. At that time, I think it can hardly be said that these private buildings were taken for the good of the owners. Instead the taking by the Army was for the benefit of the public generally. I still feel that the guiding principle should be this: Whenever the Government determines that one person's property — whatever it may be — is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss." (1952) 344 US 149, 156, 97 L. Ed. 157, 163, 73 S. Ct. 200 (dissenting opinion of Mr. Justice Douglas).

AIR 1970 U. S. S. C. 25 (V 57 C 5)

(1969-23 L. Ed. 2d 349)*

DOUGLAS, HARLAN, BLACK, JJ.

Christine Sniadach, Petitioner v. Family Finance Corporation of Bay View et al, Respondents.

(No. 130). Decided on 9-6-1969.

†Constitution of India, Arts. 226 and 31 — Case from America — Prejudgment garnishee proceedings — Procedural due process — Attachment of wages due to debtor — Hearing to debtor not given — Attachment violates due process requirement of 14th Amendment of American Constitu-

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†Reference is given to a parallel Indian Provision for the convenience of Indian Lawyers.

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tion — (Constitution of America, Fourteenth Amendment*) — (Civil P. C. (1908), O. 38 R. 5, O. 21 R. 46).

The plaintiff, a finance corporation, in accordance with the procedure provided by a Wisconsin statute, instituted a garnishment action against the defendant and her employer, as garnishee. The complaint alleged a claim on a promissory note, and the garnishee in its answer stated that it had a certain sum as wages under its control earned by the defendant and unpaid, and that it would pay one-half to the defendant as a subsistence allowance and would hold the other half subject to the order of the Court. The defendant was served with summons and complaint on the same day as the garnishee, but moved that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment, in that notice and an opportunity to be heard were not given before the in rem seizure of her wages:

Held, that though such summary procedure might well meet the requirements of due process in extraordinary situations, there was no situation requiring special protection to a State or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition.

(Para 4)

The sole question was whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. A procedural rule that may satisfy due process for attachments in general, does not necessarily satisfy procedural due process in every case. The fact that procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. Here the question was with wages — a specialized type of property, presenting distinct problems in today's economic system.

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the collection fees incurred by its attorneys in the garnishment proceedings. A prejudgment garnishment of the Wisconsin type may as a practical matter drive a

*The relevant portion of the 14th Amendment runs:

Sec. 1. "...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

wage earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that, absent notice and a prior hearing, this prejudgment garnishment procedure violates the fundamental principles of due process.

(Paras 5, 11)

Cases Referred: Chronological Paras

- (1968) 393 US 1078=21 L Ed 2d 771=89 S Ct 849 2
- (1967) 37 Wis 2d 163=154 NW 2d 259 2, 14, 16, 20, 23, 25
- (1962) 371 US 208=9 L Ed 2d 255=83 S Ct 279, Schroeder v. New York 5
- (1951) 342 US 165=96 L Ed 183=72 S Ct 205, Antonio Richard Rochin v. People of the State of California 27
- (1950) 339 US 306=94 L Ed 865=70 S Ct 652, Mullane v. Central Hanover Bank & Trust Co. 14
- (1950) 339 US 594=94 L Ed 1088=70 S Ct 870, Ewing v. Mytinger & Casselberry Inc 4
- (1949) 339 US 306=94 L Ed. 865=70 S Ct 652, Mullane v. Central Hanover Bank & Trust Co. 5
- (1948) 336 US 930=93 L Ed 1090=69 S Ct 738, Standard Oil Co. v. Superior Court of the State of Delaware in and for New Castle County 23
- (1947) 332 US 245=91 L Ed 2030=67 S Ct 1552, Cf. Fahey v. Mallonee 4
- (1946) 332 US 46=91 L Ed 1903=67 S Ct 1672, Adamson v. California 26
- (1941) 312 US 126=85 L Ed 624=61 S Ct 524, Opp Cotton Mills v. Administrator 14
- (1940) 312 US 183=85 L Ed 725=61 S Ct 513, Huron Holding Corpn. v. Lincoln Mine Operating Co. 24
- (1934) 291 US 457 = 78 L Ed 909=54 S Ct 471, United States v. Illinois Cent. R. Co. 14
- (1928) 279 US 820=73 L Ed 975=49 S Ct 344, McKay v. McInnes 6, 14, 23
- (1927) 277 US 29=72 L Ed 768=48 S Ct 422, Coffin Bros. v. Bennett 4
- (1922) 260 US 22=67 L Ed 107=43 S Ct 9, Jackman v. Rosenbaum 25
- (1920) 256 US 94=65 L Ed 837=41 S Ct 433, Ownbey v. Morgan 4, 25
- (1919) 253 US 233=64 L Ed 878=40 S Ct 499, Green v. Frazier 5
- (1914) 237 US 413=59 L Ed 1027=35 S Ct 625, Cf. Coe v. Armour Fertilizer Works 11
- (1908) 210 US 373=52 L Ed 103=28 S Ct 708, Londoner v. City & County of Denver 14
- (1904) 198 US 215=49 L Ed 1023=25 S Ct 625, Harris v. Balk 23

- (1901) 184 US 334=46 L Ed 573=22 S Ct 391, Rothschild v. Knight 24
- (1876-78) 95 US 714=24 L Ed 565, Pennoyer v. Neff 23
- 44 Del 538=62 A 2d 454=14 ALR 2d 405, Standard Oil Co. v. Superior Court of New Castle County 23
- 112 W Va 192 = 163 SE 845, Byrd v. Rector 25
- 127 Me 110, McInnes v. McKay 23

Jack Greenberg, for Petitioner; Sheldon D. Frank, for Respondents.

SUMMARY

The plaintiff finance corporation, in accordance with the procedure provided by a Wisconsin statute, instituted a garnishment action in the Milwaukee County Court, Wisconsin, against the defendant and her employer, as garnishee. The complaint alleged a claim of \$ 420 on a promissory note, and the garnishee in its answer stated that it had wages of \$63.18 under its control earned by the defendant and unpaid, and that it would pay one-half to the defendant as a subsistence allowance and would hold the other half subject to the order of the court. The defendant was served with summons and complaint on the same day as the garnishee, but moved that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment, in that notice and an opportunity to be heard were not given before the rem seizure of her wages. The Wisconsin Supreme Court sustained the County Court in approving the procedure ((1967) 37 Wis 2d 163, 154 NW 2d 259).

On certiorari, the United States Supreme Court reversed. In an opinion by Douglas, J., expressing the view of seven members of the court, it was held that the Wisconsin prejudgment garnishment procedure whereby the defendant's wages are frozen in the interim between the garnishment of the wages and the culmination of the main suit without the defendant having a chance to be heard violates the due process clause of the Fourteenth Amendment.

HARLAN, J., concurred, stating that he wished to make explicit that the precise basis on which he joined the court's opinion was that the "property" of which the defendant had been deprived was the "use" of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit, and that since this deprivation could not be characterized as de minimis, she was entitled to be accorded the usual requisites of procedural due process: notice and a prior hearing.

BLACK, J., dissented on the grounds that (1) the court's opinion amounted to a plain, judicial usurpation of State legis-

lative power to decide what the State's laws shall be; (2) the court's opinion overruled a number of its own decisions and abandoned the legal customs and practices in this country with reference to attachments and garnishments wholly on the ground that the garnishment laws of the kind in question are based on unwise policies of government which might sometime in the future do injury to some individuals; and (3) the court's holding savored too much of the "Natural Law," "Due Process," "Shock-the-conscience" test of what is constitutional.

OPINION OF THE COURT

Mr. Justice DOUGLAS delivered the opinion of the Court.

Respondent instituted a garnishment action against petitioner as defendant and Miller Harris Instrument Co., as her employer, as garnishee. The complaint alleged a claim of \$. 420 on a promissory note. The garnishee filed its answer stating it had wages of \$. 63.18 under its control earned by petitioner and unpaid, and that it would pay one-half to petitioner as a subsistence allowance(1) and hold the other half subject to the order of the court.

2. Petitioner moved that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment. The Wisconsin Supreme Court sustained the lower State court in approving the procedure. (1967) 37 Wis 2d 163=154 NW 2d 259. The case is here on a petition for a writ of certiorari. (1968) 393 US 1078=21 L Ed 2d 771=89 S Ct 849.

3. The Wisconsin statute gives a plaintiff 10 days in which to serve the summons and complaint on the defendant after service on the garnishee.(2) In this case petitioner was served the same day as the garnishee. She nonetheless claims that the Wisconsin garnishment procedure violates that due process required by the Fourteenth Amendment, in that notice and an opportunity to be heard are not given before the in rem seizure of the wages. What happens in Wisconsin is

1. Wis Stat § 267.18 (2) (a) provides: "When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of \$. 25 in the case of an individual without dependents or \$. 40 in the case of an individual with dependents; but in no event in excess of 50% of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action."

2. Wis Stat § 267.07 (1).

that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen.(3) They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.

4. Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. *Fahey v. Mallonee*, (1947) 332 US 245, 253-254 = 91 L Ed 2030, 2038, 2039=67 S Ct 1552; *Ewing v. Mytinger & Casselberry, Inc.* (1950) 339 US 594, 598-600=94 L Ed 1088, 1092-1094=70 S Ct 870; *Ownbey v. Morgan*, (1920) 256 US 94, 110-112=65 L Ed 837, 845, 846=41 S Ct 433, *Coffin Bros. v. Bennett*, (1927) 277 US 29, 31=72 L Ed 768, 769 = 48 S Ct 422. But in the present case no situation requiring special protection to a State or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and in personam jurisdiction was readily obtainable.

5. The question is not whether the Wisconsin law is a wise law or unwise law. Our concern is not what philosophy Wisconsin should or should not embrace. See *Green v. Frazier*, (1919) 253 US 233 = 64 L Ed 878=40 S Ct 499. We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schroeder v. New York*, (1962) 371 US 208, 212=9 L Ed 2d 255, 259=83 S Ct 279) within the meaning of procedural due process. See *Mullane v. Central Hanover Bank & Trust Co.* (1949) 339 US 306, 314=94 L Ed 865, 873=70 S Ct 652. In the latter case we said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." (1949) 339 US, at 306 314 = 94 L Ed 865 at 873. In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process.

6. A procedural rule that may satisfy due process for attachments in general,

3. Wis Stat § 267.04 (1).

see *McKay v. McInnes*, (1928) 279 US 820=73 L Ed 975=49 S Ct 344, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.

7. A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. Until a recent Act of Congress, (4) S. 304 of which forbids discharge of employees on the ground that their wages have been garnished, garnishment often meant the loss of a job. Over and beyond that was the great drain on family income. As stated by Congressman Reuss: (5)

"The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level."

8. Recent investigations of the problem have disclosed the grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking. Congressman Sullivan, Chairman of the House Sub-committee on Consumer Affairs who held extensive hearings on this and related problems stated:

"What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor, ignorant person who is trapped in any easy credit nightmare in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides." (1968) 114 Cong Rec p H 688.

9. The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the "collection fees" incurred by its attorneys in the garnishment proceedings:

"The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of 'pay-

ment schedule' which incorporates these additional charges." (6)

10. Apart from those collateral consequences, it appears that in Wisconsin the statutory exemption granted the wage earner (7) is "generally insufficient to support the debtor for any one week." (8)

11. The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. (9)

Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe v. Armour Fertilizer Works* (1914) 237 US 413, 423=59 L Ed 1027, 1031=35 S Ct 625) this prejudgment garnishment procedure violates the fundamental principles of due process.

Reversed.

SEPARATE OPINIONS

Mr. Justice HARLAN, concurring.

12. Particularly in light of my Brother Black's dissent, I think it not amiss for me to make explicit the precise basis on which I join the Court's opinion. The "property" of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as de minimis, she must be accorded the usual requisites of procedural due process: notice and a prior hearing.

13. The rejoinder which this statement of position has drawn from my Brother Black prompts an additional word. His and my divergence in this case rests, I think, upon a basic difference over whe-

6. Comment, *Wage Garnishment in Washington—an Empirical Study*, 43 Wash L Rev 742, 753 (1968). And see comment, *Wage Garnishment as a Collection Device*, 1967 Wis L Rev 759.

7. See n 1, supra.

8. Comment, *Wage Garnishment as a Collection Device*, 1967 Wis L Rev 759, 767.

9. "For a poor man — and whoever heard of the wage of the affluent being attached? — to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy, and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense in such a process?" Congressman Gonzales, 114 Cong Rec, p H 690 (1968). For the impact of garnishment on personal bankruptcies see HR Rep No. 1040, 90th Cong, 1st Sess, pp 20-21.

4. 82 Stat 146, Act of May 29, 1968.

5. 114 Cong Rec, p H 688 (1968).

ther the Due Process Clause of the Fourteenth Amendment limits state action by norms of "fundamental fairness" whose content in any given instance is to be judicially derived not alone, as my colleague believes it should be, from the specifics of the Constitution, but also, as I believe, from concepts which are part of the Anglo-American legal heritage — not, as my Brother Black continues to insist, from the mere predilections of individual Judges.

14. From my standpoint, I do not consider that the requirements of "notice" and "hearing" are satisfied by the fact that the petitioner was advised of the garnishment simultaneously with the garnishee, or by the fact that she will not permanently lose the garnished property until after a plenary adverse adjudication of the underlying claim against her, or by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances. Compare the majority and dissenting opinions in the Wisconsin Supreme Court, (1967) 37 Wis 2d 163, 178=154 NW 2d 259, 267. Apart from special situations, some of which are referred to in this Court's opinion, see ante, at (1969) 23 L Ed 2d at 352 = (see ante, at AIR 1970 USSC P. 27). I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court. See, e. g., *Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 US 306, 313=94 L Ed 865, 872=70 S Ct 652 Opp. *Cotton Mills v. Administrator*, (1941) 312 US 126, 152-153=85 L Ed 624, 639, 640=61 S Ct 524 *United States v. Illinois Cent. R. Co.* (1934) 291 US 457, 463, = 78 L Ed 909, 917=54 S Ct 471 *Londoner v. City & County of Denver*, (1908) 210 US 373, 385-386, = 52 L Ed 1103, 1112, 1113 = 28 S Ct 708.† And I am quite unwilling to take the unexplicated *per curiam* in (1928)

†There are other decisions to the effect that one may be deprived of property by summary administrative action taken before hearing when such action is essential to protect a vital governmental interest. See, e. g., *Ewing v. Mytinger & Casselberry, Inc.*, 339 US 594, 94 L Ed 1088, 70 S Ct 870 (1950); *Fahey v. Maloney*, 332 US 245, 91 L Ed 2030, 67 S Ct 1552 (1947); *Bowles v. Willingham*, 321 US 503, 88 L Ed 892, 64 S Ct 641 (1944); *North Amer. Cold Storage Co. v. City of Chicago*, 211 US 306, 53 L Ed 195, 29 S Ct 101 (1908). However, no such justification has been advanced in behalf of Wisconsin's garnishment law.

279 US 820=73 L Ed 975=49 S Ct 344, as vitiating or diluting these essential elements of due process.

Mr. Justice BLACK, dissenting.

15. The Court here holds unconstitutional a Wisconsin statute permitting garnishment before a judgment has been obtained against the principal debtor. The law, however, requires that notice be given to the principal debtor and authorizes him to present all of his legal defenses at the regular hearing and trial of the case. The Wisconsin law is said to violate the "fundamental principles of due process." Of course the Due Process Clause of the Fourteenth Amendment contains no words that indicate that this Court has power to play so fast and loose with state laws. The arguments the Court makes to reach what I consider to be its unconstitutional conclusion, however, shows why it strikes down this state law. It is because it considers a garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make. The Court shows it believes the garnishment policy to be a "most inhuman doctrine"; that it "compels the wage earner, trying to keep his family together, to be driven below the poverty level"; that "in a vast number of cases the debt is a fraudulent one, saddled on a poor, ignorant person who is trapped in any easy credit nightmare in which he is charged double for something he could not pay for, even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides."

16. The foregoing emotional rhetoric might be very appropriate for Congressmen to make against some phases of garnishment laws. Indeed, the quoted statements were made by Congressmen during a debate over a proposed federal garnishment law. The arguments would also be appropriate for Wisconsin's legislators to make against that State's garnishment laws. But made in a Court opinion, holding Wisconsin's law unconstitutional, they amount to what I believe to be a plain, judicial usurpation of state legislative power to decide what the State's laws shall be. There is not one word in our Federal Constitution or of any of its Amendments and not a word in the reports of that document's passage from which one can draw the slightest inference that we have authority thus to try to supplement or strike down the State's selection of its own policies. The Wisconsin law is simply nullified by this Court as though the Court had been granted a superlegislative power to step in and frustrate policies of States adopted by their own elected legislatures. The Court

thus steps back into the due process philosophy which brought on President Roosevelt's Court fight. Arguments can be made for outlawing loan sharks and installment sales companies but such a decision, I think, should be made by state and federal legislators, and not by this Court.

17. This brings me to the short concurring opinion of my Brother Harlan, which makes "explicit the precise basis" on which he joins the Court's opinion. That basis is:

"The 'property' of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as de minimis, she must be accorded the usual requests of procedural due process: notice and a prior hearing."

Every argument implicit in this summary statement of my Brother Harlan's views has been, in my judgment, satisfactorily answered in the opinion of the Supreme Court of Wisconsin in this case — an outstanding opinion on constitutional law. (1967) 37 Wis 2d 163=154 NW 2d 259. That opinion shows that petitioner was not required to wait until the "culmination of the main suit," that is, the suit between the creditor and the petitioner. In fact the case now before us was not a final determination of the merits of that controversy but was, in accordance with well established state court procedure, the result of a motion made by the petitioner to dismiss the garnishment proceedings. With reference to my Brother Harlan's statement that petitioner's deprivation could not be characterized as de minimis, it is pertinent to note that the garnishment was served on her and her employer on the same day, November 21, 1966, that she, without waiting for a trial on the merits, filed a motion to dismiss the garnishment on December 23, 1966, which motion was denied by the Circuit Court on April 18, 1967, and it is that judgment which is before us today. The amount of her wages held up by the garnishment was \$ 31.59. The amount of interest on the wages withheld even if computed at 10% annually would have been less than \$ 3. Whether that would be classified as de minimis I do not know and in fact it is not material to know for the decision of this case.

18. In the motion to dismiss, petitioner, according to the Supreme Court of Wisconsin, asserted a "number of grounds based on injuries and deprivations which have been or are likely to be suffered by others but which she has not personally experienced." 37 Wis 2d 163, 154 NW 2d 259. The court went

further and pointed out that under Wisconsin law the court would not strike down a law as unconstitutional on the ground that some person other than the challenger of that law might in the future be injured by its unconstitutional part. It would seem, therefore, that the great number of our cases holding that we do not determine the constitutionality of state statutes where the judgment on them was based on state law would prevent our passing on this case at all.

19. The indebtedness of petitioner was evidenced by a promissory note, but petitioner's affidavit in support of the motion to dismiss, according to the Wisconsin Supreme Court contained no allegation that she is not indebted thereon to the plaintiff. Of course if it had alleged that, or if it had shown in some other way that this was not a good-faith lawsuit against her, the Wisconsin opinion shows that this could have disposed of the whole case on the summary motion.

20. Another ground of unconstitutionality, according to the state court, was that the Act permitted a defendant to post a bond and secure the release of garnished property and that this provision denied equal protection of the law "to persons of low income." With reference to this ground, the Wisconsin court said:

"Appellant has made no showing that she is a person of low income and unable to post a bond." (1967) 37 Wis 2d, 163 at 167=154 NW 2d 259 at 261.

21. Another ground of unconstitutionality urged was that since many employers discharged garnished employees for being unreliable, the law threatened the gainful employment of many wage earners. This contention the Supreme Court of Wisconsin satisfactorily answered by saying that appellant had "made no showing that her own employer reacted in this manner."

22. Another ground challenging the state act was that it affords 10 days' time to a plaintiff to serve the garnishee summons and complaint on the defendant after service of the summons on the garnishee. This, of course, she could not raise. The Court's answer to this was that appellant was served on the same day as the garnishee.

23. The state court then pointed out that the garnishment proceedings did not involve "any final determination of the title to a defendant's property but merely reserved the status quo thereof pending determination of the principal action." (1967) 37 Wis 2d, 163 at 169=154 NW 2d, 259 at 262. The court then relied on *McInnes v. McKay*, 127 Me 110. That suit related to a Maine attachment law which, of course, is governed by the same rule as garnishment law. See "garnishment,"

Bouvier's Law Dictionary; see also Penoyer v. Neff, 95 US 714. The Maine law was subjected to practically the same challenges that Brother Harlan and the Court raise against his Wisconsin law. About that law the Supreme Court of Maine said:

"But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is not a deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied." 127 Me 110, 116.

This Court did not even consider the challenge to the Maine law worthy of a Court opinion but affirmed it in a per curiam opinion, (1928) 279 US 820 = 73 L Ed 975=49 S Ct 344, on the authority of two prior decisions of this Court. See also Standard Oil Co. v. Superior Court of New Castle County, 44 Del 538=62 A 2d 454=14 ALR 2d 405, appeal dismissed, (1948) 336 US 930=93 L Ed 1090=69 S Ct 738, 739; Harris v. Balk, (1904) 198 US 215, 222, 227-228 = 49 L Ed 1023, 1026, 1028=25 S Ct 625.

24. The Supreme Court of Wisconsin, in upholding the constitutionality of its law also cited a statement of our Court made in *Rothschild v. Knight*, (1901) 184 US 334, 341 = 46 L Ed 573, 580 = 22 S Ct 391, stating:

"[T]o what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide. . . ."

Accord, *Huron Holding Corp. v. Lincoln Mine Operating Co.* (1940) 312 US 183, 193=85 L Ed 725, 731=61 S Ct 513.

25. The Supreme Court of Wisconsin properly pointed out:

"The ability to place a lien upon a man's property such as to temporarily deprive him of its beneficial use without judicial determination of proper cause dates back not only to mediæval England but also to Roman times." (1967) 37 Wis 2d, 163 at 171=154 NW 2d, 259 at 264.

The State Supreme Court then went on to point out a statement made by Mr. Justice Holmes in *Jackman v. Rosenbaum Co.* (1922) 260 US 22, 31=67 L Ed 107, 112=43 S Ct 9:

"The Fourteenth Amendment, itself a historical product, did not destroy for the

states and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a stronger case for the Fourteenth Amendment to effect it, as is well illustrated by (1920) 256 U.S. 94, 104, 112=65 L Ed 837, 843, 846=41 S Ct 433."

The *Ownbey* case was one of the two cited by this Court in its per curiam opinion affirmance of *McInnes v. McKay*, supra, sustaining the constitutionality of a Delaware attachment law. And see *Byrd v. Rector*, 112 W. Va 192=163 SE 845.

26. I can only conclude that the Court is today overruling a number of its own decisions and abandoning the legal customs and practices in this country with reference to attachments and garnishments wholly on the ground that the garnishment laws of this kind are based on unwise policies of government which might some time in the future do injury to some individuals. In the first sentence of the argument in her brief, petitioner urges that this Wisconsin law "is contrary to public policy"; the Court apparently finds that a sufficient basis for holding it unconstitutional. This holding savors too much of the "Natural Law," "Due Process," "Shock-the-conscience" test of what is constitutional for me to agree to the decision. See my dissent in *Adamson v. California* (1946) 332 US 46, 68=91 L Ed 1903, 1917=67 S Ct 1672.

ADDENDUM.

27. The latest statement by my Brother Harlan on the power of this Court under the Due Process Clause to hold laws unconstitutional on the ground of the Justices' view of "fundamental fairness" makes it necessary for me to add a few words in order that the differences between us be made absolutely clear. He now says that the Court's idea of "fundamental fairness" is derived "not alone. . . from the specifics of the Constitution, but also. . . from concepts which are part of the Anglo-American legal heritage." This view is consistent with that expressed by Mr. Justice Frankfurter in *Rochin v. California* that due process was to be determined by "those canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ." (1951) 342 US 165, 169=96 L Ed 183, 188 =72 S Ct 205. In any event, my Brother Harlan's "Anglo-American legal heritage" is no more definite than the "notions of justice of English-speaking peoples" or the shock-the-conscience test. All of these so-called tests represent nothing more nor less than an implicit adoption of a Natural Law concept which under our system leaves to judges alone the power to decide what the Natural Law means.

These so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional. On the contrary, these tests leave them wholly free to decide what they are convinced is right and fair. If the judges, in deciding whether laws are constitutional, are to be left only to the admonitions of their own consciences, why was it that the Founders gave us a written Constitution at all?

APR 1970 U. S. S. C. 32 (V 57 C 6)

(1969-23 L Ed 2d 404)*

SHALL, WARREN, BRENNAN,
RT, WHITE, DOUGLAS, BLACK,
HARLAN, JJ.

ick Jenkins, Appellant v. John
McKeithen et al. Respondents.

(No. 548) Decided on 9-6-1969.

†Constitution of India, Arts. 226 and 21
— Case from America — Administrative
enquiry under State Statute — Investiga-
tion of criminal violations in field of
labour management relation under statute
— Inquiry Commission to make public
the finding — Observance of due process
essential — Opportunity to give evidence
— Procedural safeguards — (Constitution
of America, Fourteenth Amendment).

A State statute created a Labor-Management Commission of Inquiry to investigate criminal violations in the field of labor-management relations upon referral by the governor, to hold public hearings for determining whether there was probable cause to believe that violations of the criminal laws had occurred, and to make public findings and recommendations to appropriate authorities with regard to the institution of criminal prosecutions, including conclusions as to specific individuals, the statute also limiting the right of a witness, who could be compelled to attend, or his counsel, to examine other witnesses and to call witnesses. A member of a labour Union instituted an action for declaration and injunction, in the Federal District Court challenging the constitutionality of the statute under the due process clause and the action thereunder of the State officials, on the allegation that the Commission was an executive trial agency performing an accusatory function designed to publicly find the plaintiff and others

guilty of violations of criminal laws without trial or procedural safeguards, allegedly for the purpose of injuring the plaintiff and destroying the labor union of which he was a member, and that the defendants, acting in concert with others and in connection with the administration of the statute, had engaged in a course of conduct designed publicly to brand the plaintiff and others as criminals, including the filing of allegedly baseless criminal charges against the plaintiff.

Held (per majority) that the plaintiff had locus standi to attack the constitutionality of the statute and the acts of the defendants thereunder, notwithstanding that the plaintiff had not alleged that he had been or would be called before the commission. He had sufficient adversary interest with regard to his regulation and economic well-being to ensure proper presentation of issues and he also showed a substantial, legally redressable injury to the plaintiff as a direct, rather than a collateral, consequence of the statute's administration. The plaintiff's opportunity to defend any criminal prosecutions against him was not sufficient to deprive him of his locus standi to challenge the statute. (Paras 15, 21, 22)

The procedures of the Commission did not meet the minimal requirements made obligatory by the due process clause of the 14th Amendment. Specifically, the Act severely limited the right of a person being investigated to confront and cross-examine the witnesses against him. Only a person appearing as a witness may cross-examine other witnesses. Cross-examination was further limited to those questions which the Commission "deems appropriate to its inquiry," and those questions must be submitted, presumably beforehand, in writing to the Commission. The right to confront and cross-examine witnesses was a fundamental aspect of procedural due process. The right to present oral testimony from other witnesses and the power to compel attendance of those witnesses might be denied in the discretion of the Commission. The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. Where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights. (Paras 31, 32)

The allegations of the complaint were sufficient to state a cause of action and the question whether due process required that the commission provide all the

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†Reference is given to a parallel Indian Provision for the convenience of Indian Lawyers.

tion makes an appeal from any decree or order in the suit or an application or an act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit, to be proceedings in the suit. That would suggest that that is not the general rule. The Code of Civil Procedure is not applicable to the proceedings under the U. P. (Temporary) Control of Rent and Eviction Act. The deeming provision in sub-rule (3) of R. 4 of O. III, Civil P. C., would not govern the power of attorney filed by a counsel in proceedings under this Act. It was further submitted that even under the deeming clause a revision is not included, even though the Code of Civil Procedure itself provides for a revision; and so, a vakalatnama filed in the suit shall not enure in a revision filed under Sec. 115, Civil P. C. The submission is plausible and appears to have substance, but for a reason, which I shall presently state, it is unnecessary to discuss it any further.

17. The U. P. (Temporary) Control of Rent and Eviction Act does not prohibit practising lawyers from appearing before the authorities constituted under it. It does not require counsel to file written authority for "acting" or "pleading" separately. The question of the terms upon which a litigant engages a counsel for conducting his case before the Rent Control authorities would primarily depend upon the intention of the parties and the interpretation of the actual contract entered into by them. The tenant Mohan Lal indicated the terms of the authority of Mr. Ayyer by the vakalatnama. Before the Commissioner Mr. Ayyer on 20th May, 1960, filed a memorandum of appearance stating that he was appearing on behalf of Mohan Lal, the respondent-tenant in that revision. He then appended a note saying that his vakalatnama was already in the lower Court's file. Mohan Lal, the tenant, appeared in the witness-box and stated that he had engaged Mr. Ayyer to argue the revision before the Commissioner and that he had conferred no other authority on him. There is no documentary evidence to support this contention. The memorandum of appearance filed by Mr. Ayyer seems to contradict him. If it was true that Mr. Ayyer had been engaged merely for arguing the revision and had no other authority, he would not have mentioned in the memorandum of appearance filed by him that his vakalatnama was already on the lower court's file.

This note was appended obviously to inform the Commissioner and the other side, that the vakalatnama in his favour would be operative in the revision. That would indicate that the appellant had

entitled Mr. Ayyer to conduct the revision before the Commissioner on the same terms and conditions on which he was engaged before the Rent Control and Eviction Officer. The terms and conditions mentioned in the vakalatnama were to govern them. Thus, the vakalatnama, which was on the file, became operative in the revision also. Under it Mr. Ayyer had an express authority to compromise the case. His action in compromising the case was, therefore, within his powers. It cannot, therefore, be held that the Commissioner acted contrary to the provisions of the Act in recognising the compromise signed by Mr. Ayyer on behalf of the appellant. The order of the Commissioner was not invalid on this ground.

18. The other submission of Mr. Seth was that in view of Section 3 (3) of the Act the Commissioner could not act upon a compromise between the parties. Under Section 3 (3) of the Act the Commissioner is to hear the revision and "he may if he is not satisfied as to the correctness, legality or propriety of the order passed by the District Magistrate or as to the regularity of proceedings held before him, alter or reverse his order, or make such other order as may be just and proper". It was urged that the Commissioner can pass an order only after satisfying himself as to the correctness, legality or propriety of the order of the District Magistrate. In the present case he did not apply his mind to the merits of the District Magistrate's order, but decided the revision simply in terms of the compromise entered into between the parties. That was beyond the purview of the powers conferred on him by the statute. It was also urged on the authority of Commissioner, Sales Tax v. Ujjal Singh Autar Singh, (1968) 22 STC 26 (All) that the Commissioner has to confine himself to the record of the case as it was before the District Magistrate and had no power to accept or act upon additional evidence or fresh material. The compromise was such a fresh material. It is true that Jagdish Sahai, J. did make such observations while interpreting Section 10 (3) of the U. P. Sales Tax Act, 1948, but Beg, J. the other learned Judge, did not go as far. He held that if a case does arise in which the purpose for which the revisional power exists requires adduction of additional evidence, it would fetter the revisional powers, as found in the Sales Tax Act, too much to lay down that additional evidence cannot be taken. I would, with respect, dissent from the views expressed by Jagdish Sahai, J. Section 3 (3) authorises the Commissioner to pass such order as may be just and proper. The legislature obviously left an element of flexibility with the Commissioner. Holding that the Commissioner could not take into consideration subsequent events either on facts

or in law which may be germane to the purpose for which the revisional power exists, would be making the Commissioner's jurisdiction unduly rigid, and placing him in a sort of straight jacket. In other words, that would frustrate, rather than advance, the legislative intent and object.

19. In the present case the defendant was the tenant of the entire house. The landlord had purchased it and wanted its possession for his personal residence. On that ground, he sought permission to eject the tenant. The compromise between the parties was that the tenant would vacate the inner portion of the house within four months so as to enable the landlord to live in it, and the landlord would continue to recognise the defendant as the tenant of the outer portion. It was further provided that if the tenant failed to vacate the inner portion, the permission would be deemed to have been granted for the entire house.

20. The U. P. (Temporary) Control of Rent and Eviction Act does not affect the contractual rights of the lessor and the lessee in relation to a tenancy. The Act does not place any restriction on the right of the tenant to surrender the tenancy and vacate the accommodation whenever he chooses to do so. The rights of the landlord and the tenant to put an end to a contract of tenancy by an agreement, remain unaffected by any provision of the Act. They can substitute, for an existing contract of tenancy, a fresh one. They can alter the subject-matter of the tenancy by reducing or enlarging the accommodation which would be the subject of tenancy. The compromise in the present case merely amounted to this: that both the parties agreed that henceforth the appellant would remain a tenant of only a portion of the house and that he would surrender the tenancy in relation to the rest. By so arranging their mutual rights they sought to resolve the controversy whether it was a case fit for the grant of permission to sue for the ejectment of the tenant under Section 3 of the Act, a matter which was the subject of the revisional jurisdiction conferred on the Commissioner. The compromise, therefore, was germane to the purpose of the power conferred on the Commissioner. By taking into consideration this subsequent development between the parties, a development to which both the parties were agreed, the Commissioner could not be said to have acted upon any fresh material or evidence foreign to the purposes of the power conferred on him.

21. When the Act authorises the Commissioner to pass such orders as may be just and proper, the Commissioner would be within his powers in taking into consideration a mutually agreed solution

advanced by both the parties. An order based upon an agreement between the parties could not but be said to be just and proper in relation to the rights and liabilities of both the parties.

22. It is true that the order of the Commissioner does not in terms indicate whether he considered the legality, correctness or propriety of the District Magistrate's order on merits, but it is apparent that when the parties themselves put forth before the Commissioner an agreed solution which involved a modification of the District Magistrate's order, the fact that the Commissioner acted upon the compromise would inevitably mean that the order of the District Magistrate was duly taken into account. I am, therefore, unable to hold that the Commissioner's order was outside the purview of the jurisdiction conferred on him by S. 3 (3) of the Act. Thus the Respondent has failed to establish that the Commissioner did not comply with the provisions of the Act or did not act in conformity with the fundamental principles of judicial procedure or that he otherwise acted illegally or improperly. His order hence would remain binding on the parties. The State Government's order being ineffective, the suit for ejectment was liable to be decreed on the basis of the Commissioner's order granting the requisite permission.

23. In the result, the appeal succeeds and is allowed. The appellate decree is set aside and that of the trial Court restored. Under the circumstances, I would leave the parties to bear their own costs in this and the lower appellate Court.

Appeal allowed.

AIR 1970 ALLAHABAD 130 (V 57 C 15) FULL BENCH

S. N. DWIVEDI, GANGESHWAR PRASAD AND YASHODANANDAN, JJ.

M/s. Upper Ganges Sugar Mills Ltd.,
Petitioner v. Civil Judge, Bijnor and
others, Respondents.

Civil Misc. Writ No. 78 of 1967, D/-12-3-1969.

(A) Tenancy Laws — U. P. Imposition of Ceiling on Landholdings Act (1 of 1961), Ss. 10, 11 and 37 — Person claiming to be tenure-holder — Absence of his name in revenue records — Statement under S. 10 (1) not issued to him — He can still file objection to that statement. 1965 All LJ 756 and 1967 All LJ 551, Overruled. — Civil P. C. (1908), O. 1, R. 10 (2).

Per Majority (Dwivedi, J. Contra).

The fact that a tenure-holder is not recorded as such in the revenue records is not relevant for determining whether he is

GM/IM/D226/69/DVT/R

entitled to file an objection to the statement prepared under Section 10 (1) of the Act and issued to another person under Section 10 (2) of the Act, and the above fact does not disentitle him to file an objection if he is otherwise entitled to do so. A tenure-holder to whom a statement has not been issued under Section 10 (2) of the Act is not entitled to file an objection, under that provision i.e. Sec. 10 (2) of the Act, to the statement prepared under Section 10 (1) of the Act and issued to another person under Section 10 (2) of the Act. Section 11 (1) of the Act does not provide for the filing of any objection and no objection can, therefore, be filed under that provision. Under S. 11 (2) of the Act, however, a tenure-holder to whom a statement under Section 10 (2) of the Act has not been issued is entitled to file an objection to the statement prepared under Section 10 (1) of the Act and issued to another person under Section 10 (2) of the Act, subject to the restrictions imposed by that provision, i.e., Sec. 11 (2) of the Act. If, upon an objection made by a tenure-holder to whom a statement under Section 10 (2) of the Act has been issued, a tenure-holder to whom no such statement has been issued is added as a party by the Prescribed Authority under O. 1, R. 10 (2) of the Civil P. C. read with Section 37 of the Act the latter tenure-holder can prefer a claim or objection. Similarly if, in a proceeding under Section 11 (2) of the Act, a tenure-holder to whom a statement has not been issued under Section 10 (2) of the Act is added as a party by the Prescribed Authority such tenure-holder can prefer a claim or objection under that provision, i.e. under S. 11 (2) of the Act.

(Para 36)

Under the definition of the term "Tenure-holder" and the scheme of the Act the holder of a holding has to be considered to be a tenure-holder, whether or not he is recorded as such in the revenue records and there is nothing in the provisions of the Act that precludes him from the right of filing an objection to the statement issued by the Prescribed Authority to another person. The disability, if any, must arise from a reason other than that he is not recorded as a tenure-holder in the revenue records.

(Para 20)

The language of Section 10 (2) does not admit of the construction that even a person upon whom a notice has not been served thereunder and who has not been called upon to show cause why the statement prepared by the Prescribed Authority be not accepted as correct is entitled to file an objection under Sec. 10 (2). The result, therefore, is that such person can neither file an objection under Section 10 (2) nor under Section 11 (1). Section 12 restricts the jurisdiction of the Prescribed Authority to deciding only

such objections as may be made under Section 10 (2) and Section 11 (2) and it thus rules out the making of any objection under Section 11 (1) by any person. Section 37 invests the Prescribed Authority with all the powers and privileges of a Civil Court, in so far as they may be applicable, in holding an enquiry or hearing an objection under the Act, and consequently the Prescribed Authority can under O. 1, R. 10 (2) of Civil P. C. add the name of any person as a party to the proceeding before him, if his presence is necessary to enable him effectually and completely to decide and settle the question involved in the proceeding. In doing so and hearing him in support of his claim, the Prescribed Authority would not at all be enlarging the scope of the powers vested in him under the provisions of the Act. He would still be acting under Section 12, because an objection under Section 10 (2) has been filed. Section 11 (2) enables a tenure-holder upon whom no notice under Sec. 10 (2) has been served to have his claim to any land shown in the statement prepared by the Prescribed Authority decided in a cheap and expeditious manner without recourse to a suit; and, what is more important for the purpose of the Act, it also lessens, to some extent, the possibility of the danger that a certain land may be treated as the ceiling area of a landholder for determining his surplus land and the ceiling area may later be lost or reduced on account of the claim of another person. 1965 All LJ 756 & 1967 All LJ 551, Overruled; AIR 1968 All 305 (FB), Disting. (Paras 22, 23, 24, 29)

(B) Tenancy Laws — U. P. Imposition of Ceiling on Landholdings Act (1 of 1961), S. 3 (1) — Tenure-holder — Definition of — Entry in Revenue records — Not relevant for deciding as to who is tenure-holder.

Section 3 (1) defines "Tenure-holder" as "an individual or a person who is the holder of a holding"; and it is, therefore, obvious that for being a tenure-holder under the Act a person has to fulfil no other qualification except that of being the holder of a holding. The definition leaves entries in the revenue records altogether out of account. There is not only a complete absence of any repugnancy but the provisions in regard to the definition of "Tenure-holder" can be fully carried into effect only when the expression "Tenure-holder" is understood in the plain terms of its definition. It is, therefore, not permissible to introduce into it any limitation not imposed by the Act.

(Para 16)

Cases Referred: Chronological Paras
(1968) AIR 1968 All 305 (V 55) =
1968 All LJ 292 (FB), Raja
Yuvaraj Datt Singh v. Prescribed
Authority, Tahsil Lakhimpur 10, 34

(1967) 1967 All LJ 551 = 1967 All WR (HC) 186, Kesar Sugar Works Ltd., Baheri v. State of U. P. 2, 34
 (1965) 1965 All LJ 756, Bageshwari Devi v. S. B. Pandey 2, 34
 K. C. Agarwala, for Petitioner; V. K. Khanna, for Respondents.

DWIVEDI J.:— M/s. Upper Ganges Sugar Mills Ltd. (hereinafter called the Company) has filed this writ petition. It appears that the Company did not file a statement in respect of its holdings as required by Section 9 of the Imposition of Ceiling on Landholdings Act (hereinafter called the Act). The Prescribed Authority prepared a statement of its holdings, mentioning the plots proposed to be declared as surplus land. This statement was served upon it in accordance with Section 10 (2). It was required to show cause why the statement should not be taken to be correct. The Company filed an objection. While the objection was pending, the Dhampur Sugar Mills Ltd., the fourth respondent, filed an application before the Prescribed Authority. The respondent claimed to be the exclusive tenure-holder of certain plots mentioned in the statement and wanted to be impleaded as a party in the proceedings. The Prescribed Authority rejected the application. On appeal, the Civil Judge has set aside the order and directed the Prescribed Authority to implead the respondent as a party and to decide its claim in accordance with law. The writ petition is directed against his order.

2. When the petition came up for hearing before Sri Justice Satish Chandra, the Company argued before him that the Act does not envisage the filing of a claim to the plots shown in the statement prepared under Section 10 (1) by a stranger to the proceedings started under Section 10 (2). The company relied on a decision of the learned Judge himself. (*Kesar Sugar Works v. State*, 1967 All LJ 551). The respondent opposed this argument and counterposed the decision of another learned Judge (*Bageshwari Devi v. S. B. Pandey*, 1965 All LJ 756). There is an obvious conflict between these two decisions. So the learned Judge referred a specific question to a larger bench for opinion. That question, after some verbal alterations made by us, is:

"Is a person who claims to be the tenure-holder but is not so recorded in the revenue papers entitled to file an objection to the statement which is prepared under Section 10 (1) of the Act and issued to another person under Section 10 (2) of the Act?"

3. The scheme of the Act is to provide for the acquisition by the State of the surplus land of a tenure-holder and for its redistribution among the landless. With this end in view it imposes a ceiling on

landholding, and acquires the area in excess of the ceiling. Chapter II of the Act contains provisions for the imposition of ceiling on landholdings and acquisition of the surplus land by the State. It comprises Sections 5 to 16. Section 4 imposes a ceiling of 40 acres on the existing landholdings. Section 5 provides that no tenure-holder shall hold an area in excess of the ceiling area. Under Section 9 the Prescribed Authority publishes in the Gazette a general notice calling upon every tenure-holder holding land in excess of the ceiling area to submit to him within 30 days of the publication of the notice a statement in respect of all his holdings in the prescribed form. He has also to specify the plots which he would retain as part of his ceiling area. Section 10 deals with the contingency of the tenure-holder's failure to submit a statement. It consists of two sub-sections. Under sub-section (1) the Prescribed Authority shall cause to be prepared a statement containing such particulars as may be prescribed. The statement shall also indicate the plots proposed to be declared as surplus land. Under sub-section (2) the Prescribed Authority serves 'upon every such tenure-holder' a notice together with a copy of the statement prepared under sub-section (1) and calls upon him "to show cause within a period specified in the notice why the statement be not taken as correct". As some controversy raged round the meaning of Section 11 (1) and (2), it is necessary to reproduce these sub-sections in extenso. Section 11 (1) provides:

"Where the statement submitted by a tenure-holder in pursuance of the notice published under Section 9, is accepted by the Prescribed Authority or where the statement prepared by the Prescribed Authority under Section 10, is not disputed within the specified period, the Prescribed authority shall accordingly determine the surplus land of the tenure-holder".

Section 11 (2) provides:

"The Prescribed Authority shall, on application made within thirty days from the date of the order under sub-section (1) by a tenure-holder aggrieved by such order passed in his absence and on sufficient cause being shown for his absence set aside the order and allow such tenure-holder to file objection against the statement prepared under Section 10 and proceed to decide the same in accordance with the provisions of S. 12".

4. Section 12 provides that where an objection has been filed under Section 10 (2) or S. 11 (2), the Prescribed Authority shall, after hearing the Parties decide the objections and determine the surplus land. Section 14 comprises eight sub-sections. Sub-section (1) requires the Prescribed Authority to notify in the Gazette the surplus land determined by him or in ap-

peal. Sub-section (2) states that all such surplus land shall stand transferred and vest in the State free from all encumbrances and all rights, title and interests of all persons in such land shall stand extinguished from the date of the notification. Sub-section (3) reads:

"On the publication of the notification under sub-section (1), any person claiming interest as a tenure-holder or a lessee in possession from the tenure-holder, in the surplus land in respect of which the notification has been published, may within thirty days thereof, file an objection before the Prescribed Authority indicating the extent of his interest in such land."

Sub-section (4) provides for a hearing to the objector, the tenure-holder concerned and the State and for decision. Other sub-sections are not relevant for our purposes and so are not touched upon.

5. It is obvious from these provisions that the object of the Act is to acquire the surplus land of a person and vest it in the State free from all encumbrances and titles. This object is achieved in two stages. In the first stage, the Prescribed Authority determines the surplus land of a person; in the second stage, the Prescribed Authority enquires into the claims of a third person to the surplus land. It is only when his claim is rejected that the surplus land vests in the State, otherwise not. The Prescribed Authority is given power to decide claims to the surplus land with the object of vesting a perfectly certain title in the State. The Act contains no express provision enabling him to decide in the first stage third party claims to the land mentioned by the tenure-holder in his statement under Section 9 or in the statement sent to him under Section 10 (2). The reason is plain. It is not the purpose of the Act to constitute the prescribed Authority a new forum for decision of disputes regarding rights to agricultural land which has not been declared surplus land. Such disputes are to be decided by the ordinary revenue Courts. It is said that Section 11 will enable the Prescribed Authority to decide a third party claim in the first stage. I do not think so. Section 11 should be read in the background of Section 10. It will follow from a conjoint reading of these sections that the only person who can dispute the statement prepared under Section 10 (1) is the tenure-holder to whom that statement is furnished under Sec. 10 (2). Section 11 (2) also does not provide for a third party claim in the first stage. The expression 'a tenure-holder aggrieved by such order' in Section 11 (2) will not include any person other than the tenure-holder to whom the statement prepared under Section 10 (1) is furnished.

This inference is supported by two expressions which follow the foregoing ex-

pression in S. 11 (2): (1) "In his absence" and (2) "On sufficient cause being shown for his absence". These are strong expressions. And they imply three things: (1) a prior obligation to appear at a certain place and at a certain time; (2) consequential blame on account of non-appearance; (3) explanation for the blame-worthy non-appearance. If a person not required to be present is not present, one does not speak of his being absent. So a third party to whom notice has not gone under Section 10 (2) will not be included in the expression 'a tenure-holder aggrieved by such order'. The words 'aggrieved by such order' have been added for the purpose of precluding the making of an application under Section 11 (2) by the tenure-holder to whom a notice was sent under Section 10 (2) where the order, though passed in his absence, does not cause any prejudice to him. These words do not enlarge the meaning of the word 'tenure-holder' so as to comprehend a third party. Nor will the use of the indefinite article 'a' before 'tenure-holder' to expand its arms as to embrace a third party. Read in its proper setting, Section 11 (2) does not envisage a third-party claim.

6. Section 11 (2) resembles R. 13, O. 9, Code of Civil Procedure. So a person, who is not a party to the proceeding upto the stage of Section 11 (1), could not have been intended to be given a chance to get the ex parte order regarding surplus land set aside; all the more so when he is given a chance under Section 14 (3). The interpretation suggested by the respondent should not be accepted as it makes Section 14 (3) a superfluity. The absence of a provision for notice to a third party before Section 11 (2) of the proceedings also weighs against this interpretation.

7. The Prescribed Authority is a statutory creation. He can enjoy only such powers as are conceded to him by the Act expressly or by necessary implication. It is said that Section 10 (1) impliedly allows him to entertain a third-party claim in the first stage. I am unable to read any such implication in that provision. Of course the Prescribed Authority is given the power not to accept an incomplete or incorrect statement submitted by a tenure-holder under Section 9. But the power of not accepting an incomplete or incorrect statement does not imply power of a different nature, namely, the power of entertaining a third-party claim in the first stage.

8. It is pointed out that the interpretation suggested by me will work hardship on a person whose exclusive claim to holding is lost in the second stage on the acceptance of the objection of a third person that he is a co-tenure-holder. Suppose A is recorded as the sole-tenure-

holder of an 80 acre holding. He bona fide believes that he is the sole tenure-holder. He can retain 40 acres with him; the remaining 40 acres will be declared as his surplus area. In the second stage B files an objection that he is a co-tenure-holder and has a half share in the entire holding. If his objection is upheld, he will get back 20 acres out of the 40 acres declared as surplus land. He will also have 20 acres from the 40 acres retained by A. So in the end A is a loser; he retains only 20 acres although he was also entitled to 40 acres.

9. I do not think that A will in the end be a loser. When the objection of B is decided in his favour in the second stage, A can be relieved under Section 151, Code of Civil Procedure, by restoration of 20 acres of land to him. S. 151 will apply to such a case by virtue of S. 37 of the Act. Sections 11 (3) and 12 (2) will not debar the Prescribed Authority from acting under Section 151.

10. In *Raja Yuvaraj Datt Singh v. Prescribed Authority Tahsil, Lakhimpur*, 1968 All LJ 292 = (AIR 1968 All 305) (FB) a Full Bench has said:

"From the scheme of the Act it is clear that there are only two parties before the Prescribed Authority that is, the tenure-holder and the State. The transferees (third party) are not parties before it and the Prescribed Authority has no jurisdiction to take into consideration their rights or to determine them".

(Words in brackets mine).

I respectfully agree with this interpretation.

11. If the question referred to us is answered in the affirmative, a third person, who claims as a tenure-holder the surplus land or any portion thereof determined under Section 11 (1), will have a right to file an objection to such determination. The word 'tenure-holder' is defined in Section 3 (1) as the holder of a holding. 'Holding' is defined in Section 3 (d) as the land held by a person 'as a bhumidhar, sirdar, asami of Gaon Samaj or an asami mentioned in Section 11' of the Zamindari Abolition and Land Reforms Act or 'as a tenant under the U. P. Tenancy Act, 1939, other than as a sub-tenant.' So the asami of a person belonging to any of the classes mentioned in Section 157, Zamindari Abolition and Land Reforms Act is not a tenure-holder; nor a sub-tenant under the Tenancy Act. Neither of them can file an objection under Section 11 (2) to the determination of surplus land under Section 11 (1). But they can file an objection to it under Section 14 (3). One may legitimately ask as to why the Legislature denied them an opportunity under Section 11 (2). There appears to be no proper reason for their being treated differently from the tenure-holder as defined in the Act. In my view,

an interpretation which results in invidious discrimination of a class of persons should not commend itself to the Court. If the legislature had intended a third party objection under Section 11 (2), it would not have denied his right to them.

12. For the reasons already discussed I would answer the question in the negative.

13. **GANGESHWAR PRASAD J.:**— I have had the benefit of reading the judgment of my learned brother Dwivedi; but I regret I am not able to concur in his opinion.

14. The question to be decided by this Bench relates to the interpretation of certain provisions of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act (hereinafter called the Act) and is in following terms:

"Is a person who claims to be the tenure-holder but is not so recorded in the revenue papers entitled to file an objection to the statement which is prepared under Section 10 (1) of the Act and issued to another person under Section 10 (2) of the Act?

15. In the form in which the question has been formulated it is a composite question, and for a proper appreciation of its scope and implications it is necessary to split it up. What has first to be determined is whether the fact that a person claiming to be a tenure-holder is not recorded as such in the revenue records itself disentitles him to file an objection to the statement prepared under Section 10 (1) of the Act and issued to another person under Section 10 (2) of the Act. The next thing to be determined is whether a tenure-holder, even if he is so recorded, is entitled to file an objection to such statement issued to another person under Section 10 (2) of the Act. Determination of the above questions necessarily involves examination of some other matters too which are not, strictly speaking, within the ambit of the question which this Bench has to answer but which have vital bearing on that question and must materially affect the answer to it. Those matters, therefore, have also to be dealt with.

16. The expression "tenure-holder" has been defined in the Act. Unless, therefore, the meaning given to it by the definition is repugnant in the context and the subject-matter of the provisions dealing with the procedure for determination and acquisition of surplus land, it would not be permissible to ignore the definition or to introduce into it any limitation not imposed by the Act. As will presently be seen there is not only a complete absence of any repugnancy but the provisions in regard to the above matters can be fully carried into effect only when the expression "tenure-holder" used therein

is understood in the plain terms of its definition. And it would, indeed, be strange if the definition provided by the Act for the expression "tenure-holder" became repugnant or inappropriate in the provisions relating to the very first and the most essential step towards the acquisition of surplus land. Sec. 3 (1) defines. "Tenure-holder" as "an individual or a person who is the holder of a holding"; and it is, therefore, obvious that for being a tenure-holder under the Act a person has to fulfil no other qualification except that of being the holder of a holding. The definition, therefore, leaves entries in the revenue records altogether out of account.

17. Section 4, which lays down what the ceiling area of a tenure-holder shall be, provides in sub-section (1) that "subject to the provision of this Act, the ceiling area applicable to a tenure-holder shall be calculated after taking into account all the land in any holding in the State held by him in his own right, whether in his own name or ostensibly in the name of any other person." Thus, the fact that a land is not recorded in the name of a person is not a matter of any consequence in the determination of the ceiling area, and all the land that a person really holds has to be treated as his, irrespective of the fact that somebody else is the ostensible holder of any such land. Section 4 (1) emphasises the generality of the words used in the definition of "Tenure-holder" and furnishes a key, if one is at all needed, to the interpretation of that expression in the provisions that follow.

18. Section 9 provides for general notice and not for notice addressed to particular individuals. The notice issued under the above section calls upon every tenure-holder to submit a statement of all his holdings, and in the light of the definition of the term "Tenure-holder" and Section 4 (1), it is manifest that no real tenure-holder can claim exemption from the operation of the notice under Section 9 or from the consequent obligation to submit a statement merely by reason of his name not being recorded as such in the revenue records.

19. When the Prescribed Authority proceeds to act under Section 10 the field of his enquiry is not limited to the statements filed in response to the notice issued under Section 9 or to the persons actually filing the statements. He has to conduct an enquiry whether a tenure-holder liable to submit a statement has failed to do so and also whether the statement submitted by a tenure-holder is correct. In the investigation of neither of these questions is the Prescribed Authority required or expected to treat as conclusive the entries respecting a land in the revenue records and he has to ascertain whether any tenure-holder in fact holds land in excess of the ceiling area

applicable to him on the date of the enforcement of the Act. In doing so he has, by the very terms of Section 4 (1), to ignore entries which though ostensibly showing another person as the holder of a holding, do not represent the real state of things. Entries incorrect from their inception, continuance of entries after a change has become necessary as a result of subsequent events or transactions, entries incomplete by reason of omission to mention the names of all such persons as have an interest in a land, and entries in favour of mere Benamidars—all these are familiar features of the revenue records; and it is not conceivable that the Act could have intended that the Prescribed Authority should accept the revenue records as final in the course of his enquiry. Having regard to the language as also the object of the Act, it is plain that the Prescribed Authority can, after the enquiry under Section 10 (1), issue a notice under Section 10 (2) to a tenure-holder who is not recorded as such in the revenue records and has not submitted a statement after notice under Section 9. The Prescribed Authority is to be guided not by the ostensible but by the real title to a land.

20. The words "such tenure-holder" in Section 10 (2) refer to the tenure-holder mentioned in Section 10 (1) and, therefore, comprehend both a tenure-holder who has failed to submit a statement and a tenure-holder who has submitted an incomplete or incorrect statement. Now if the Prescribed Authority is bound, as he clearly is, to issue a notice together with a copy of the statement prepared by him under Section 10 (1) to a tenure-holder who holds land in excess of the ceiling area applicable to him, although he is not recorded as such in the revenue records, it should follow as a necessary consequence that such tenure-holder is entitled to show cause against the statement prepared by the Prescribed Authority. In fact, the notice issued to him would itself require him to show cause. If a notice under Section 10 (2) may be issued to a tenure-holder who is not recorded as such in the revenue records he has to be treated as a tenure-holder for other purposes as well. The position, therefore, is that under the definition of the term "Tenure-holder" and the scheme of the Act the holder of a holding has to be considered to be a tenure-holder, whether or not he is recorded as such in the revenue records and there is nothing in the provisions of the Act that precludes him from the right of filing an objection to the statement issued by the Prescribed Authority to another person. The disability, if any, must arise from a reason other than that he is not recorded as a tenure-holder in the revenue records.

21. The question then is whether a tenure-holder, even if he is so recorded in

the revenue records, can file an objection under Section 10 (2) if the Prescribed Authority has not served upon him the notice and the statement referred to in that provision and has not called upon him to show cause why the statement be not taken as correct. As distinguished from the general notice issued under Section 9, the notice issued under Section 10 (2) is one directed to a certain specified individual and it calls upon him and nobody else to show cause against the acceptance of the statement accompanying the notice. There is consequently nothing in Section 10 (2) that may entitle a tenure-holder who has not been served with notice under the provision to file an objection to the statement mentioned therein. Further, the right to file an objection, if it is to have some meaning and juridical efficacy, must carry with itself the right to have the objection adjudicated and, therefore, there has to be a corresponding power in the Prescribed Authority to adjudicate. If the power to decide the objection is found to be clearly lacking in the Prescribed Authority, the inference would naturally be that the right to file the objection has also not been given. The power of adjudication conferred upon the Prescribed Authority has, therefore, to be examined, bearing in mind the fact that he has been constituted under the Act, derives his authority solely from the provision of the Act, and can exercise only such powers as have been conferred upon him by the Act.

22. Section 10 (2) does not provide for any determination or enquiry. The procedure governing the proceedings subsequent to the expiry of the period specified in the notice issued under Section 10 (2) is contained in Sections 11 and 12 which are reproduced below:

"11. Determination of surplus land where no objection is filed— (1) Where the statement submitted by a tenure-holder in pursuance of the notice published under Section 9, is accepted by the Prescribed Authority or where the statement prepared by the Prescribed Authority under Section 10, is not disputed within the specified period, the Prescribed Authority shall accordingly, determine the surplus land of the tenure-holder.

(2) The Prescribed Authority shall, on application made within thirty days from the date of the order under sub-section (1) by a tenure-holder aggrieved by such order passed in his absence and on sufficient cause being shown for his absence set aside the order and allow such tenure-holder to file objection against the statement prepared under Section 10 and proceed to decide the same in accordance with the provisions of S. 12.

(3) Subject to the provisions of sub-section (2) and Section 13, the order of

the Prescribed Authority shall be final and conclusive and be not questioned in any Court of law.

12. Determination of the surplus land by the Prescribed Authority where an objection is filed. (1) Where an objection has been filed under sub-section (2) of Section 10 or under sub-section (2) of Section 11, or because of any appellate order under S. 13, the Prescribed Authority shall, after affording the parties reasonable opportunity of being heard and of producing evidence, decide the objections after recording his reasons, and determine the surplus land.

(2) Subject to any appellate order under Section 13, the order of the Prescribed Authority under sub-section (1) shall be final and conclusive and be not questioned in any Court of law".

It is apparent that Section 11 (1) deals with situations in which there is no dispute at all i.e., when either the statement submitted by a tenure-holder in response to the general notice issued under Sec. 9 is accepted by the Prescribed Authority or no objection is taken to the statement prepared by the Prescribed Authority within the period specified in the notice served under Section 10 (2). Certainly, the word "disputed" used in Section 11 (1) is not qualified by any such words as "the tenure-holder upon whom a notice has been served under sub-section (2) of S. 10"; but the provision aforesaid indicates that the dispute spoken of in it is a dispute raised by a tenure-holder upon whom a notice has been served under Section 10 (2). Firstly, the words "within the specified period" refer to the period mentioned in the notice served under Section 10 (2) and the words "is not disputed within the specified period" should, therefore, be regarded as having reference to a person who has been called upon to dispute the correctness of the statement prepared by the Prescribed Authority if he so desires within the specified period. Secondly, Section 11 (1) is not a provision enabling the raising of a dispute and it only lays down what the Prescribed Authority has to do when either the statement filed by a tenure-holder is accepted or the statement prepared by the Prescribed Authority "is not disputed". In other words, it does not empower anybody to raise a dispute but directs the Prescribed Authority to proceed to determine the surplus land of the tenure-holder in the absence of any dispute raised under the preceding provision, i.e. Section 10 (2). Thirdly, it would be seen that Section 11 (1) does not itself authorise the Prescribed Authority to decide any dispute nor does it indicate what he has to do in the event of a dispute.

Surely, the power to raise a dispute must have as its counter-part the power of the Prescribed Authority to decide it;

and if the scope of the power to decide conferred upon the Prescribed Authority is confined to a dispute raised by a certain kind of person, the power of raising a dispute must likewise be regarded as confined to such person alone. The provision which gives the Prescribed Authority the power to decide the dispute raised before him is Section 12 (1) and there is no other provision which invests him with that power. Section 12 (1) expressly lays down in what situations the Prescribed Authority can act thereunder and they are: (1) Where an objection has been filed under Section 10 (2), and (2) where an objection has been filed under Section 11 (2). The words "or because of any appellate order under Section 13"—which, one must say, are not very happy and appropriate—occurring in Section 12 (1) do not really provide for any third situation, and all that they mean is that the power conferred by the provision is exercisable by the Prescribed Authority not only when he himself treats an objection as having been properly filed under Section 10 (2) or under Section 11 (2) but also when he is directed to treat an objection as such by an appellate order made under Section 13. It will be noticed that Section 13 provides for an appeal only by a person who is aggrieved by an order under Section 11 (2) or Section 12 and, therefore, one has ultimately to go back to the two situations specified in Section 12 (1).

Patently, Section 12 (1) does not speak of any objection filed under S. 11 (1) and the two types of objections in relation to which it confers a judicial power upon the Prescribed Authority are an objection under Section 10 (2) and an objection under S. 11 (2). The result is that an objection not covered by the two categories mentioned in Section 12 (1) cannot form the subject-matter of a decision by the Prescribed Authority. It seems, therefore, clear that the Act does not contemplate an objection under Section 11 (1) and it provides neither for an adjudication of any such objection nor for an appeal against any order passed thereon. The only objections contemplated by the Act are those mentioned in Section 10 (2) and Section 11 (2). I have already stated that in my view the language of Section 10 (2) does not admit of the construction that even a person upon whom a notice has not been served thereunder and who has not been called upon to show cause why the statement prepared by the Prescribed Authority be not accepted as correct is entitled to file an objection under Section 10 (2). The result, therefore, is that such person can neither file an objection under Section 10 (2) nor under Section 11 (1).

23. If Section 12 had also provided for the decision of an objection filed under

Section 11 (1), there could certainly have been no doubt then about the entertainability of an objection under Section 11 (1), and it might, in that case, have been possible to hold that the correctness of the statement prepared by the Prescribed Authority can be disputed by any person, whether or not notice has been served upon him under Section 10 (2). As Section 12 stands, however, it restricts the jurisdiction of the Prescribed Authority to deciding only such objections as may be made under Section 10 (2) and S. 11 (2) and it thus rules out the making of any objection under S. 11 (1) by any person.

24. But even though a tenure-holder upon whom no notice under S. 10 (2) has been served is not entitled to file an objection under that provision, a situation may arise when his claim to a land covered by the statement prepared by the Prescribed Authority may have to be considered and decided. Suppose A, a tenure-holder has received a notice and a statement under Section 10 (2) showing him to be the holder of a land which is not recorded in his name in the revenue records and he files an objection under Section 10 (2) saying that the land is not held by him but by B and that he does not hold land in excess of the ceiling area applicable to him. This objection has to be decided by the Prescribed Authority under Section 12 and the matter for decision would naturally be whether the land in question is held by A or by B. Obviously, for an effective and complete decision of that matter it is essential that B too should be heard and if he claims to be the holder of the land in question his claim should be considered. If the Prescribed Authority is not competent to make B a party to the enquiry under the provisions of the Act, B cannot of course have his claim considered, howsoever desirable that may be; but if the Prescribed Authority has the power to do so there seems to be no reason why the claim of B should not be considered if he has been made a party.

Section 37 of the Act invests the Prescribed Authority with all the powers and privileges of the Civil Court, in so far as they may be applicable, in holding an enquiry or hearing an objection under the Act, and it also requires him to follow the procedure laid down in the Code of Civil Procedure for the trial and disposal of suits relating to immovable property. The prescribed authority may, therefore, under Order 1, Rule 10 (2) of the Code of Civil Procedure add the name of any person as a party to the proceeding before him, if his presence is necessary to enable him effectually and completely to decide and settle the question involved in the proceeding. In doing so and hearing in support of the claim made by him, the Prescribed Authority would not at all be

enlarging the scope of the powers vested in him under the provisions of the Act. He would still be acting under Section 12, because an objection under Section 10 (2) has been filed by A, the tenure-holder upon whom notice has been served, and he would still be deciding the objection of A and determining his surplus land, with only this difference that he will be deciding the objection in the presence of B as well. The position, as I see it, is that if A accepts the statement prepared by the Prescribed Authority and does not dispute its correctness by filing any objection no other person has a right to intervene in the proceeding under Section 10 (2) and interrupt its course, and the Prescribed Authority must in that case proceed to determine his surplus land under Section 11 (1). It is only when A himself objects to the statement prepared by the Prescribed Authority that the Prescribed Authority may exercise the power given by Order 1, Rule 10 (2) of the Code of Civil Procedure at the stage of Section 10 (2) of the Act.

The disowning of a land by A materially affects the statement prepared by the Prescribed Authority and necessarily also the determination of A's surplus land. The object of making B a party in such a case would not be an adjudication of any dispute between A and B (because A has disowned the land) but an effective and complete adjudication of the objection of A to the statement prepared by the Prescribed Authority. If B is not made a party by the Prescribed Authority B's rights remain unaffected, but if the Prescribed Authority chooses to make him a party under O. 1, R. 10 of the Civil P. C. the objection of A and the claim of B are both effectively and completely decided. And this is as it should be. If A has clearly said in his objection that he does not hold a land shown as his in the statement prepared by the Prescribed Authority and there is nothing to show that the objection is manifestly false, it is but proper that the objection be disposed of in the presence of B also who, according to A, is the holder of the land in question, because otherwise the land may be treated as A's by the Prescribed Authority for determining his surplus land and yet be retained or claimed by B whose title to it has been admitted by A. It is true that considerations of supposed or real hardship are not to affect the interpretation of a statute where the language used by it is plain and unambiguous; but it is also well recognised that where the language of a statute is fairly capable of a meaning which will prevent unjust consequences and avoid anomalies, that meaning has to be preferred to one which may lead to opposite results. The construction which permits the deciding of the objection of A in the presence of B, not only does no

violence to the language used in the Act but appears to be in perfect harmony with it and obviates results which the legislature could not, in my opinion, have intended.

If A, the tenure-holder who has received notice under Section 10 (2) has not himself filed an objection, the aforesaid provision does not permit B to prefer any claim, but if A has filed an objection and B is thereafter made a party by the Prescribed Authority the question whether the land to which the objection relates belongs to A or to B has to be finally adjudicated. The very object of the power conferred by O. 1, R. 10 (2) of the Code of Civil Procedure is to effectively and completely adjudicate and settle questions involved in a proceeding, and it cannot therefore, in my opinion, be doubted that once the Prescribed Authority exercises the aforesaid power and decides the objection of A in the presence of B, the decision is final subject of course to the appeal provided by Section 13. I have dwelt at some length on this matter only to show that the determination of the right of a person upon whom no notice under Section 10 (2) has been served is not outside the scope of the Act.

25. It may be asked why a tenure-holder who has not received notice under Section 10 (2) of the Act should not also be able to file an objection under that provision if, on his being added as a party by the Prescribed Authority his claim may be decided under Section 10 (2) by the Prescribed Authority. The reasons, to my mind, are clear. Firstly, the words of Section 10 (2) do not contemplate such an objection and Section 12 empowers the Prescribed Authority to decide only two kinds of objections viz. objection under Section 10 (2) and objection under Section 11 (2). Secondly, the Act is in the main concerned with the person whose surplus land is intended to be acquired and if he does not dispute the statement prepared by the Prescribed Authority the proceedings are not to wait for the decision of disputes between him and other persons, and the Prescribed Authority has to proceed under Section 11 (1) to determine the surplus land of the tenure-holder upon whom a notice under Section 10 (2) has been served. And thirdly, it is quite likely that upon a consideration of the objection of the tenure-holder upon whom a notice under Section 10 (2) has been served the Prescribed Authority comes to the conclusion that the tenure-holder has no surplus land at all, and in that case the question of any further proceedings under the Act would not arise and a determination of any objection on behalf of a tenure-holder upon whom no notice under Section 10 (2) has been served would be unnecessary and futile.

26. It may be that subsequent to the acquisition of what is determined to be the surplus land of a tenure-holder somebody puts forward a claim to a land included in his ceiling area and succeeds in the claim, but this situation cannot be altogether avoided. Even if a person upon whom no notice has been served under Section 10 (2) is held entitled to file an objection under Section 10 (2), it is not obligatory for him to do so, and nothing in the Act can preclude him from subsequently claiming any portion of the area shown as ceiling area of a tenure-holder.

27. What has next to be seen is whether a person who has not been served with a notice under Section 10 (2) may have the order passed under Section 11 (1) set aside and file an objection under Section 11 (2). The objection contemplated by Section 11 (2) is obviously an objection subsequent to the determination of the surplus land of a tenure-holder under Section 11 (1) and it entitles a tenure-holder aggrieved by the order under Section 11 (1) to file such objection. Determination of a land as surplus does not in itself amount to its acquisition but it cannot be doubted that it gives the tenure-holder, who claims to hold the land but was not served with a notice under Section 10 (2), a cause to be aggrieved; and if that is so there appears to be no valid reason why the benefit of Section 11 (2) may not be available to him and why Section 11 (2) should be regarded as limited to those tenure-holders only who have been served with a notice under Section 10 (2).

It is true that the words "passed in his absence and on sufficient cause being shown for his absence" occurring in Section 11 (2) will normally be of relevance only in the case of a tenure-holder who has received notice under Section 10 (2), but cases are easily conceivable in which they will materially affect even a tenure-holder who has not received such a notice. Supposing that the Prescribed Authority, acting under O. 1, R. 10 (2) of the Code of Civil Procedure, has made a person upon whom no notice has been served under Section 10 (2), a party but such person has not put in appearance at the stage of the enquiry under Section 10 (2). If such a person feels aggrieved by a determination made under Section 11 (1) he has to show sufficient cause for his absence before the order passed under Section 11 (1) can be set aside and he can be allowed to file an objection. Again, if a person, upon whom no notice under S. 10 (2) has been served but who has been made a party under O. 1, R. 10 (2) of the Civil P. C., has actually been heard in the enquiry on the objection under Section 10 (2) of the tenure-holder upon whom notice has been served, it would not be open to

him to make any further objection and have the order under Section 11 (1) set aside, because the order has not been passed "in his absence". The words "passed in his absence and on sufficient cause being shown for his absence" will, therefore, have meaning and effect in relation also to a tenure-holder who has not been served with a notice under Section 10 (2) and they will prevent even such a tenure-holder from claiming the benefit of Section 11 (2) if he was made a party upon an objection under Section 10 (2) by a tenure-holder who has been served with a notice.

In my opinion, the words "a tenure-holder aggrieved by such order" embrace even those tenure-holders who have not been served with a notice under Sec. 10 (2) and their scope is in no manner curtailed by the words "passed in his absence and on sufficient cause being shown for his absence". A tenure-holder who has not been served with a notice and has also not been made a party would be treated as having been absent and the fact that he was not a party would itself sufficiently account for his absence. Section 11 (2) should not, to my mind, be interpreted as withholding its benefit from a person who has committed no default at all while extending it to a person who has committed a default but furnishes sufficient cause for it.

28. A question may be raised whether the Act intends to provide two opportunities of filing an objection of the same kind to a tenure-holder upon whom no notice under Section 10 (2) has been served, one under Section 11 (2) against the determination made under Section 11 (1) and the other under S. 14 (3). The two opportunities are, however, not identical in their scope and their legal incidents. It will be seen that although only a person aggrieved by the determination of the surplus land made under Section 11 (1) can file an objection under Section 11 (2) the scope of the objection that he may file upon the order of determination being set aside is not limited by Section 11 (2) to the land determined as surplus land. The determination having already been set aside, only the statement prepared by the Prescribed Authority under S. 10 (2) is then intact and it is against that statement that the objection has necessarily to be directed as the words of Section 11 (2) clearly show. The objection under Section 11 (2) may, therefore, be in respect of any land mentioned in the statement prepared by the Prescribed Authority under Section 10 (1). But, unlike the objection under Section 11 (2), the objection under Section 14 (3) has to be confined to the surplus land in respect of which notification under Section 14 (1) has taken place.

The scope of the objection under Section 14 (3) is, therefore, narrow. Moreover, the failure to make an objection under Section 14 (3) results in extinction of title, but no such consequence is attached to the failure on the part of a person, upon whom no notice has been served under Section 10 (2), to have the order under S. 11 (1) set aside and to make an objection under S. 11 (2). If a tenure-holder upon whom no notice under Section 10 (2) has been served files an objection after getting the order under Section 11 (1) set aside and that objection is decided under Section 12, the decision should certainly be final subject to the appeal provided by Section 13. But, if no such objection is filed and decided, such title as he may have to any land remains wholly unaffected, subject of course to what may follow as a result of Section 14. For an analogy I may refer to Section 11 of the U. P. Encumbered Estates Act, 1934, which provided for the determination of a claim to the property mentioned in sub-sec. (1) of that section. If the claim was made within the time allowed for it and determined, the determination was to operate as a decree of the Civil Court but where no claim was filed and there was, consequently, no determination, the title of the claimant in respect of the said property was not affected. An objection under Section 11 (2) of the Act filed by a tenure-holder, upon whom no notice under Section 10 (2) has been served, therefore, differs from an objection under Section 14 (3) in some important respects.

29. On the interpretation which I give to Section 11 (2), it serves two important purposes. It enables a tenure-holder upon whom no notice under Section 10 (2) has been served to have his claim to any land shown in the statement prepared by the Prescribed Authority decided in a cheap and expeditious manner without recourse to a suit; and, what is more important for the purpose of the Act, it also lessens, to some extent, the possibility of the danger that a certain land may be treated as the ceiling area of a landholder for determining his surplus land and the ceiling area may later be lost or reduced on account of the claim of another person. It is true that such a claim under S. 11 (2) may not at all be made and, therefore, the danger referred to above is not altogether removed but, as I have said it is certainly lessened.

30. The period of time provided for having the order under S. 11 (1) set aside and for filing an objection under S. 11 (2) also does not indicate that Section 11 (2) deals only with a person who is bound to file an objection if he wishes to safeguard his right or interest in any land. It will be noticed that Section 11 (2) of the Encumbered Estates Act also required a claim to be made within three months of

the publication of the notice under Section 11 (1) of that Act. A period of time for having the order passed under Section 11 (1) of the Act set aside and for filing an objection under Section 11 (2) had, in any case, to be fixed if the scheme of the Act was to be carried out and the fixation of that period does not at all lead to the inference that in Section 11 (2) the expression "as tenure-holder" signifies only a tenure-holder upon whom notice has been served under S. 10 (2).

31. I must here again refer to the power of the Prescribed Authority under O. 1, R. 10 (2) of the Civil P. C. The Prescribed Authority may make a person upon whom no such notice has been served a party also in a proceeding started upon an objection under Section 11 (2) by a person upon whom such notice has been served, and if such a person is made a party he has evidently to be heard in support of any claim that he may put forward in respect of the land shown in the statement prepared by the Prescribed Authority. A determination of the question whether a person other than the tenure-holder upon whom notice under Section 10 (2) has been served is the holder of any land shown in the aforesaid statement has, therefore, in a certain situation to be made under Section 11 (2) as well in the presence of such other person. In these circumstances there seems to be no justification for qualifying the words "a tenure-holder" by words which do not find a place in the statute.

32. What the Prescribed Authority is required to do under Section 12 (1) has also to be seen. The section says that the Prescribed Authority has to decide the objection and to determine the surplus land. An objection under Section 10 (2) or Section 11 (2) by the tenure-holder upon whom notice under Section 10 (2) has been served may relate to any land shown in the statement prepared by the Prescribed Authority and that objection has to be decided under Section 12. Similarly, therefore, the objection of a tenure-holder upon whom no notice has been served under Section 10 (2) has, in my opinion, to be decided if he is made a party by the Prescribed Authority or files an objection in circumstances which entitled him to do so.

Section 12 does not empower and require the Prescribed Authority merely to determine the surplus land but also to decide the objections. Determination of the surplus land is certainly the ultimate thing to be done, but that determination is inseparably connected with and entirely dependent on the fixation of the ceiling area. The entire land held by a tenure-holder is naturally involved in the process of determination of his surplus land. Objection to any land being treated as his in the statement prepared by the Pres-

cribed Authority under Section 10 has, therefore, to be decided if surplus land is to be determined. Plainly, S. 12 (1) requires both decision of objections and determination of the surplus land. Thus, the power conferred upon the Prescribed Authority under Section 12 (1) is wide enough to cover the power to decide an objection of a tenure-holder, upon whom no notice under Section 10 (2) has been served, with respect to any land shown in the statement prepared by the Prescribed Authority under S. 10 (1).

33. I must say that on no interpretation of the provisions of the Act can some anomalies and difficulties be avoided. A tenure-holder may, as a result of a subsequent litigation, lose part or whole of his ceiling area after the rest of his land has been finally acquired under the Act as surplus land what remedy, if any, is open to such a tenure-holder? Can he, in spite of Section 14 (2) of the Act, have the determination of his surplus land reopened under Section 151 of the Civil P. C. and claim back what has been acquired by the State or has he then to content himself with the compensation that he has received? I do not find the questions easy to answer.

But the answer to the aforesaid questions cannot, to my mind, have a bearing on the answer to the question before this Bench. On no view of the relevant provisions of the Act is a person, upon whom a notice under Section 10 (2) has not been served and who has not been made a party under O. 1, R. 10 (2) of the Civil P. C., bound to make an objection to the statement prepared by the Prescribed Authority under Section 10 (1) and nothing that happens prior to the stage of Section 14 can have any effect on his right in any land shown in the aforesaid statement. If he files no objection under Section 14 (3) his rights in the land determined as surplus land are certainly extinguished, but his claim to any land shown as the ceiling land of the tenure-holder whose surplus land has been acquired remains unaffected by the proceedings under the Act. Consequently, the title of a person to the area shown as his ceiling area cannot under the provisions of the Act, become secure against the claim of such a person in all circumstances. The answer to the question before this Bench is, therefore, not dependent upon or necessarily connected with the answer to the question as to what remedy a tenure-holder deprived of part or whole of his ceiling area subsequent to the acquisition of the rest of his land as surplus land has. I, therefore, express no opinion on the latter question.

34. It would be seen from the above discussion that my conclusions differ in some respects both from the observations made in 1965 All LJ 756 and in Kesar

Sugar Works v. State, 1967 All LJ 551 cases in which divergent views have been expressed. These two are the only reported decisions of this Court in which the question before this Bench came up for consideration. In the Full Bench case of 1968 All LJ 292 = (AIR 1968 All 305) (FB) also there are doubtless some observations which may appear to have a bearing on the question before us, but a close examination of that case would show that it involved a totally different question, and the observations have to be read in the context of that question. The facts of the case were that a tenure-holder was possessed of 2510.96 acres of land. He had made certain transfers in respect of some land after the 20th of August, 1959. Upon receipt of a notice in CLH form 4 the tenure-holder filed an objection stating that he wanted to retain plots situate in a particular village in his ceiling area. The choice of the tenure-holder was, however, not accepted by the Prescribed Authority and he was allotted in his ceiling area the land which he had transferred after the 20th of August, 1959. The order of the Prescribed Authority was confirmed by the District Judge in appeal. The tenure-holder thereupon filed a writ petition, which was dismissed by a learned single Judge. That led to a Special Appeal which ultimately came up for decision before that Full Bench.

The Bench was, therefore, considering the question whether the Prescribed Authority could refuse to accept the choice of the tenure-holder, and it held that he could not. The Bench found that "What the Prescribed Authority had done was to accept the transfers, to recognise their existence, and to protect the interests of the transferees", though he had to treat the transfers "as a nullity". While dealing with the question whether the Prescribed Authority could disregard the choice of the tenure-holder in the interest of the transferees, the Bench observed:

"From the scheme of the Act it is clear that there are only two parties before the Prescribed Authority, i.e. the tenure-holder and the State. The transferees are not parties before it and the Prescribed Authority has no jurisdiction to take into consideration their rights or to determine them."

What the Bench decided was that a determination of rights or an adjustment of equities between the tenure-holder and the transferees was beyond the power of the Prescribed Authority when the tenure-holder had indicated his choice with regard to the ceiling area. The observations made in that case have, therefore, no application to the questions before this Bench.

35. The fact that while Section 14 (3) enables even a lessee from a tenure-holder to indicate his interest in the land

mentioned therein Section 11 (2) enables only a tenure-holder to make an objection does not in any manner suggest that the expression 'tenure-holder' should be given a restricted meaning in Section 11 (2). The reason for the distinction made in the aforesaid two provisions is not far to seek. The person who is really affected by the acquisition of surplus land is the tenure-holder thereof and the Act has not, therefore, provided for an objection under Section 11 (2) by anybody else except the tenure-holder. A lessee from the tenure-holder is, however, entitled under Section 17 (2) to a portion of the compensation payable in respect of the land acquired as surplus land and Section 14 (3), therefore, enables him to indicate the extent of the interest claimed by him so that the same may be determined for the purpose of apportioning compensation under Section 17 (2).

36. Determination of the claim of a tenure-holder upon whom no notice has been served under Section 10 (2) is not foreign to the scheme of the Act. Section 14 specifically provides for such a determination in respect of the area mentioned in that provision and excludes the possibility of its determination outside the Act. In proceedings under Sections 10 (2) and 11 (2) the Prescribed Authority has power under Order 1, Rule 10 (2) of the Code of Civil Procedure read with Section 37 of the Act, in the situation mentioned earlier, to add as a party a tenure-holder upon whom no notice has been served under Section 10 (2), and if the Prescribed Authority does exercise the power the tenure-holder added as a party has obviously to be heard and his claim or objection has to be determined. This is to be borne in mind in the interpretation of the provisions of Sections 10, 11 and 12 and in finding out their scope. Effect has to be given to the words used in the said provisions both as to what they include and what they exclude and no pre-supposition or consideration of result can prevail over the plain meaning of the language employed in the provisions; and if the words are capable of alternative constructions, a construction which will remove or reduce chances of hardship, inconvenience or anomaly and may avoid multiplicity of litigation has to be accepted in preference to the alternative which may have a contrary tendency.

As a result of an examination of the relevant provisions of the Act in the light of the above principles my answer to the question before this Bench is as follows:—

"The fact that a tenure-holder is not recorded as such in the revenue records is not relevant for determining whether he is entitled to file an objection to the statement prepared under Section 10 (1)

of the Act and issued to another person under Section 10 (2) of the Act, and the above fact does not disentitle him to file an objection if he is otherwise entitled to do so. A tenure-holder to whom a statement has not been issued under Sec. 10 (2) of the Act is not entitled to file an objection, under that provision i.e. S. 10 (2) of the Act, to the statement prepared under Section 10 (1) of the Act and issued to another person under Section 10 (2) of the Act. Section 11 (1) of the Act does not provide for the filing of any objection and no objection can, therefore, be filed under that provision. Under Section 11 (2) of the Act, however, a tenure-holder to whom a statement under Section 10 (2) of the Act has not been issued is entitled to file an objection to the statement prepared under Section 10 (1) of the Act and issued to another person under S. 10 (2) of the Act, subject to the restrictions imposed by that provision, i.e. S. 11 (2) of the Act. If, upon an objection made by a tenure-holder to whom a statement under Section 10 (2) of the Act has been issued, a tenure-holder to whom no such statement has been issued is added as a party by the Prescribed Authority under O. 1, R. 10 (2) of the Civil P. C., read with Section 37 of the Act the latter tenure-holder can prefer a claim or objection. Similarly if, in a proceeding under Section 11 (2) of the Act, a tenure-holder to whom a statement has not been issued under Section 10 (2) of the Act is added as a party by the Prescribed Authority such tenure-holder can prefer a claim or objection under that provision, i.e. under Section 11 (2) of the Act".

37. **YASHODANANDAN J.:** I respectfully agree with my learned brother Gangeshwar Prasad, J. and have nothing to add.

BY THE COURT

38. In accordance with the majority opinion our answer to the question referred to us is as follows:—

"The fact that a tenure-holder is not recorded as such in the revenue records is not relevant for determining whether he is entitled to file an objection to the statement prepared under Section 10 (1) of the Act and issued to another person under Section 10 (2) of the Act, and the above fact does not disentitle him to file an objection if he is otherwise entitled to do so. A tenure-holder to whom a statement has not been issued under S. 10 (2) of the Act is not entitled to file an objection, under that provision i.e. Section 10 (2) of the Act, to the statement prepared under Section 10 (1) of the Act and issued to another person under Section 10 (2) of the Act. Section 11 (1) of the Act does not provide for the filing of any objection and no objection can, therefore, be filed under that provision. Under Sec. 11 (2) of the Act, however, a tenure-holder to

whom a statement under Section 10 (2) of the Act has not been issued is entitled to file an objection to the statement prepared under Section 10 (1) of the Act and issued to another person under S. 10 (2) of the Act, subject to the restrictions imposed by that provision, i.e. Section 11 (2) of the Act. If, upon an objection made by a tenure-holder to whom a statement under Section 10 (2) of the Act has been issued, a tenure-holder to whom no such statement has been issued is added as a party by the Prescribed Authority under O. 1, R. 10 (2) of the Civil P. C., read with Section 37 of the Act, the latter tenure-holder can prefer a claim or objection. Similarly if, in a proceeding under Section 11 (2) of the Act, a tenure-holder to whom statement has not been issued under Section 10 (2) of the Act is added as a party by the Prescribed Authority such tenure-holder can prefer a claim or objection under that provision, i.e. under S. 11 (2) of the Act".

39. The case will now go back to the learned single Judge who referred the question to a larger Bench.

Reference answered accordingly.

AIR 1970 ALLAHABAD 143 (V 57 C 16)

A. K. KIRTY J.

Raghubar Dayal Kanodia, Petitioner v. Union of India and others, Opposite Parties.

Civil Misc. Writ Nos. 3159 and 3164 of 1967, D/- 10-1-1969.

(A) Telegraph Act (1885), S. 7 — Rules made thereunder, R. 443 — Rule is not *ultra vires* rule making powers—No notice to show cause before disconnecting telephone is required — (Constitution of India, Art. 245).

Rule 443 does not contravene any provision of the Telegraph Act, nor can it be said that it is in excess of the Rule making power given under the Act to the Central Government. It cannot therefore, be said that R. 443 of the rules is *ultra vires* or illegal. (Para 6)

Disconnection of the telephone of a particular subscriber cannot be treated as a punishment. If the Department refuses to extend telephone facilities, unless the amount payable for the use of telephone for a previous period is paid, then it cannot be said that the Telephone Authorities are punishing that subscriber. In fact it would probably be a matter of contract between the subscriber and the Department. Consequently it cannot be said that before proceeding to disconnect, opportunity of showing cause should be given. (Para 6)

(B) Constitution of India, Art. 226 — Telegraph Act (1885), S. 7-B (1) — Dispute

relating to actual reading of meter involving questions as to whether meter had been correctly and honestly read and the readings had been correctly and honestly noted down — Is clearly outside purview of S. 7-B (1) — Filing of writ petition is not barred by S. 7-B (1) — Held, however, that on basis of affidavit and materials placed on record, it was not possible to record any finding which could be made basis for grant of relief — Proper forum was competent Court of law.

(Para 7)

Ambika Pd. and Jagdish Prasad, for Petitioner; H. N. Seth, for Opposite Parties.

ORDER:— These petitions under Article 226 of the Constitution raise a common question for determination. In both the petitions it is prayed that a Writ of certiorari be granted quashing the order dated 27-7-1967 which was passed individually against each petitioner. It is further prayed that writ of mandamus be issued directing the opposite parties not to disconnect or remove telephone No. 32702 in case of the petitioner in the first case and telephone No. 33262 in case of the petitioner in the second case. In both the petitions there is a further prayer also for an interim order commanding the opposite parties not to disconnect the said telephones. This Court issued an interim order in each case. It, however, appears that in Writ petition No. 3159 of 1967 the telephone of the petitioner was actually disconnected before the interim order passed by this Court was communicated to the Authorities concerned. In the second case, however, the stay order was communicated before the actual disconnection of the telephone.

2. Both the petitioners in the instant Writ petitions are businessmen having telephone connections in their business premises. A bill for the fixed rental for the period from 1-4-1967 to 30-6-1967 and local calls for the period from 1-12-1966 to 28-2-1967 was given to and received by the petitioner of each case in March, 1967. The amount demanded under the bill in the case of R. D. Kanodia petitioner in Writ Petition No. 3159 of 1967, was Rs. 657.30 Paise. The number of local calls shown in the bill during the relevant period was 4292. In the case of R. C. Gupta, petitioner in writ petition No. 3164 of 1967, the amount demanded under the bill was Rs. 122.85 Paise and the number of local calls noted in the bill for the period was 729. It is admitted that both these bills were duly paid by the petitioners. Subsequently, however, a further bill was submitted to each of the petitioners in July, 1967 demanding a further sum of Rs. 4,500 in case of Kanodia and a further sum of Rs. 5,000 in case of Gupta which amounts were required to be paid by the party concerned within

fifteen days of the date of issue of each bill.

In Kanodia's case, it was mentioned in the bill that as against the total local calls for the period in question amounting to 34292, in the original bills, the figure was by mistake shown as 4292. Similarly in the case of Gupta, it was noted in the subsequent bill that as against the correct figure of local calls numbering 20729, the figure of 729 was incorrectly mentioned in the original bill. Each petitioner, thereupon, wrote letters to the Telephone Authorities concerned asking them to furnish details of the meter readings during the relevant period. The figures of Meter readings supplied to Kanodia are mentioned in paragraphs 6 and 7 of his writ petition and the figures supplied to Gupta are mentioned in paragraph 6 of his petition. The petitioners wrote to the Authorities protesting against the subsequent bill sent to each of them and contended that the subsequent bills were wrong and on no calculation the number of local calls could be of the magnitude as shown in the subsequent bills.

The Authorities concerned, however, according to the petitioners, paid no heed to their protests and objections and intimated that the respective telephones of the petitioners would be disconnected unless the amount demanded was paid. Thereafter the present two Writ petitions were filed in this Court.

3. A counter-affidavit has been filed in each case on behalf of the respondents. In the counter-affidavits it has, inter alia, been alleged that the meter works automatically and works under the system known as 'time and zone'. It has been explained as to how this system works and it has been stated that Kanpur has been provided with a direct dialling system for trunk connections and that whenever a subscriber dials, for example Delhi, the meter starts working as soon as the subscriber gets an effective connection. Thereafter the Meter automatically works and for each period of six seconds the Meter registers one local call. The Meter automatically goes on registering local calls in this manner so long as the trunk connection obtained by the subscriber is not disconnected by him. It has further been alleged in the counter-affidavits that the Meter can record upto 9999 calls and as soon as that figure is reached and the next call is registered, the meter shows "0000" and starts working afresh thereafter beginning with No. 1.

It has further been alleged in the counter-affidavits that the Authorities concerned received some information about the misuse of telephones by some subscribers and thereupon it was decided to open special registers and to note therein the Meter reading of such subscribers much more frequently than is

done ordinarily. Ordinarily a subscriber's Meter is read every fortnight but in case of persons against whom some reports had been received a direction was given to read their Meters very frequently either on alternate days or at such short intervals as may be considered appropriate. Such frequent readings thus came to be recorded in the special register opened for this purpose. In that special register whenever a reading showed that the figure "9999" had been crossed a circle was put around the reading made on a particular date. This indicated that the Meter had already registered 10000 calls i.e. 9999 actually shown in the Meter and 1 more call indicated by "0000".

It has been stated in the counter-affidavits that while sending the original bills, it was omitted to be noted that in case of Kanodia there were three "circle marks" and in the case of Gupta, there were two 'circle marks' in the special register against readings on different dates indicating that in each case local calls to the extent of 10000 had already been registered. Thus in the case of Kanodia there occurred a difference of 30000 calls between the bill originally sent and the revised bill sent subsequently, and in the case of Kanodia, (Sic Gupta) a difference of 20000 calls.

4. Today Mr. H. N. Seth, learned counsel for the respondents, showed me the special register which according to his instructions, is maintained at Kanpur and on the basis of which the revised bills were sent to the two petitioners. On seeing the special register at least I was, prima facie, satisfied that the bills which were subsequently sent were in conformity with the figures noted in that register. It has, however, been suggested on behalf of the petitioners that no reliance can be placed on the register and that a casual look into the register itself might show that in fact the register had been written at one and the same time and that it may very well have been manufactured for certain purposes. It is not necessary for me to go into the question and to give any decision as to whether the special register is a genuine register or it has been forged or manufactured for the purpose of defence in these cases or for the purpose of sending fictitious bills to the petitioners.

Indeed, I am not in a position either to investigate into this question or to record any finding thereon. I was also, prima facie, satisfied by the explanation given by Mr. Seth that even if you ignore the circle marks placed around certain figures on certain dates you will get the correct figure shown in each of the revised bills by calculating the number of local calls in each case from the Meter readings noted in the special register.

5. Personally speaking, I do not very much appreciate the idea of opening a special register confined to the Meter readings of certain members of the subscribers against whom, the Authorities alleged, some reports of misuse had been received. I should think that all the Meter readings of all the subscribers, whether such readings are taken after an interval of a fortnight or whether such readings are taken every day, should be noted in one register. The petitioners at least, *prima facie*, had a cause of grievance when they alleged in this Court that even the particulars of their Meter readings which had been furnished to them by the Department did not show that the bill which was subsequently sent to each of them was a correct bill according to the Meter readings shown in the particulars supplied to them. Whether a *bona fide* mistake was committed by the Department as alleged in the counter-affidavit, or not is again a matter in respect of which I am not in a position to give any findings on the basis of the affidavits filed in each case. In so far as the question of granting any relief to the petitioner is concerned, I find that unless it is possible for me to hold that the revised bills which had been sent were fictitious bills or were incorrect bills, no relief can be granted.

6. On behalf of the petitioners, it was argued by Mr. Jagdish Prasad that before proceeding to disconnect, no opportunity of showing cause was given and that, therefore, the Department could not legally exercise their power to disconnect the telephone. This argument, in my opinion, is not sound. Disconnection of the telephone of a particular subscriber cannot be treated as a punishment. If the Department refuses to extend telephone facilities unless the amount payable for the use of telephone for a previous period is paid, then it cannot be said that the Telephone Authorities are punishing that subscriber. In fact it would probably be a matter of contract between the subscriber and the Department. Mr. Seth has pointed out that under R. 443 of the Rules, the Department has a right to disconnect the telephone in case of non-payment of the amount due under a bill or in case of non-payment of the sum demanded for the use of a telephone. Mr. Jagdish Prasad argued that this Rule was *ultra vires*. He, however, did not explain as to what exactly he meant by saying that the Rule was *ultra vires*. Under the Telegraph Act, there is a rule-making power given to the Central Government. The Act also provides that the Rules which are framed by the Central Government under the Act are to be laid before both Houses of Parliament for approval during a certain period. There is nothing to show or suggest that the require-

ments of law had not been complied with before the Rules were enforced. The Rule, in my opinion, does not contravene any provision of the Telegraph Act, nor can it be said that it is in excess of the Rule-making power given under the Act to the Central Government. I am unable to hold Rule 443 of the Rules is *ultra vires* or illegal.

7. In the counter-affidavit, it was also pleaded that since the Telegraph Act itself provides for an alternative remedy under Section 7-B thereof, the Writ petitions are not legally maintainable. This plea does not appear to me to be a plea of substance. Section 7-B (1) of the Indian Telegraph Act, 1885 reads as follows:—

"Except as otherwise expressly provided under this Act, any dispute concerning any telegraph line, appliances or apparatus arises between the Telegraph Authority and the person for whose benefit the line, appliance or apparatus is, or has been, provided, the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this section".

Howsoever extended meaning be given to the language used in the aforesaid Section, to my mind, the dispute which has been raised by these two petitions cannot be brought within the ambit of that section. There is no dispute that any apparatus, appliance or telegraph line had not functioned properly or correctly and that the bills had been wrongly made as a result of defective operation or functioning of the Meters in question. The dispute centres round the actual readings of the Meters and the basic question is as to whether in each case the Meter had been correctly and honestly read and the readings had been correctly and honestly noted down. Such a dispute, in my opinion, is clearly outside the provisions of Section 7-B (1) of the Telegraph Act. Therefore, Section 7-B (1) of the Telegraph Act cannot be accepted as a bar to the filing of the Writ petitions or to the granting of reliefs to the petitioners. I have, however, already observed above that on the basis of the affidavits and materials placed on the record of the two writ petitions it is not possible to record any finding which can be made the basis for the grant of relief to the petitioners. I am of opinion that the petitioners, if they do desire, should seek relief in an appropriate Court of law. The Telegraph Act itself does not appear to contain any statutory bar in regard to the filing of suits of seeking of redress and remedy from a competent Court of law. If the matter is taken to a competent Court of law by means of a suit by these peti-

tioners, that Court will certainly have every power in law to investigate the issues which may arise and to record findings thereon.

8. For the reasons mentioned above, both the petitions fail and are dismissed. However, I am of opinion that, in the circumstances of the case, the parties should be directed to bear their own costs and I order accordingly.

Petitions dismissed.

**AIR 1970 ALLAHABAD 146 (V 57 C 17)
FULL BENCH**

**T. RAMABHADRAN, S. D. KHARE
AND H. SWARUP JJ.**

Hari Ram Sri Harkesh, Petitioner v. Election Tribunal, Muzaffarnagar and others, Opposite Parties.

Civil Misc. Writ No. 4627 of 1966, D/- 25-3-1969.

(A) Municipalities — U. P. Town Areas Act (2 of 1914), Ss. 8-A (2), 39 — Rules framed under S. 39 by State Government, Rr. 48, 49 (iv) — Scope — Canvassing — What is — Phrase “induces or attempts to induce” in R. 49 (iv) refers to unfair and illegal canvassing — C. Misc. W. No. 1137 of 1966 dated 5-9-1966 (All), Overruled — (Words and Phrases — “Canvassing” and “induces or attempts to induce”).

The intention of the legislature was to introduce a system of election which was free from religious bias. The introduction of the joint electorate system for all the seats in the Committee and for the election of the Chairman clearly indicates that the electors have to seek election without taking recourse to their religious affinity or membership of a community. (Para 7)

Canvassing is the act which is performed by the person who seeks the vote to induce the elector to cast his vote in his favour. Thus if a person does any act (and that act may be canvassing only) to induce any voter to give or to refrain from giving a vote in favour of any candidate on the ground of sect, caste or sub-caste he becomes guilty of committing corrupt practice within the meaning of R. 49. If he makes a speech or distributes a pamphlet which is calculated to induce the voter either to give vote in his favour or to refrain from giving vote in favour of his opponent on the ground of sect, caste or sub-caste, he commits the act of corrupt practice under Rule 49 (iv).

(Paras 8 and 9)

The phrase “induces or attempts to induce” used in clause (iv) of Rule 49 refers to unfair and illegal canvassing for votes and if in the course of canvassing

any attempt is made to induce, persuade or influence the will of an elector so as to induce him to give or refrain from giving a vote in favour of any candidate on the ground of sect, caste or sub-caste it becomes a corrupt practice. It is immaterial whether the elector is actually induced or not to vote or refrain from voting for a candidate under the influence of such a canvassing, as under Cl. (iv) of Rule 49 even an attempt to induce has been made a corrupt practice. C. Misc. W. No. 1137 of 1966, dated 5-9-1966 (All), Overruled. (Para 13)

(B) Municipalities — U. P. Town Areas Act (2 of 1914), S. 39 — Rules under, R. 49 (iv) — Word “induces” refers to canvassing — (Municipalities — U. P. Municipalities Act (2 of 1916), S. 28) — (Representation of the People Act (1951), S. 123) — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Meaning of words — Different words used in two different statutes — No bar to their conveying similar meaning if context so warrants).

The legislature while enacting different laws at different times can use different expressions to convey the same intention. It is only when the same words are used in two different statutes that the rule of interpretation requires that so far as possible the same meaning be given to them, because the legislature is presumed to mean the same thing by the same words. But when two different words are used in two different statutes, there is no bar to their conveying a similar meaning if the context so warrants. (Para 14)

Inducing and canvassing or appealing to religious feelings of electors has in every enactment been made an independent item of corrupt practice. Both in Section 28 of U. P. Municipalities Act and Section 123 of the Representation of the People Act mere canvassing and appeal on the ground of religion, caste or sect has been made a corrupt practice. The words “induces” or “attempts to induce” used in Cl. (iv) of Rule 49 refer to canvassing and appealing unadulterated with the element of threat of injury or promise of reward.

(Para 14)

(C) Municipalities — U. P. Town Areas Act (2 of 1914), S. 39 — Rules under, R. 49 (iv) — Scope — Word “sect” has both wider and narrower meaning — ILR 1960 (2) All 822, Partly overruled — (Words and Phrases — ‘Sect’).

The word ‘sect’ has both a wider and narrower meaning. The rule makes it a corrupt practice for a person to canvass for votes on the ground both of ‘sect’ as used to represent a religious denomination and also to represent a sub-division of that religious community or section of the electorate. ILR 1960 (2) All 822, Partly overruled. (Paras 15, 16)

Cases Referred: Chronological Paras
 (1966) Civil Misc. Writ No. 1137
 of 1966, D/- 5-9-1966 (All), Sajid
 Husain v. Narain Das 2, 3, 10, 16
 (1960) ILR 1960-2 All 822, Shah
 Hamid Ullah v. Raja Ram Gupta

15, 16, 17
 38 Ala 411, Wilson v. State 10
 Sri Dhar, S. N. Kacker and Ashok
 Mohiley, for Petitioner; S. S. Bhatnagar
 and S. C., for Opposite Parties.

H. SWARUP J.: This petition has been filed for the issue of a writ in the nature of certiorari to quash the order of the Election Tribunal dated 1-11-1966 dismissing the Election Petition No. 2 of 1965 filed by Hari Ram against the election of Habibullah as the Chairman of the Town Area Committee Shahpur held on 11-11-1964.

2. The result of the election was declared on 12-11-1964. At the election Habibullah secured 952 votes, Hari Ram petitioner 938 and Mohd. Husain Khan secured 425 votes. Habibullah was declared elected. The contention of the election petitioner was that Habibullah himself and through his workers, agents and supporters had canvassed for the votes on the ground of religion and community and such canvassing had affected materially the result of the election. He had also challenged the election on the ground that certain votes of his had been wrongly rejected while some cast in favour of Habibullah had been wrongly included. Habibullah, respondent No. 2, denied the allegations of the petitioner and also raised objection to the votes secured by Hari Ram and rejected qua him. The Election Tribunal on a final scrutiny held that there was mistake and after adding and deducting the disputed votes, held that 934 votes were validly cast in favour of Hari Ram and 936 votes in favour of Habibullah.

On the plea of inducing the voters to cast votes in favour of Habibullah and to refrain from casting votes in favour of Hari Ram on the ground of religion and sect, the finding of the Election Tribunal was that, "Habibullah and his supporters had as against the petitioner canvassed for the votes of about 50 to 60 voters on the ground of religion and community at the meeting held on the day preceding the election in the Thateron Wali Masjid." But taking the view that mere canvassing could not amount to the corrupt practice of inducing or attempting to induce the voters in giving or refraining from giving their votes in favour of the candidate on the ground of sect, caste or sub-caste within the meaning of Cl. (iv) of R. 49 of the rules regarding election to Town Areas, the Tribunal dismissed the Election petition. In taking this view of law the Election Tribunal relied on the unreported decision of this Court in Civil Misc. Writ No. 1137 of 1966, Sajid Husain v. Narain Das, D/- 5-9-1966 (All).

3. The learned counsel for the petitioner contended before the Division Bench which originally heard this petition that the decision given by this Court in C. M. Writ No. 1137 of 1966 (All), required re-consideration and, thereupon, this case was referred to the Full Bench for decision.

4. The learned counsel for the petitioner confined his case to the plea that the Election Tribunal was in error in holding that canvassing in the circumstances of the present case did not amount to corrupt practice within the meaning of Clause (iv) of Rule 49. No other point was raised.

5. The learned counsel for the respondent No. 2 has contended that canvassing for votes on the ground of religion is not hit by the provisions of Rule 49 (iv) and the same does not amount to a corrupt practice. He has further contended that 'sect' means only a sub-division of the Muslim community, such as Shia and Sunni sub-divisions and does not include the Muslim community as such and thus, according to him, an appeal to the Muslim on the ground of their religion and community does not amount to an appeal to any sect within the meaning of the rule. We do not think any of the contentions raised by the learned counsel for the respondent is correct.

6. The U. P. Town Area Amendment Act No. 6 of 1948 which came into force on February 14, 1948 brought a change in the electoral system for the election of a Town Area Committee and its Chairman. It introduced the joint electorate system and defined it to mean a system under which the electors belonging to the minority and non-minority communities vote jointly and not as electors of separate communities. Minority community was again defined to mean Muslim or non-Muslim community according to the population in the area of the Committee. Section 8-A (2) of the Town Areas Act provides that the Chairman shall be elected by the electors of the Town Area at an election to be held simultaneously with the general election of the members of the Committee. 'Elector' in relation to a ward means a person whose name is for the time being entered in the electoral roll of that ward.

With certain qualifications every person above the age of 21 was to be included in the electoral roll. By Section 6-A added by the Town Area Amendment Act of 1952 the election of the members of the committee was to be on the basis of adult suffrage. In exercise of the powers given to the State Government under Section 39 of the U. P. Town Areas Act, the State Government framed rules regarding elections to Town Areas. These rules were enforced on February 26, 1948, and after amendments and corrections

were finalised on October 2, 1948, and they stand today in the same form so far as the election of the Chairman of the Town Area Committee is concerned. Rule 48 of these rules provides that the election of any person as Chairman of the Committee may be questioned on various grounds including the ground that such person committed a corrupt practice as defined in Rule 49 for the purpose of the election. Rule 49 reads as follows:—

"49. A person shall be deemed to have committed a corrupt practice who directly or indirectly by himself or any other person:

(i) induces or attempts to induce, by fraud, intentional misrepresentation, coercion or threat of injury, any voter to give or to refrain from giving a vote in favour of any candidate;

(ii) with a view to inducing any voter to give or to refrain from giving a vote in favour of any candidate, offers or gives any money or valuable consideration, or any place or employment, or holds out any promise of individual advantage or profit to any person;

(iii) gives or procures the giving of a vote in the name of a voter who is not the person giving such vote;

(iv) induces or attempts to induce any voter to give or to refrain from giving a vote in favour of any candidate on ground of sect, caste or sub-caste;

(v) abets (within the meaning of the Indian Penal Code) the doing of any of the acts specified in Cls. (i), (ii), (iii) or (iv) of this rule."

7. A reading of the various sections of the U. P. Town Areas Act and the Rules makes it clear that the intention of the legislature was to introduce a system of election which was free from religious bias. The introduction of the joint electorate system for all the seats in the Committee and for the election of the Chairman clearly indicates that the electors have to seek election without taking recourse to their religious affinity or membership of a community.

8. Rule 49 mentions the various acts which if employed to persuade an elector to vote or refrain from voting for a candidate will be deemed to be corrupt practice. Sub-rules (i) and (ii) of R. 49 speak of inducing the electors to vote in favour of a candidate or to refrain from voting in favour of a candidate by some threat or promise. Sub-rule (iv) of R. 49 deals with the inducement of the electors on the ground of sect, caste or sub-caste. This form of corrupt practice has in it no element either of threat or of promise of reward, but is confined to an appeal to the electors on the ground of sect, caste or sub-caste. Under a democratic process of elections canvassing is the only recognised method of inducing the electors to vote

for or to refrain from voting for a particular candidate.

Canvassing is the system of persuading the electors through the medium of speech — vocal and written. It is the method of inducing the elector to act in a particular manner. By means of canvassing the candidate and his supporters attempt to change the mind of the voter and to persuade him to vote for a particular candidate. Canvassing is the act which is performed by the person who seeks the vote to induce the elector to cast his vote in his favour. Thus a voter is induced to cast his vote for a particular candidate as a result of the canvassing done by the candidate or his supporters. It is only by means of canvassing that he can induce or attempt to induce any voter to give or to refrain from giving a vote in favour of any candidate.

9. The law punishes a man for his acts and a candidate is liable to be unseated if he does any act either directly or through his agent which amounts to a corrupt practice. What the candidate does is canvassing and, therefore, it is only the canvassing of a particular nature that can be prohibited by law. A candidate is liable for his acts and that of his agents. It is to be noted that even an 'attempt to induce' has been made a corrupt practice under sub-rule (iv) of Rule 49. In our opinion if a person does any act (and that act may be canvassing only) to induce any voter to give or to refrain from giving a vote in favour of any candidate on the ground of sect, caste or sub-caste he becomes guilty of committing corrupt practice within the meaning of R. 49. If he makes a speech or distributes a pamphlet which is calculated to induce the voter either to give vote in his favour or to refrain from giving vote in favour of his opponent on the ground of sect, caste or sub-caste, he commits the act of corrupt practice under R. 49 (iv).

10. With great respect we do not agree with the view taken by the learned Judges while deciding C. M. Writ No. 1137 of 1966 (All) regarding the interpretation of Cl. (iv) of Rule 49. There can be no act of inducing other than the act of canvassing which the candidate or his supporters are permitted to do in a democratic election. One can only canvass his view point to induce the electors to vote or refrain from voting in favour of a candidate. We might call canvassing permissible under the law to be "canvassing" pure and simple and "unfair canvassing", which is not permissible under the law to be an act to induce or an "attempt to induce". We do not think there is any justification for holding that: "inducement signifies controlling the will of the voter while canvassing merely indicates that the voter is requested to vote but his will is left free and he is able to act as he chooses." In

our opinion the word 'inducement' has not been used to signify the 'controlling of the will'. The maximum the judicial interpretation has gone, is to hold that inducing means 'inclining the will' (Wilson v. State, 38 Ala 411, 413). The various meanings assigned to phrase to "induce" given in Vol. 42 Corpus Juris Secundum are as follows:—

"To bring on, to bring on or about, to cause to effect; to lead to or produce, also to incline, the will, to incite by motives, to influence to an act or course of conduct, to lead by persuasion or reasoning, to influence, to lead on, to remove by persuasion or influence, to persuade, to influence the actions of others by either hope of reward or fear of reprisal, to prevail on, to prevail on by argument, advice, expostulations, or reasons, to coax.

"Induce" has been held synonymous with "influence" and "persuade". It has also been compared with "influence".

11. According to Webster's New International Dictionary, Vol. 2 "Induce" means to lead on, to influence, to bring on or about, to effect, to cause, to use argument." The Word "Influence" means "to sway, to infuse, to inspire and to produce an effect without apparent force or direct authority as influenced by suggestion".

12. The Shorter Oxford English Dictionary defines the word "Induce" as to bring on, to bring on or about, to cause, to effect; to lead to or produce; also to incline the will; to incite by motives, to influence to an act or course of conduct to lead by persuasion or reasoning; to influence, to lead on, to remove by persuasion or influence, to persuade; to influence the actions of others by either hope of reward or fear of reprisal; to prevail on; to prevail on by argument, advice, expostulations, or reasons; to coax." "To persuade" means to induce a person to believe something, to lead one to do something. It is thus clear that the phrase "induce or attempt to induce" in sub-clause (iv) of Rule 49 cannot be interpreted to mean: controlling the will 'of the voter'.

13. In a way the will of a voter is never controlled. The stage of canvassing and inducing is only upto the time the vote is not cast. Once the elector goes to the booth to cast his vote he cannot be induced any further. At the time of the casting of vote the voter may, if he so chooses, do as he likes. The election by means of secret ballot is based on the principle that an elector has a right to exercise a vote in such a manner that others may not even know what he has done. An elector can be persuaded by a candidate to vote for him or to refrain from voting for another till he enters the polling booth, and thereafter his will has to be left absolutely free for exercise of franchise.

We, therefore think that the phrase "induces or attempts to induce" used in Cl. (iv) of R. 49 refers to unfair and illegal canvassing for votes and if in the course of canvassing any attempt is made to incline, persuade or influence the will of an elector so as to induce him to give or refrain from giving a vote in favour of any candidate on the ground of sect, caste or sub-caste it becomes a corrupt practice. As soon as a person appeals to an elector to vote for him or his nominee or to refrain from voting for another candidate on the ground of sect, caste, or sub-caste he commits corrupt practice. It is immaterial whether the elector is actually induced or not to vote or refrain from voting for a candidate under the influence of such a canvassing as under Cl. (iv) of R. 49 even an attempt to induce has been made a corrupt practice.

14. The learned counsel for respondent No. 2 drew our attention to the provisions of Section 28 of the U. P. Municipalities Act and urged that while the word 'inducing' has been used in respect of securing votes by exercise of fraud etc. or by extending a threat or promising a reward, the word 'canvassing' has been used in cases of securing votes on account of caste, community, sect or religion. We do not think that the use of two words in different context signifies any special difference between them. The word 'canvasses' refers to the same idea as induces when used in relation to securing of votes at an election by unfair means not permissible by law. The legislature while enacting different laws at different times can use different expressions to convey the same intention. It is only when the same words are used in two different statutes that the rule of interpretation requires that so far as possible the same meaning be given to them, because the legislature is presumed to mean the same thing by the same words. But when two different words are used in two different statutes, there is no bar to their conveying a similar meaning if the context so warrants.

The learned counsel then referred to Section 123 of the Representation of the People Act and pointed out that in sub-section (iii) "appeal" by a candidate to vote or to refrain from voting on the ground of religion, caste etc. has been specifically made a corrupt practice and whenever the word "induced" has been used it has been used with reference to an act by which the candidate either gives a threat or offers a reward. From this he wants us to draw the inference that by using the word "induce" in Cl. (iv) of Rule 49, the legislature did not intend to make it equivalent to simple appealing or canvassing but meant to refer only to processes whereby some threat was given or reward promised. In our opinion no such inference can be drawn. Where-

ever a threat or promise is contemplated as a means of inducing the voter it is made a separate item of corrupt practice. Inducing and canvassing or appealing to religious feelings of electors has in every enactment been made an independent item of corrupt practice. Both in Section 28 of the U. P. Municipalities Act and Section 123 of the Representation of the People Act mere canvassing and appeal on the ground of religion, caste or sect has been made a corrupt practice and there appears no reasonable ground for holding that the words "induces" or "attempts to induce" used in Cl. (iv) of Rule 49 do not refer to canvassing and appealing unadulterated with the element of threat of injury or promise of reward.

15. In the case of Shah Hamidullah v. Raja Ram Gupta, (ILR 1960-2 All 822) a Division Bench of this Court while interpreting Cl. (iv) of Rule 49 observed that "there can be no doubt that the intention of the framers of Cl. (iv) of Rule 49 was to prevent appeals being made to the electors on a communal or caste basis". The democratic structure of Town Area Committee is based on a secular pattern and no person who desires to represent the electorate in the management of the affairs of the Committee is permitted by law to seek election by appealing to the sectarian bias of the voters because by such canvassing he is likely to induce the voters to exercise their franchise on a criterion not envisaged by law. In a social order free from religious bias the purpose of the joint-electorate system is to elect representatives who are free from such bias and do not canvass for votes or contest the election by creating a sectarian bias in the electorate.

16. The learned counsel for the second respondent then argued that the interpretation given by the two Division Benches of this Court in C. M. Writ No. 1137 of 1966 (All) and in the case of Shah Hamidullah v. Raja Ram Gupta, reported in ILR (1960) 2 All 822 to the meaning of the word "sect" in Cl. (iv) of Rule 49 is not correct. According to him it only means a sub-division of the Muslims. His submission is that it has been used in respect of the Muslim as 'caste' and 'sub-caste' have been used in respect of Hindus. We do not see any justification for the placing of this interpretation on the word "sect" in Cl. (iv) of Rule 49. The word "sect" has both a wider and narrower meaning. It is defined, in Shorter Oxford English Dictionary as follows:—

"A religious following; adherence to a particular religious teacher or faith, especially a body of persons who unite in holding certain views differing from those of others who are accounted to be of the same religion — In modern use commonly applied to a separately organized religious

body having its distinctive name and its own places of worship; a 'denomination'".

17. In the case reported in ILR (1960) 2 All 822 a Division Bench of this Court took the view that the intention of the State Government in framing Cl. (iv) of Rule 49 was that the word "sect" should convey the wider of the two meanings. We respectfully agree with that view in so far it holds that "sect" conveys the wider meaning. We, however, think it will convey the intention of the legislature more fully if it is assigned both the alternative meanings. The rule makes it a corrupt practice for a person to canvass for votes on the ground both of 'sect' as used to represent a religious denomination and also to represent a sub-division of that religious community or section of the electorate. From the definition of the words 'minority community' given in the Town Areas Act it is clear that the framers of the law meant to refer to religious denominations also as sects. The inducing or attempting to induce any voter to give or to refrain from giving vote in favour of any candidate on ground of a religion and community will, therefore, amount to a corrupt practice.

18. The Election Tribunal had framed issue No. 3 as follows:—

"Whether the respondent No. 1 through himself, his workers, agents and supporters canvassed for votes on the ground of religion and community? The effect?"

19. It gave a finding in the following words:—

"In my opinion, he (the petitioner) has succeeded in proving his allegations with regard to what transpired after the Friday prayers in the Thateron-wali Masjid and statement of P. W. 23 proves that respondent No. 1 and his supporters have as against the petitioner canvassed for the votes of about 50 to 60 Muslim voters on the ground of religion and community".

20. We think that on this finding the Election Tribunal was bound under law to hold that Habibullah the second respondent, had committed a corrupt practice within the meaning of Cl. (iv) of Rule 49 and his election was liable to be questioned under R. 48 and the Election Tribunal committed a manifest error of law in holding that it was not a corrupt practice within the meaning of R. 49 (iv).

21. In the result the petition succeeds and is allowed. Let a writ in the nature of certiorari be issued to quash the judgment of the Election Tribunal dated 1-11-1966, passed in Election Petition No. 2 of 1965 between Hari Ram and Habibullah and another. The Election Tribunal will now decide the Election Petition in accordance with law and in the light of the observations made above. The petition is allowed, but in the circumstances of the case the parties will bear their own costs.

Petition allowed.

AIR 1970 ALLAHABAD 151 (V 57 C 18)

FULL BENCH

(LUCKNOW BENCH)

JAGDISH SAHAI, LAKSHMI PRASAD
AND GURSHARAN LAL JJ.Hakim Singh, Petitioner v. State of
Uttar Pradesh and others, Opposite Parties.Writ Petns. Nos. 711, 760, 765 and 766
of 1965, D/- 14-10-1968.

Land Acquisition Act (1894) (as amended by Act 38 of 1923), Ss. 17 (4), (1), 9 (1), 5-A, 4 and 6 — Applicability — Act 38 of 1923 is remedial statute — Notification under S. 17 (4) — Such notification can be issued even if notification under S. 17 (1) has not already been issued. AIR 1964 All 353, Overruled — (Land Acquisition (Amendment) Act (38 of 1923), Ss. 3 and 4).

A notification under Section 17 (4), Land Acquisition Act can be issued even if a notification under Section 17 (1) has not already been issued. (Paras 5 and 9)

The Land Acquisition (Amendment) Act (38 of 1923) is a remedial statute providing a remedy to the citizen against the acquisition of his land. Section 5-A gives a citizen the opportunity of objecting to the acquisition of his land. The object of introducing Section 17 (4) is to extinguish the applicability of Section 5-A in case of urgency. (Para 4)

Section 17 (1) and (4) are two independent provisions capable of being enforced at two different stages of land acquisition proceedings. Action under Section 17 (1) can be taken only after notifications under Sections 4 and 6 and the notice under Section 9 (1) have been issued and objections, if any, under Section 5-A have been disposed of. But the only condition precedent to the exercise of the power under Section 17 (4) is that the appropriate Government should be of the opinion that Section 17 (1) and (2) apply to that case. Both the sub-sections provide for cases of urgency. When Section 17 (4) speaks of "the provisions of sub-sections (1) or (2) are applicable", it only bodily lifts the words "in cases of urgency" occurring in Section 17 (1) and the words "whenever, owing to of making thereon a river-side or ghat station" occurring in Section 17 (2) and place them in S. 17 (4). This course has been adopted for legislative convenience and to avoid repetition of the words occurring in Section 17 (1) and (2) in S. 17 (4) and thus make that provision neat and intelligible. Section 17 (4) is not correlated to Section 17 (1) and (2) because it has been introduced in the Act later on and by way of a proviso to Section 5-A. It is an exception to the general rule contained in Section 5-A. There is nothing in any provision in the Act including all the sub-clauses of Sec-

tion 17 to indicate that the direction under Section 17 (4) can be issued only if a notification under Section 17 (1) has already been issued. No doubt the words used in S. 17 (4) are "the provisions of sub-sections (1) or (2) are applicable". These words only mean "the provisions of sub-sections (1) or (2) are capable of application". The word "applicable" cannot mean already applied. (Paras 5 and 9)

It follows that these words in S. 17 (4) only mean "where conditions contemplated for action by S. 17 (1) or (2) are in existence", that is, in cases of urgency, mentioned in those sub-sections.

(Para 6)

Further, under S. 17 (1) a direction can be given only after 15 days have expired from the date of the publication of the notice under S. 9 (1). The stage for an action under S. 17 (4) will be much earlier in time than the stage contemplated under Section 17 (1). Besides, if the case is of such an extreme urgency that the applicability of S. 5-A has to be superseded then the Government will straightway issue a direction under S. 17 (4). It is not comprehensible as to why a direction under S. 17 (4) will at all be necessary if a direction has already been issued under S. 17 (1) because in that case the stage under S. 5-A would have passed already. (Para 8)

Moreover, a direction under S. 17 (1) is to be given only in respect of land "needed for public purposes". It is only by means of a declaration under S. 6 that it is determined as to what land is needed for public purposes. The difference in the language of Ss. 4 and 6 has to be kept in view. Therefore, it is not possible to issue a direction under S. 17 (1) along with a notification under S. 4. It can be issued only subsequent to the issue of declaration under S. 6. So if the direction under S. 17 (4) cannot issue without the issue of a direction under S. 17 (1), it follows that the very purpose of issuing a direction under S. 17 (4) will stand defeated because a direction under S. 17 (1) cannot issue till after the declaration under S. 6 and unless a direction under S. 17 (4) has been issued a declaration under S. 6 cannot be made without allowing an opportunity under S. 5-A. Thus a notification under S. 17 (4) can be issued even if a notification under S. 17 (1) has not already been issued. AIR 1964 SC 1217 & AIR 1965 SC 1763, Foll.; AIR 1965 Bom 224, Dist.; AIR 1964 All 353, Overruled. (Para 11)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1763 (V 52) =
1965 (2) SCWR 1061, Sarju Prasad
Saha v. State of U. P. 7.
(1965) AIR 1965 Bom 224 (V 52) =
ILR (1965) Bom 394, Sadruddin
Suleman Jhaveri v. J. H. Patwardhan

(1964) AIR 1964 SC 1217 (V 51) =
ILR (1964) 1 All 1, Nandeshwar
Prasad v. U. P. Govt. 7

(1964) AIR 1964 All 353 (V 51) =
1964 All LJ 928, Sheikh Ghulam
Maula v. State of U. P. 2, 8

S. Rahman and S. Mirza, for Petitioner;
Chief Standing Counsel, for Opp. Parties.

JAGDISH SAHAI J.:— In all these writ petitions the question involved is the same, i.e., whether a notification under sub-section (4) of S. 17 of the Land Acquisition Act (hereinafter to be referred to as the Act) can be issued if a notification under Section 17 (1) of the Act has not already been issued. Since that is the only question raised in these petitions, instead of a question being referred to us, the petitions have been referred to us for decision.

2. Desai, C. J. and R. N. Sharma, J. in Sheikh Ghulam Maula v. State of U. P., 1964 All LJ 928 = (AIR 1964 All 353) took the view that a notification under Section 17 (4) of the Act without there being an earlier notification under Section 17 (1) of the Act would be invalid.

3. Section 17 so far as it is relevant for our purposes reads:—

"17(1) In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the 'expiration of fifteen days' from the publication of the notice mentioned in Section 9, sub-section (1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

(2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government, free from all encumbrances:

... (3) ...

(4) In the case of any land to which, in the opinion of the appropriate Government, 'the provisions of sub-section (1) or sub-s. (2) are applicable', (underlined by us (here in ') the appropriate Government may direct that the provisions of S. 5-A shall not apply, and, if it does so direct, a declaration may be made under S. 6 in respect of the land at any time

after the publication of the notification under S. 4, sub-section (1)."

4. It may be pointed out that originally Section 5-A and sub-section (4) of Section 17 did not exist in the Act. These provisions were introduced by Sections 3 and 4 respectively of Act 38 of 1923. That Act was a remedial statute enacted to provide a remedy to the citizen against the acquisition of his land. Section 5-A of the Act gives a citizen the opportunity of objecting to the acquisition of his land. The object of introducing sub-section (4) of Section 17 in the Act is to extinguish the applicability of S. 5-A in case of urgency.

5. In our opinion sub-sections (1) and (4) of the Act are two independent provisions capable of being enforced at two different stages of land acquisition proceedings. An analysis of Section 17 of the Act, as it stands today, reveals that under sub-section (1) the Collector may take possession of any waste or arable land, fifteen days after the publication of the notice mentioned in S. 9 (1) of the Act. In other words, action under this sub-section can be taken only after notifications under Sections 4 and 6 and the notice under Section 9 (1) of the Act have been issued and objections, if any under Section 5-A of the Act, have been disposed of. Under sub-section (4) of S. 17 of the Act, however, the appropriate Government may, after the notification under Section 4 of the Act has been issued, intervene and direct that the provisions of Section 5-A shall not apply, with the result that the declaration under S. 6 of the Act shall be made forthwith.

The only condition precedent to the exercise of the power under sub-section (4) of S. 17 of the Act is that the appropriate Government should be of the opinion that the provisions of sub-sections (1) and (2) of S. 17 apply to that case. Sub-section (1) provides for cases of urgency. Sub-section (2) also provides for cases of urgent nature, i.e., a case where there has been a sudden change in the channel of any navigable river or other unforeseen emergency, which makes it necessary for the Railway Administration to acquire the immediate possession of any land. When sub-section (4) of S. 17 of the Act speaks of "the provisions of sub-section (1) or sub-section (2) are applicable", it only bodily lifts the words "in cases of urgency" occurring in sub-section (1) and words "whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or Ghat station", occurring in sub-section (2) and place them in sub-section (4) of S. 17 of the Act.

This course was adopted for reasons of legislative convenience and to avoid the repetition of the words occurring in sub-sections (1) and (2) of Section 17 of the Act in sub-section (4) and thus relieve that provision of cumbersomeness and make it neat and intelligible.

In our opinion, sub-section (4) is not correlated to sub-sections (1) and (2) of S. 17 of the Act because it was introduced in the Act later on and by way of a proviso to S. 5-A of the Act. If Section 5-A was not introduced in the Act sub-s. (4) of S. 17 would also not have been inserted therein. It is an exception to the general rule contained in Section 5-A of the Act. There is nothing in any provision of the Act to indicate that the appropriate Government can issue the direction under Section 17 (4) only if a notification under sub-section (1) of S. 17 of the Act has already been issued. No doubt the words used in Section 17 (4) are "the provisions of sub-section (1) or sub-s. (2) are applicable". These words only mean "the provisions of sub-section (1) or sub-s. (2) are capable of application". The word 'applicable' cannot mean already applied.

6. For these reasons, we are of the opinion that all that the words underlined (here in " ") above mean is "where conditions contemplated for action by sub-section (1) or sub-section (2) of S. 17 of the Act are in existence," i.e., in cases of urgency or cases of urgent nature mentioned in sub-sections (1) and (2) of S. 17 of the Act.

7. We find support for our view from Nandeshwar Prasad v. U. P. Government, AIR 1964 SC 1217 and Sarju Prasad Saha v. State of U. P. AIR 1965 SC 1763. In the first case it was observed:—

"We have already pointed out that it is not necessary in law that when an order is passed under Section 17 (1) an order under S. 17 (4) must also be passed. Sections 17 (1) and 17 (4) are independent of each other in the sense that an order under the former one does not necessarily require an order under the latter."

In the second case Shah, J. who spoke for the Court observed as follows:—

"But by Section 17 two distinct powers exercisable by the appropriate Government in case of urgency are conferred: the first is the power to take possession before the award of compensation is made by the Collector, and the second is the power to dispense with an enquiry which the Act contemplates has to be made under Section 5-A (2)."

8. We respectfully disagree with the view taken in 1964 All LJ 928 = (AIR 1964 All 353) (Supra). Desai, C. J., who spoke for the Division Bench in that case observed:—

"It is only after the direction has been given that it can be said that the power mentioned in sub-section (1) can be ex-

ercised in regard to the land, i.e., that the provisions of sub-section (1) are applicable to it. They cannot be said to be applicable to land merely because it is waste or arable if they are not of urgency and no direction to take possession of it before an award has been given; they cannot be said to be applicable simply because such a direction may at a later stage be given The Government must bring the land actually within the application of sub-section (1) by directing the Collector, on account of urgency, to take possession of it on the expiry of 15 days from the publication of a notice under Section 9 (1) even though no award has been made'.

With great respect to Desai, C. J., he has read the word 'applicable' as 'already applied'. Under sub-section (1) of S. 17 of the Act the appropriate Government can give a direction to the Collector for taking action only after fifteen days have expired from the date of the publication of the notice mentioned in sub-section (1) of S. 9 of the Act. If action under sub-section (4) of S. 17 is to be taken, the stage for it will be much earlier in time than the stage for action contemplated by sub-section (1) of S. 17 of the Act. Besides, if the case is of such an extreme urgency that the applicability of Section 5-A has to be superseded then the appropriate Government would straightway issue a direction under Section 17 (4) of the Act. It is not comprehensible as to why a direction under sub-section (4) of S. 17 would at all be necessary if a direction has already been issued by the appropriate Government to the Collector under S. 17 (1) of the Act to take possession of the land, because in that case the stage under Section 5-A would have been passed already.

9. There is nothing in the language of any provision in the Act including all the sub-clauses of S. 17 to indicate that before a notification under S. 17 (4) is issued one under S. 17 (1) must already have been issued.

10. Mr. Shafiq Mirza has invited our attention of Sadraddin Suleman Jhaveri v. J. H. Patwardhan, AIR 1965 Bom 224. That is a clearly distinguishable case. In that case the learned Judges were called upon to decide whether the question that a land is or is not waste or arable is to be decided on the basis of the subjective satisfaction of the appropriate government or on the basis of objective factors. The Bombay Judges held that the opinion was to be based on objective test.

11. There is yet another reason for the view indicated above. A direction under Section 17 (1) is to be given only in respect of land "needed for public purposes". It is only by means of a declaration under Section 6 of the Act that it is determined as to what land is needed for public purposes. The difference in the language of

Section 4 and that of S. 6 of the Act has to be kept in view. It shall thus appear that it is not possible to issue a direction under S. 17 (1) along with a notification under S. 4. In fact a direction under Section 17 (1) can be issued only subsequent to the determination of land needed for public purposes and that can be done only by a declaration under Section 6.

So, if the direction under Section 17 (4) cannot issue without the issue of a direction under S. 17 (1), it would follow that the very purpose of issuing a direction under S. 17 (4) would stand defeated for the simple reason that a direction under Section 17 (1) cannot issue till after the declaration under Section 6 and unless a direction under S. 17 (4) has been issued a declaration under Section 6 cannot be made without allowing an opportunity to file objection under Section 5-A of the Act. That would positively show that the view expressed by the Division Bench in the case referred to above cannot be sustained.

12. For the reasons mentioned above we are of the opinion that the direction under Section 17 (4) of the Act does not suffer from any defect either of fact or law. No other point has been raised in these petitions. We, therefore, dismiss them but direct the parties to bear their own costs.

Petitions dismissed.

AIR 1970 ALLAHABAD 154 (V 57 C 19)

R. CHANDRA AND K. C. PURI JJ.

Ram Khelawan Bhagwati, Applicant v. Sunder Nankau and another, Opposite Parties.

Criminal Ref. No. 89 of 1966, D/- 24-9-1968 from order of Sessions J. Lucknow D/- 27-9-1966.

Criminal P. C. (1898), S. 145, sub-sections (4) and (9) — Power of Magistrate under sub-section (9) to summon any witness — Not subject to first proviso to sub-section (4) — Witness can be summoned to file affidavit. AIR 1959 All 763, Overruled; AIR 1961 Punj 187, Diss.

The Magistrate can in suitable cases summon any witness irrespective of the fact whether he has filed an affidavit and direct him to attend or produce any document or thing. Thus an order of the Magistrate summarily dismissing the petition of a party requesting to summon a witness for filing an affidavit is erroneous. AIR 1959 All 763, Overruled; AIR 1961 Punj 187, Diss. (Paras 8 and 14)

Neither in sub-section (9) nor in the proviso to sub-section (4), a party has a right to examine a witness. In either

case, the discretion lies with the Magistrate. When it is not possible for a party to obtain affidavits from persons who may be competent to speak about the possession, the Magistrate has the discretion to examine such persons as witnesses under sub-section (9). The first proviso to sub-section (4) is quite independent of sub-section (9). That proviso would govern only sub-section (4) and not other sub-sections which follow it. The view that sub-section (9) is subject to the proviso to sub-section (4) would be violating all rules of interpretation of the statutes. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined only to that case. AIR 1957 Bom 20, Rel. on. (Para 8)

A plain reading of sub-section (9) clearly indicates that it was quite independent of sub-section (4). It empowers the Magistrate where necessary 'at any stage' of the proceedings on the application of either party to summon 'any witness' directing him to 'attend or to produce any document or thing.' The words used in the proviso to sub-section (4) are 'any person' but in sub-section (9) the words are 'any witness.' The said proviso is restricted to the evidence of only those persons who have filed the affidavit. But sub-section (9) says that 'any witness' could be summoned at any stage. There is not the least indication that its scope is also confined only to the persons who have filed affidavits in the case. 'At any stage' occurring in the sub-section may even be prior to the filing of the affidavits. AIR 1965 Pat 25 and AIR 1960 Raj 15 and AIR 1961 Madh Pra 302 and AIR 1964 Mad 263 and AIR 1965 All 294, Rel. on. (Para 8)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 All 294 (V 52) = | |
| 1965 (2) Cri LJ 39, Lalta Ram v. Dalip Singh | 12 |
| (1965) AIR 1965 Pat 25 (V 52) = | |
| 1965 (1) Cri LJ 69, Sheo Kumar Dubey v. Tribhuwan Rai | 9 |
| (1964) AIR 1964 Mad 263 (V 51) = | |
| 1964 (1) Cri LJ 674, Challamuthu Padayachi v. Rajavel | 12 |
| (1961) AIR 1961 Madh Pra 302 (V 48) = | |
| 1961 (2) Cri LJ 642, Kanhaiyalal v. Devi Singh | 11 |
| (1961) AIR 1961 Punj 187 (V 48) = | |
| 1961 (1) Cri LJ 708, S. Jodh Singh v. Mahant Bhagambar Das | 2, 9, 12 |
| (1960) AIR 1960 Raj 15 (V 47) = | |
| 1960 Cri LJ 116, Bahori v. Ghure | 10, 12 |
| (1959) AIR 1959 All 763 (V 46) = | |
| 1959 Cri LJ 1384, Bhagwat Singh v. State | 1, 2, 9, 12 |
| (1957) AIR 1957 Bom 20 (V 44) = | |
| ILR (1957) Bom 56, Keshavlal Premchand v. Commr. of Income-tax Bombay | 8 |

Govt. Advocate, for the State; S. S. Chauhan, for Opposite Party.

R. CHANDRA J.— This reference arises out of the proceedings under Section 145 of the Code of Criminal Procedure. Ram Khelawan the petitioner, applied to the Magistrate for summoning the Lekhpal for filing an affidavit in that case. The Magistrate disallowed the prayer on the ground that under the existing law, there was no provision for summoning a witness for giving evidence in a case under Section 145 of the Cr. P. C. In the revision filed against that order, the Sessions Judge, Lucknow, did not agree with that view. So, he made a reference to the High Court recommending that the order of the Magistrate be quashed, and he be directed to decide the application of Ram Khelawan for summoning the Lekhpal on the merits. The reference came up for hearing before Brother Misra, J. He thought that the view expressed by Desai, J. (as he then was), in the case of Bhagwat Singh v. State, AIR 1959 All 763, that the Magistrate can summon only those persons for examination whose affidavits have been put in, needed reconsideration. So, he referred the matter to a Bench. In these circumstances, this reference has come up for hearing before us. We have heard Sri Chauhan, Counsel for the opposite parties. Nobody, however, appeared from the side of the applicant in spite of sufficient service. Since the matter was of some importance, we also called upon the Government Advocate to address us.

2. In AIR 1959 All 763 (Supra) Desai, J. interpreting the provisions of sub-sections (4) and (9) of Section 145 of the Criminal P. C. observed:

"The provisions of Section 145 were amended with effect from 1-1-1956 by the Criminal P. C. (Amendment) Act (No. 26 of 1955). Previously affidavits were not allowed to be produced and witnesses had to be examined orally. Now the law has been changed and the legislature has provided that only affidavits should be put in evidence and that if any witnesses are to be examined, they must be the persons whose affidavits have already been put in; no person can be examined as a witness unless his affidavit is on the record.....

Sub-section (4) lays down how the sub-Divisional Magistrate is to proceed after the parties have appeared before him; he is required to peruse the written statements, documents and affidavits, if any put in, hear the parties and decide which party was in possession on the relevant date. There is a proviso to the effect that he 'may, if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained therein'. This provision means that he is required to peruse only the statements,

documents and affidavits and then hear the parties and conclude the inquiry; he is not required to examine any person as a witness.

Sub-section (9) does not confer any right upon a party to examine a person as its witness; it only lays down the procedure to be followed in procuring the attendance of its witnesses. Whether it has a right to examine a witness or not has to be ascertained from other provisions. All that the sub-section means is that if a party has a right to examine a witness orally, it may obtain from the Magistrate a summon directing him to attend the Court. The first proviso to sub-section (4) is the only provision which confers a right upon a party to examine a witness orally in the Court; so sub-section (9) must be read with the first proviso to sub-section (4).

The Magistrate's failure to pass a proper order contemplated by Section 145 (1) and to require the parties to put in affidavits does not confer any right on the parties to examine witnesses whose affidavits are not on the record.....

This view was also followed by the Division Bench in the case of S. Jodh Singh v. Mahant Bhagambar Das, AIR 1961 Punj 187.

"Though we feel that the continued existence of sub-section (9) in its present form is certainly not very apt and requires looking into by the Legislature, yet we have no doubt in our mind that it gives no right to a party to summon or examine any witness orally apart from the right given to it to adduce evidence as detailed in sub-section (1) and that oral examination of a witness must be confined within the limits imposed by the newly added proviso namely the first proviso to sub-section (4)."

With the greatest respect we do not agree with the view expressed in these cases. Our reasons shall follow.

3. For finding out the real intention of the Legislature, we propose to examine in detail the provisions of Section 145 of the Criminal P. C. as they stand after the amendment by Act 26 of 1955. The section reads:

"(1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective

(Supra). In that connection, Ramratna Singh, J. observed:

"With the greatest respect, I am unable to agree. There is nothing in the language of the proviso to sub-section (4) or in that of sub-section (9) to indicate that the former confers a right upon a party to examine a witness orally. It will be noticed that the expression 'if he thinks fit' occurs in both the sub-sections and this expression shows that the discretion lies with the Magistrate. Further, the proviso to sub-section (4) does not speak of the application of a party, which fact indicates that the Magistrate may examine a person who has sworn an affidavit either of his own motion or at the request of a party, whereas sub-section (9) enables the Magistrate to summon a witness at the request of a party at any stage of the proceedings. It will also be noticed that the proviso to sub-section (4) contains the provision to summon and examine any person and therefore, a separate provision like the one in sub-section (9) is not required for exercising the power given by the proviso. The view taken in the aforesaid decisions can be justified only if sub-section (9) is completely ignored. This sub-section was, in its present form, before the legislature, when extensive amendments were made in 1955 in Ss. 145 and 146.

The retention of sub-section (9) in its old form cannot, therefore be due to mere oversight. It is true that the amendments aimed at expeditious disposal of a proceeding under Section 145; nevertheless, sub-section (9) was retained. The newly added proviso to sub-section (4) certainly empowers the Magistrate to summon and examine any person whose affidavit has been put in; but at the same time the legislature also empowered the Magistrate, under sub-section (9), to summon any witness at any stage of the proceeding on the application of either party. Neither in sub-section (9) nor in the proviso to sub-section (4) a party has been given any right to examine a witness; in either case the discretion lies with the Magistrate, and he can summon a person under either of these provisions only if he thinks fit to do so.

In my opinion, the legislature deliberately allowed sub-section (9) to continue for meeting certain contingencies. It may not be possible for a party to obtain the affidavits of some persons either because they do not want to be identified with a party to the dispute or because they are public servants; at the same time such persons may be very competent to speak about possession. What remedy has a party in such a contingency? A party may, of course, request the Magistrate to ask such a person to swear an affidavit; but the Magistrate has no power to compel such a person to do so. The only

other alternative, therefore, for the party is to request the Magistrate to summon such a person and examine him as a witness; and this can be done only under sub-section (9). Of course, the Magistrate is not bound to comply with the request of the party; but he has to exercise his discretion judiciously—not arbitrarily. For instance, the Magistrate should ordinarily accede to the request of a party to summon and examine a government servant who may be quite competent to speak about the possession of a disputed land.....

My considered opinion, therefore, is that a Magistrate may, at the request of a party, examine, if he thinks fit a person as a witness under sub-section (9) of Section 145, even if such a person has not filed an affidavit contemplated by sub-section (1) of that section."

10. In AIR 1960 Raj 15, Bahori v. Ghure it was held:—

"The proviso to sub-section (4) of Section 145 is merely an enabling provision of law which entitles the Magistrate to summon and examine any of the persons whose affidavits have been filed on behalf of the parties, if he so desires in order to decide the question of possession; but the proviso does not preclude the Magistrate from calling as a witness any other person that he thinks proper to examine. Sub-section (9) of S. 145 contemplates such a situation. Sub-section (9) says that the Magistrate, if he thinks fit, at any stage of the proceedings under the section, on the application of either party, issue summons to any witness directing him to attend or to produce any document or thing. If on the application of either party to the proceeding the Magistrate can do so, he can do so equally in the ends of justice of his own accord....."

11. In AIR 1961 Madh Pra 302, Indore Bench Kanhaiyalal v. Devi Singh it was held:—

"Under Section 145, summons to examine witnesses can be issued either under the first proviso to sub-section (4) or under sub-section (9). If they are issued under the former provision, obviously, the summons can be addressed only to those who have put in affidavits; the examination also should be restricted to the contents of the affidavits. The proviso enables the Magistrate to summon and examine a person who puts in affidavit possibly where he finds the affidavit vague or one otherwise calling for some clearing.

But sub-section (9) is wider than the first proviso to sub-section (4) and is not limited by the latter. Sub-section (9) really enables any party to move the Magistrate to issue summons for the attendance of any witness who may or may not be a person putting in an affidavit. But the matter of issuing summons under

sub-section (9) is discretionary with the Magistrate. Indiscriminate application of that sub-section will certainly defeat the purpose of the amendment to sub-s. (1) and draw over the proceedings just as long as they could have been under the un-amended law. Thus, simply because a summons had been issued to witnesses other than those putting in the affidavits and they had been examined and their oral evidence considered, it cannot be said that there has been any breach of a mandatory provision. The issue of summons under sub-section (9) without any affidavit at all cannot be considered to be an illegality going to the root of the proceedings."

12. In AIR 1964 Mad 263, Challamuthu Padayachi v. Rajavel it was held:

".....The powers under sub-s. (9) to summon a witness directing him to attend or produce a document at any stage of the proceedings on the application of the parties are not in any way affected by the first proviso to sub-section (4) and the Magistrate can summon any witness under Section 145 (9) to give evidence or to produce a document even though he may not have filed an affidavit under Section 145 (1)."

Similar matter also came up for consideration before the Division Bench of this Court in AIR 1965 All 294, Lalta Ram v. Dalip Singh. Their Lordships observed:

"The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or things. The aforesaid section was amended by the Criminal P. C. Amendment Act No. 26 of 1955. Prior to the amendment of the section the parties had the right to examine witnesses in support of their respective cases. One of the changes effected by the Amendment Act, referred to above, was that provision was made for the filing of affidavits and the object underlying the aforesaid change was expedition in the disposal of cases and simplification of procedure. The aforesaid change was not brought about because the procedure of examining the witnesses was considered to be either illegal or faulty and we have no doubt that in introducing the aforesaid change expeditious disposal of the proceedings under Section 145, Criminal P. C. was in the contemplation of the Legislature.

.....There is nothing in S. 145 as it now stands, to indicate that the intent of the Legislature was that the examination of witnesses would be illegal or that a Court would be precluded from recording oral statements of witnesses proposed to be examined by the parties even in cases in which the parties were not required to and did not file affidavits in support of their respective cases."

... ..

"In AIR 1959 All 763, Desai, J., as our Lord the Chief Justice then was, held that under the amended Section 145 of Criminal P. C. only affidavits could be put in evidence and that if any witnesses were to be examined they must be persons whose affidavits had already been put in. With great respect to him we find ourselves unable to agree with the general proposition laid down in that case. The aforesaid decision was followed by the Punjab High Court in the case of AIR 1961 Punj 187. A different view was taken in the case of AIR 1960 Raj 15. In that case a patwari was examined as a Court witness and the question arose as to whether such examination was countenanced by provisions of the Code. It was held that proviso to sub-section (4) of S. 145 was merely an enabling provision of law but it did not preclude the Magistrate from calling as a witness any other person that he thought proper to examine."

13. There are numerous cases which lay down that the provisions of S. 540 of the Criminal P. C. also apply to the proceedings under S. 145. In the instant case, however, there is no such controversy. We are only concerned with the provisions of sub-sections (4) and (9) as discussed earlier.

14. In this view, we hold that the Magistrate clearly erred in summarily rejecting the application of the petitioner for summoning the Lekhpal and directing him to file an affidavit. He was fully competent under S. 145 (9) of the Cr. P. C. to have granted that prayer if it was necessary in the ends of justice and for proper decision of the rights of the parties. In the circumstances, the reference is allowed and the recommendation made by the Sessions Judge, Lucknow, is accepted. The order of the Magistrate dated 7th June, 1966 is quashed and he is directed to decide the application of the petitioner for summoning the Lekhpal on the merits.

Reference allowed.

AIR 1970 ALLAHABAD 159 (V 57 C 20)
G. C. MATHUR J.

Durga Prasad, Petitioner v. Board of Revenue U. P. Allahabad and others, Opposite Parties.

Civil Misc. Writ No. 3755 of 1966, D/- 9-12-1968.

(A) Tenancy Laws — U. P. Urban Areas Zamindari Abolition and Land Reforms Act (9 of 1957), S. 2 (1) (d)—Construction — Area held on lease duly executed before 1-7-1955 for purpose of erecting building thereon can be included within the meaning of "agricultural area" in S. 2 (1), if being used for cultivation.

FM/FM/C531/69/GGM/B

Area which is held on a lease duly executed before July 1, 1955, for the purposes of erecting buildings thereon, can be included within the meaning of "agricultural area" as defined in Section 2 (1), only if the area is being used by the lessee or his sub-lessee for cultivation. It follows from this that, if the area is not being so used for cultivation but has been built upon, it does not come within the mischief of Cl. (d) of S. 2 (1) of the Act and cannot be demarcated as agricultural area. (Para 9)

(B) Civil P. C. (1908), Pre. — Interpretation of Statutes — Reading or adding words into a statutory provision is permissible only where the language employed in the statute does not represent legislative intent — Construction of S. 2 (1) (d) of U. P. Act 9 of 1957.

It is only when a Court can be certain that the language employed by the Legislature does not represent its avowed intention, if interpreted literally and grammatically, or when there are adequate grounds to justify the inference that the Legislature intended something which it had omitted to express, that words can legitimately be added to or taken out from the language of the statute in interpreting it.

Legislation and Interpretation by Jagdish Swarup; Maxwell on Interpretation of statutes: AIR 1955 Bom 113 & 1910 AC 409 & 1910 AC 444 & (1951) 1 KB 547 & AIR 1966 SC 1678 & AIR 1958 SC 56 & AIR 1949 All 261, Ref. (Para 7)

The words "but is being used by the lessee or his sub-lessee for cultivation" should be read in Section 2 (1) (d) of the U. P. Urban Areas Zamindari Abolition and Land Reforms Act. The intention of the legislature in enacting Section 2 (1) (d) was to keep all "parti" and built up areas outside the scope of the Act and to confine its operation to agricultural areas alone. The intention further was to give protection to a limited class of lessees, namely, those who had taken land for building purposes but were themselves or through their sub-lessees using it for cultivation. If the words "but is being used by the lessee or his sub-lessee for cultivation" are read in Section 2 (1) (d), it will not only give full effect to the clear intention of the legislature but will also avoid the anomalies and the discrimination which result from a literal interpretation. The area covered by Section 2 (1) (d) will then be an agricultural area as ordinarily understood also and Bhumidhari and asami rights under Ss. 17 (1) (b) and 19 (i) will be conferred in really agricultural areas and not in built up areas. 1969 All LJ 47, Dist. (Paras 7 & 8)

(C) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (9 of 1957), Preamble — Object of the statute.

The long title and the preamble show that the Act deals only with agricultural areas falling within a municipality, a notified area or a cantonment. "Agricultural area" here means agricultural area as commonly understood. The aim and object of the Act is to acquire the rights of intermediaries in the agricultural areas where they stand between the State and the tiller of the soil. The further object is to introduce land reforms in the agricultural area. None of these objects can be achieved by holding that agricultural area includes an area covered by buildings. In such areas, the zamindar does not stand in the position of an intermediary between the State and the tiller of the soil. Equally, no land reforms can be introduced in such an area. (Para 5)

Cases Referred: Chronological Paras

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|---|---|
| (1968) Spl. Appeal No. 5 of 1968, D/-9-9-1968 = 1969 All LJ 47, Ishar Singh v. Board of Revenue | 8 |
| (1966) AIR 1966 SC 1678 (V 53) = (1966) 3 SCR 466, Shyam Kishori Devi v. Patna Municipal Corpora- tion | 7 |
| (1958) AIR 1958 SC 56 (V 45) = 1958 Cri LJ 228, Ramaswamy Nadar v. State of Madras | 7 |
| (1955) AIR 1955 Bom 113 (V 42) = 1955 Cri LJ 423, Mohandas Issardas v. A. N. Sattanathan | 7 |
| (1951) 1951-1 KB 547 = 1951-1 All ER 249, Tinkham v. Perry | 7 |
| (1949) AIR 1949 All 261 (V 36) = ILR (1949) All 391, Tafazzul v. Shah Mohammad | 7 |
| (1910) 1910 AC 409 = 79 LJKB 905, Thompson v. Goold & Co. | 7 |
| (1910) 1910 AC 444 = 79 LJKB 954, Vickers Sons & Maxim Ltd. v. Evans | 7 |
| G. N. Verma, for Petitioner; K. L. Grover, for Opposite Parties. | |

ORDER:— The petitioner is the zamindar of plots Nos. 1616 and 1617 which lie within the municipal limits of Saharanpur. On August 13, 1946, he executed a registered lease of these two plots for 20 years at a yearly rent of Rs. 1,000 in favour of one Babu Ram. On a portion of these plots stood two Kothas and a pucca well. The lease was given for the purpose of construction of buildings on the land. Babu Ram transferred his lease rights in favour of Ram Singh and Pratap Singh who, in their turn, transferred the rights in favour of Hari Ram and Labh Chand. Labh Chand transferred his rights in favour of Gopal Das. The lessee constructed a rice mill and other pucca constructions on the land and these constructions still stand.

2. After the U. P. Urban Areas Zamindari Abolition and Land Reforms Act, 1956 (hereinafter referred to as the Act) came into force, a notification was

published by the State Government under Section 3 of the Act for demarcating the agricultural area in district Saharanpur. In the original proposals issued by the Commissioner, these two plots were not included in the agricultural area. Respondents Hari Ram and Gopal Das, thereupon, filed objections under S. 4 (3) of the Act before the Demarcation Officer that these two plots should also be included in the agricultural area. The Demarcation Officer referred the matter to the Additional Commissioner. By order dated January 10, 1966, the Additional Commissioner held that the plots, even though buildings stood thereon, were agricultural area as contemplated by Sec. 2 (1) (d) of the Act and directed that they be so demarcated. Against this order, the petitioner filed an appeal before the Board of Revenue. It was urged by the petitioner that, under Section 2 (1) (d), an area would be agricultural area only if buildings had not been erected on it. The Board did not accept this contention and, on September 19, 1966, dismissed the appeal. The petitioner now challenges these two orders.

3. The case has been ably argued by Shri G. N. Verma, learned counsel for the petitioner, and he has also collected much useful material and placed it before the Court. In order to appreciate the arguments, it is necessary to set out the relevant provisions of the Act. Section 2 is the definition section and sub-section (1) thereof, which defines "agricultural area", is in these words:—

"2(1) 'Agricultural area' as respects any urban area means an area which, with reference to such date as the State Government may notify in that behalf, is—

(a) in the possession of or held or deemed to be held by an intermediary as sir, khudkasht or an intermediary's grove;

(b) held as a grove by or in the personal cultivation of a permanent lessee in Avadh; or

(c) included in the holding of—
(i) a fixed-rate tenant,
(ii) an ex-proprietary tenant,
(iii) an occupancy tenant,
(iv) a tenant holding on special terms in Avadh,

(v) a rent-free grantee,
(vi) a grantee at a favourable rate of rent,

(vii) a hereditary tenant,
(viii) a grove-holder,
(ix) a sub-tenant referred to in sub-section (4) of S. 47 of the U. P. Tenancy Act, 1939; or

(x) a non-occupancy tenant of land other than land referred to in sub-s. (3) of Section 30 of the U. P. Tenancy Act, 1939, and is used by the holder thereof for purposes of agriculture or horticulture:

Provided always that land which on the date aforesaid is occupied by buildings not

being 'improvements' as defined in S. 3 of the U. P. Tenancy Act, 1939, and land appurtenant to such buildings shall not be deemed to be agricultural area.

(d) held on lease duly executed before the first day of July, 1955, for the purposes of erecting buildings thereon; or

(e) held or occupies by an occupier.

"Explanation— An area, being part of the holding of a tenant, shall not be deemed to have ceased to be agricultural area by reason merely that it has not been used, during the seven years preceding the commencement of this Act, for raising crops or other agricultural produce".

Section 3 provides that the State Government may, with a view to acquisition under the provisions of the Act of the rights, title and interest of intermediaries in urban areas, direct, by notification in the official Gazette, that the agricultural area situated in any such area be demarcated. It further provides that, on the publication of the notification, the Demarcation Officer shall make inquiries and shall determine and demarcate the agricultural area. Section 4 provides for the publication of preliminary proposals and for the filing of objections against those proposals. The final demarcation is provided for in Section 5. Section 8 provides that, after the agricultural area has been demarcated, the State Government may, by notification in the official Gazette, declare that such area shall vest in the State. Section 10 provides for the consequences of vesting. Section 17 provides for the settlement of certain lands with intermediaries or cultivators as bhumidhars. Clause (b) of sub-s. (1) of this section reads:—

"17(1) Subject to the provisions of Sections 16 and 18—

(a)

(b) all lands in an agricultural area held on lease duly made before the first day of July, 1955, for the purpose of erecting building thereon,

shall be deemed to be settled by the State Government with such intermediary, lessee, who shall, subject to the provisions of this Act, be entitled to take or retain possession as a bhumidhar thereof".

Section 19 makes provision for the conferment of asami rights. Clause (j) thereof provides that notwithstanding anything contained in the Act, every person who, on the date immediately preceding the date of vesting, occupies or held land in an agricultural area as a sub-lessee from a person holding land under a lease referred to in Cl. (b) of sub-section (1) of S. 17 shall be deemed to be an asami thereof. Section 20 (1) empowers a person who has become a bhumidhar under Section 17 (1) (b) to make an application for the ejectment of the asami under Sec-

tion 19 (j) on the ground that he wants the land for purposes of erecting buildings thereon.

4. Learned counsel for the petitioner has contended that, if the words of Cl. (d) of Section 2 (1) are literally construed as they stand and it is held that Cl. (d) includes an area which is covered by buildings, then it would result in serious anomalies as well as discrimination. He further contends that such an interpretation would be against the object and intention of the Legislature. It is apparent that it would be doing violence to the ordinary meaning of the expression "agricultural area" to include built-up areas in it. One result of accepting the interpretation put on Clause (d) by the Board of Revenue and supported by the lessees would be that, under Section 17 (1) (b), bhumidhari rights, which are essentially cultivatory rights, will be conferred in respect of an area which is covered by buildings or which may be lying parti and is not under cultivation at all. It will also result in this inconsistency that whereas, under Clause (c) where admittedly agricultural plots in possession of agricultural tenants are occupied by buildings not being improvements, they will not be included in the agricultural area, whilst, admittedly non-agricultural plots, upon which buildings stand, will be included in the agricultural area. Lastly, such an interpretation will result in discrimination in two ways: First, such areas, on which buildings have been constructed by lessees holding under leases duly executed before July 1, 1955, will become agricultural areas, but areas, on which buildings have been constructed by the zamindar himself or by licensees or by lessees holding otherwise than on lease duly executed before July 1, 1955, will not be included in the agricultural area. Secondly, in the urban areas, the rights of landlords, who have granted similar leases but to whom the Act is not applicable, will remain intact, whilst the rights of the landlords (zamindars), to whom the Act applies, will be abolished.

5. The question is whether the Legislature intended such consequences. The long title of the Act is:

"An Act to provide for the abolition of zamindari system in agricultural areas situate in urban areas in U. P., and for the acquisition of the rights, title and interest of intermediaries between the tiller of the soil and the State in such areas and for the introduction of the land reforms therein."

The preamble to the Act reads:

"Whereas it is expedient to provide for the Abolition of Zamindari system in agricultural areas situate in Urban Areas in U. P. and for the acquisition of the rights,

title and interest of intermediaries between the tiller of the soil and the State in such areas and for the introduction of the land reforms therein."

The long title and the preamble show that the Act deals only with agricultural areas falling within a municipality, a notified area or a cantonment. "Agricultural area" here means agricultural area as commonly understood. The aim and object of the Act is to acquire the rights of intermediaries in the agricultural areas where they stand between the State and the tiller of the soil. The further object is to introduce land reforms in the agricultural area. None of these objects can be achieved by holding that agricultural area includes an area covered by buildings. In such areas, the zamindar does not stand in the position of an intermediary between the State and the tiller of the soil. Equally, no land reforms can be introduced in such an area.

6. The history of the legislation shows unmistakably that it was never intended to abolish the rights of the zamindars in areas which were covered by buildings or which were parti. The U. P. Urban Areas Zamindari Abolition & Land Reforms Bill, 1955, was first published in the Extraordinary Gazette dated August 6, 1955. Para. 2 of the Statement of Objects and Reasons accompanying the Bill states:

"2. This Bill provides for the acquisition of the rights of intermediaries in lands situate within urban limits and held either by tenants, rent-free grantees, grantees at favourable rates of rent and groveholders or by intermediaries as 'sir', khudkasht or groves and also for the introduction of land reforms similar to those that have been brought into force in the rural areas. The Bill does not seek to interfere with the possession and rights in the built-up or uncultivated areas. In order to obviate hardship to lessees who have taken leases of land for building purposes after a particular date, but 'have let it out temporarily for cultivation', it has been provided in the Bill that such lessees will be able to eject their sub-tenants and utilise the land for building purposes."

(Underlined (here into ' ') by me).

The Bill did not contain either Cl. (d) or Cl. (e) of Section 2. (1). It, however, contained Section 17 (1) (b) in the same form as it is in the present Act. Section 19 (j) was also in the same form in the Bill. But there was no provision in the Bill corresponding to the present Section 20 (1). The Bill was introduced in the Legislative Assembly on August 19, 1955. The Bill was referred to a Joint Select Committee. The Joint Select Committee made certain changes in the Bill. The report of the Joint Select Committee and the Bill, as amended by it (hereinafter referred to as the Amended Bill)

were published in the U. P. Gazette dated February 4, 1956. Clause (d) of S. 2 (1) and S. 20 (1) were incorporated in the Amended Bill by the Joint Select Committee. Clause (d) was introduced in the following form:—

“(क) इमारतें बनाने के प्रयोजनों के लिये १ जुलाई १९५५ के पूर्व यथावत निष्पादित (duly made) लिखित पट्टे पर हो, किन्तु उस पर काबिज व्यक्ति (holder) या ऐसा अन्य व्यक्ति जो उस व्यक्ति के आधार पर स्वत्व रखने का दावा करता हो, उसको उसकी कृषि के प्रयोजनों के लिये काम में लाता हो।”

The Amended Bill was placed before the Legislative Assembly and was passed on September 3, 1956, in the same form in which it had been submitted by the Joint Select Committee. In paragraph 6 of the counter-affidavit of Sri Narain Prasad filed on behalf of the State Government, it is admitted that the Bill, as amended by the Joint Select Committee, was considered and passed by the U. P. Vidhan Sabha on September 3, 1956, without any amendment. After a Bill is passed by the Legislative Assembly, the Secretary of the Assembly is required to re-number the clauses, revise and complete marginal notes and to make purely formal, verbal or consequential amendments. In exercise of his power to make formal amendments, the Secretary deleted the following words from Cl. (d) of S. 2 (1):—

“किन्तु उस पर काबिज व्यक्ति (holder) या ऐसा अन्य व्यक्ति जो उस व्यक्ति के आधार पर स्वत्व रखने का दावा करता हो, उसको कृषि के प्रयोजनों के लिये काम में लाता हो।” He also substituted

the words “पट्टे पर अध्यासित हो” for the words “पट्टे पर हो” in this clause. This fact is admitted in paragraph 8 of the counter-affidavit of Sri Narain Prasad. Thereafter Clause (d) read thus:—

“(क) इमारतें बनाने के प्रयोजनों के लिये १ जुलाई १९५५ के पूर्व यथावत निष्पादित (duly made) लिखित पट्टे पर अध्यासित हो, अथवा”

The Secretary probably thought that, by introducing the word “अध्यासित” the implications of the word “अध्यासी” as defined in Section 2 (9), will be brought in. The Bill, as passed by the Legislative Assembly and as formally amended by the Secretary, was moved before the Legislative Council on December 26, 1956. It may be mentioned that the Bill was moved by the Hon'ble Minister for Agriculture and he read out to the Council the same Statement of Objects and Reasons which accompanied the original Bill and para. 2 of

which has been set out above. In paragraph 10 of the counter-affidavit of Sri Narain Prasad, it is admitted that the Legislative Council passed the Bill on December 26, 1956, without any amendment. Thereafter the Bill received the assent of the Governor and of the President. From these facts it is abundantly clear that the Legislature never intended to include areas, which were either parti or were covered by buildings, within the purview of the Act. The Legislature adopted Cl. (d) of Section 2 (1) in the form in which it was introduced by the Joint Select Committee. At no stage did it manifest any intention to alter it.

It appears that the Secretary of the Legislative Assembly made certain changes in Cl. (d) apparently as he thought that those changes will not alter the substance or meaning of the clause as passed by the Legislative Assembly. He had no power to alter the substance or meaning of any provision passed by the Legislature. It appears to me that the Legislative Council also understood Cl. (d) of Section 2 (1) as having the same content as the clause introduced by the Joint Select Committee.

There is, to my mind, no doubt that the Legislature did not seek to interfere with the possession and rights in the built-up or parti areas. It merely sought to give protection to those lessees who had taken land for purposes of erecting buildings thereon before July 1, 1955, but were themselves or through their sub-lessees using it for cultivation. There was no intention to touch any land which was not agricultural land and had merely been taken on a lease for erection of buildings, whether buildings were constructed on it or not.

It thus appears that the Legislature intended that Cl. (d) of Section 2 (1) should apply only to cases where the lessee or his sub-lessee was using the land for cultivation. It has been brought to my notice that, in the English version of the Bill, as amended by the Joint Select Committee, which was also published in the Gazette, Cl. (d) was in the same form as it is today in the Act. The question is not as to whether the English version or the Hindi version is to prevail but as to what was the intention of the Legislature. It appears that the Joint Select Committee added Cl. (d) in Hindi and the Hindi version of the Amended Bill was placed before the Legislative Assembly. There is no conflict in the Hindi and English version of the Act.

7. Now the question, which arises, is whether it is permissible to read or add words to Cl. (d) of Section 2 (1) to give effect to the intention of the Legislature. It is the fundamental principle of construction that, ordinarily, words should not be added to a statute. Words should

not be added by implication into a statute unless it is necessary to do so to give the language sense and meaning in its context. In *Syam Kishori Devi v. Patna Municipal Corporation*, AIR 1966 SC 1678 the Supreme Court observed:

"It is well known rule of construction that a Court must construe a section, unless it is impossible to do so, to make it workable rather than to make it unworkable. In the words of Lord Bramwell, the words of a statute never should in interpretation be added to or subtracted from, without almost a necessity."

In *Ramaswamy Nadar v. State of Madras*, AIR 1958 SC 56, the Supreme Court observed that if, in construing the section, the Court has to supply some words in order to make the meaning of the statute clear, it will naturally prefer the construction which is more in consonance with reason and justice. In this case, the Supreme Court added certain words to Section 423 (1) (a) of the Code of Criminal Procedure. In *Taffazzul v. Shah Mohammad*, AIR 1949 All 261, it was observed by Seth, J.:—

"It is a well recognised canon of construction that it is the duty of the Court to interpret a section as it exists without adding to it and without subtracting from it. It is only when a Court can be certain that the language employed by legislature does not represent its avowed intention, if interpreted literally and grammatically, that it can be justified in adding words to or taking out words from the language of the statute in interpreting it."

In *Mohandas Issardas v. A. N. Sattanathan*, AIR 1955 Bom 113, Shah, J. (as he then was) observed:

"The intention of the Legislature in enacting a statute must be found from the words used therein, and in the absence of overriding reasons inherent in the statute the Code is not justified in adding words thereto."

It was observed by Lord Mersey in *Thompson v. Gould & Co.*, 1910 AC 409:

"It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do".

In *Vickers, Sons & Maxim, Ltd. v. Evans*, 1910 AC 444, Lord Loreburn observed:

"We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

In *Tinkham v. Perry*, 1951-1 KB 547, Evershed M. R. remarked:

"Words plainly should not be added by implication into a statute unless it is necessary to do so to give the language sense and meaning in its context."

It is thus well settled that Courts can, in certain circumstances, read or add words

into the provisions of a statute which are not there. Maxwell on Interpretation of Statutes states:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation or by rejecting them altogether under the influence, no doubt, of irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the Courts are very reluctant to substitute words in a statute or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense".

In Jagdish Swarup's *Legislation and Interpretation*, it is stated:

"It is only when a Court can be certain that the language employed by the Legislature does not represent its avowed intention, if interpreted literally and grammatically, or when there are adequate grounds to justify the inference that the Legislature intended something which it had omitted to express, that words can legitimately be added to or taken out from the language of the statute in interpreting it."

I fully agree with this statement of the law. The present is not a case where one has to speculate about the intention of the Legislature. It is clear beyond any doubt. The intention was to keep all parti and built-up areas outside the scope of the Act and to confine its operation to agricultural areas alone. The intention further was to give protection to a limited class of lessees, namely, those who had taken land for building purposes but were themselves or through their sub-lessees using it for cultivation. If the words "but is being used by the lessee or his sub-lessee for cultivation" are read in Section 2 (1) (d), it will not only give full effect to the clear intention of the Legislature but will also avoid the anomalies and the discrimination which result from a literal interpretation. The area covered by Section 2 (1) (d) will then be an agricultural area as ordinarily understood also and bhumidhari and asami rights under Sec-

tions 17 (1) (b) and 19 (j) will be conferred in really agricultural areas and not in built-up areas. The discrimination, to which reference has been made above, will also not arise on this interpretation and the inconsistency between Cl. (c) and Cl. (d) of S. 2 (1) will also disappear. For these reasons, in my opinion, the words "but is being used by the lessee or his sub-lessee for cultivation" should be read in Section 2 (1) (d). It is not really a question of adding anything to Section 2 (1) (d) for it is quite clear what the intention of the Legislature was, and the omission of certain words that one would expect to find there is nothing more than the faultiness of expression. It appears that the Secretary of the Assembly, who made formal amendments to the Bill as passed by the Legislative Assembly as well as the Legislative Council understood the amended Section 2 (1) (d) to mean the same thing as the clause introduced by the Joint Select Committee in the original Bill.

8. My attention was drawn to the decision of a Division Bench of this Court in *Ishar Singh v. Board of Revenue Special Appeal No. 5 of 1968, D/-9-9-1968 (All)*, where also Section 2 (1) (d) of the Act came up for interpretation. But the question, which arose in that case, was different, namely, whether the word 'buildings' in Section 2 (1) (d) meant permanent buildings or include temporary buildings also. The Division Bench held that it did not include temporary buildings and therefore, the area in that case, which had been leased out for construction of temporary buildings, was held not to be agricultural area. So far as I can see, there is no conflict in the view which I am inclined to take and the view taken by the Division Bench. In either view, the area in the case before the Division Bench falls outside the ambit of S. 2 (1) (d).

9. I have, therefore, come to the conclusion that an area, which is held on a lease duly executed before July 1, 1955, for the purposes of erecting buildings thereon, can be included within the meaning of "agricultural area" as defined in Section 2 (1), only if the area is being used by the lessee or his sub-lessee for cultivation. It follows from this that, if the area is not being so used for cultivation but has been built upon, it does not come within the mischief of Cl. (d) of S. 2 (1) of the Act and cannot be demarcated as agricultural area.

10. I accordingly allow this writ petition and quash the order of the Additional Commissioner dated January 10, 1966, and the order of the Board of Revenue dated September 19, 1966. Parties will bear their own costs of this petition.

Petition allowed.

AIR 1970 ALLAHABAD 165 (V 57 C 21)

M. H. BEG J.

Hind Auto Indo Ltd., Applicant v. M/s. Premier Motors (P) Ltd. and another, Opposite Parties.

Company Appln. No. 37 of 1968, D/-15-10-1968.

(A) Civil P. C. (1908), Pre. — Interpretation of Statutes — Rule of construction.

A statute cannot be interpreted in such a way as to limit the ambit of the words used by reading words into it unless there is some overriding need to reconcile a conflict with a statutory provision.

(Para 12)

(B) Companies Act (1956), Ss. 391 (1), 394-A (as inserted by Act 31 of 1965), 396, 643 (1) and (2), 643 (1) (b) (iii) — Companies (Court) Rules (1959), Rr. 9, 11, 11 (a) (10), 11 (b), 67, 69 — Application under S. 391 (1) — Both Central Government and share-holders of Company are entitled to notice. (1967) 37 Com Cas 195 (Cal) & (1968) 38 Com Cas 197 (Mad), Dissented from.

Both the Central Government as well as the share-holders of the Company, who are distinct legal entities apart from the company, are entitled to be heard before a decision is taken under S. 391 (1). This is implied from the nature of the function to be performed by the Court under Sec. 391 (1). The function is undoubtedly a judicial function in a proceeding which begins with the filing of an application before the Court and terminates in an order under Section 391 (1) before another stage or proceeding under Sec. 391 (2) is commenced and terminated. The correct rule to be applied in such cases is that, unless the right of the parties concerned is necessarily excluded by some clear statutory provision, notice should be given to them. Accordingly, both the Central Government as well as the share-holders are entitled to a notice under Section 394-A at this stage. (1967) 37 Com. Cas 195 (Cal) & (1968) 38 Com Cas 197 (Mad), Dissented from; AIR 1951 SC 41, Rel. on.

(Paras 15, 17)

No limitation can be imposed in Section 394-A of the Act confining the term 'application' to a petition when Rr. 67, 11, 11 (a), (10), 11 (b), of Companies (Court) Rules clearly indicate that the word 'applications' cover applications by summons as well as applications by means of petitions. The limitation can only be introduced by adding words. There is nothing either in the enactment or in the rules to indicate that the word 'application' is used in Section 394-A for applications by petitions only. Nor is there any conflict between Section 394-A and the Companies (Court) Rules. AIR 1955 All 131, Rel. on.

(Paras 7, 10, 12)

Companies (Court) Rules made by the Supreme Court for the purposes given in Section 643 of the Act cannot be used to interpret the intentions of Parliament in enacting Section 394-A in 1964. (Para 8)

Even if the rules do not specifically provide for notice, R. 9 of the Companies (Court) Rules enables the High Court, in the exercise of its inherent powers, to issue directions for service of notice upon the parties interested or concerned, if no specific rule is there for this purpose.

(Para 17)

(C) Companies Act (1956), S. 643 (1) & (2) — Rules framed under — Companies (Court) Rules (1959), R. 32 — Mode of service — All that the rule requires is service of summons and not of other material — This rule is subject to any order of Court which may suitably modify or adopt mode of service to the requirements of a case.

(Para 18)

Cases Referred: Chronological Paras

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| (1968) (1968) 38 Com Cas 197 = | |
| (1968) 1 Com LJ 102 (Mad), In re, | |
| W. A. Beardsell & Co. (P) Ltd. | 5, 6 |
| (1967) 1967-37 Com Cas 195 = 70 | |
| Cal WN 486, Bangeswari Cotton | |
| Mills Ltd. In the matter of | 5, 6, 7, 11 |
| (1955) AIR 1955 All 131 (V 42) = | |
| 1955 All LJ 244, Iswari Prasad v. | |
| Registrar University of Allahabad | 12 |
| (1951) AIR 1951 SC 41 (V 38) = | |
| 1950 SCR 869, Charanjit Lal | |
| Chowdhury v. Union of India | 17 |
| J. Swarup, V. Swarup and G. P. | |
| Swarup, for Petitioner; S. N. Verma, for | |
| Opposite Parties. | |

ORDER:— This is an application by a company under Section 391 (1) of the Companies Act which has given rise to preliminary questions at the outset before the issue of any notice either to the Central Government under Section 394-A or to the share-holders of the company. Mr. Jagdish Swarup, learned counsel for the applicant company, submitted that no notice at this stage need be given either to the Central Government or to the share-holders because all that was prayed for, by means of summons in Form 33, was a set of directions for convening, holding and conducting of meetings after the appointment of a chairman for the consideration of a scheme by equity and preference share-holders of the company. It was submitted that neither the Central Government nor the share-holders had a locus standi before meetings had been convened and had considered the proposed amalgamation of the company with M/s. Automobile Products of India Ltd., Bombay.

2. Mr. S. N. Kacker has appeared on behalf of a share-holder even before issue of notice and has been heard on the question whether the share-holders are entitled to a notice of such an application before any directions are given. By an

order of this Court, passed on 7-10-1968, a notice of the application was also served upon the Standing Counsel for the Central Government so that he may also be heard on the preliminary question whether a notice of the application before the Court should go to the Central Government at this stage. Consequently, Mr. H. N. Seth appeared for the Central Government and submitted that the Central Government was also entitled at this stage to a notice under Section 394-A of the Act, before any order is passed to convene a meeting.

3. Learned counsel for the applicant has pointed out that there are two methods under the Companies (Court) Rules 1959, in which applications may be made. The first is by means of an application through summons and the other is by means of a petition. The method for applying under Section 391 (1), given by Rule 67, is by means of a summons supported by an affidavit. The summons has to be in Form 33 which may be reproduced as follows:

"Company Application No. _____ of 19, _____ Applicant (s) Summons for directions to convene a meeting under Section 391.

Let all parties concerned attend the Judge in Chambers on.....day, the.....day.....of.....19,.....at.....O'clock in thenoon of the hearing of an application of the above named company (or of the applicant (s)) above named for an order that a meeting (or separate meetings) be held at.....of (here enter the creditors or class of creditors e.g. debentures holders, other secured creditors, unsecured creditors etc., or the members or class of members e.g., preference share-holders, equity share-holders etc., of which class or classes, the meetings have to be held) of the above company for the purpose of considering, and if thought fit, approving with or without modification, a scheme of compromise or arrangement proposed to be made between the company and the said (here mention the creditors or class of creditors or members, or the class of members) of the said company.

And that directions may be given as to the method of convening, holding and conducting the said meeting (s) and as to the notices and advertisements to be issued.

And that a Chairman (or Chairmen) may be appointed of the said meeting (s), who shall report the result thereof to the Court.

Advocate for the applicant (s) Registrar. The affidavit of.....will be used in support of the summons."

4. Another method of applying is by means of a petition prescribed for proceedings under Section 391 (2) after a proposed arrangement has been considered by a meeting or meetings of the creditors or any class of creditors or members.

These petitions are provided for in R. 11 of the Companies (Court) Rules where Rule 11 (a) (10) mentions that an application under Section 391 (2) "to sanction a compromise or arrangement" must be made by means of a petition. Rule 11 (b) provides: "All other applications under the Act or under these Rules shall be made by a Judge's summons, returnable to the Judge sitting in Court or in Chambers as hereinafter provided."

5. The contention is that Section 394-A must be so read as to preclude notice to the Central Government of an application made through summons only. Similarly, it is contended that no notice need be given at all to the creditors or shareholders before a decision is taken to hold a meeting inasmuch as they will be heard at the meeting. It is contended that it is enough if they are heard at the meeting or meetings and then by this Court before any scheme is sanctioned. The contention, if accepted, would prevent the Central Government as well as creditors and shareholders, whose meeting or meetings may be proposed, before a scheme has been actually considered at a meeting. In support of this contention learned counsel has relied on two cases: In the matter of Bangeswari Cotton Mills Ltd., (1967) 37 Com Cas 195 (Cal) and In re, W. A. Beardsell & Co. (P) Ltd. and Mettur Industries Ltd., (1968) 38 Com Cas 197 (Mad).

6. In Beardsell and Company's case, (1968) 38 Com Cas 197 (Mad) (Supra) the Madras High Court had followed the decision of the Calcutta High Court in Bangeswari Cotton Mills' case, 1967-37 Com Cas 195 (Cal) (Supra) and had held: "In an application to the Court under Section 394 of the Companies Act for the sanctioning of a compromise or arrangement, notice to the Central Government need not be given at the initial stage before the Court makes an order on an application under Section 391 (1) calling for a meeting of the creditors or of the members." The reason given was: "The role played by the Central Government in such cases is that of an impartial observer who acts in public interest and advises the Court that it is or it is not feasible for the two companies to amalgamate." The question whether shareholders are also entitled to a notice at this stage was not considered in the two cases mentioned above where the ratio decidendi seemed to be that the Central Government is not concerned with matters of internal management only. With great respect, I do not consider this to be a correct basis in view of provisions of law such as Section 396 of the Act, authorising Governmental interference with a Company's affairs.

7. The ground given, in the Bangeswari Cotton Mills' case, 1967-37 Com Cas 195

(Cal) (Supra) by the Calcutta High Court was that a conflict existed between the provisions of Section 394-A and the law as it existed prior to the introduction of this provision so that the conflict had to be resolved. Apparently, the reference to the law as it existed before the amendment of the Companies Act, which introduced Section 394-A, was meant to include the rules. The view seemed to be that there was some conflict between Section 394-A and the pre-existing rules. In my opinion, if such a conflict really existed at all, it could not be resolved by restricting the clear ambit of Section 394-A of the Act which reads as follows:

"The Court shall give notice of every application made to it under Section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections."

8. If, as the learned counsel for the applicant himself submits, the term "application", as used in the Act and in the rules, includes an application by means of a summons as well as an application by means of a petition, Section 394-A having used the words "every application made under Section 391 or 394" must necessarily be held, prima facie, to include both applications by means of petitions and applications by means of summons. This is the plain and obvious meaning of the section which cannot be modified to meet the supposed intention of the Companies (Court) Rules. These rules were framed in 1959 under Section 643 (1) (2) of Companies Act, 1956, by the Supreme Court of India. With great respect for the views taken in the above mentioned cases, I find it difficult to use rules made by the Supreme Court for the purposes given in Section 643 of the Act to interpret the intentions of Parliament in enacting Section 394-A in 1964. So far as rules relating to the "holding of meetings of creditors and members in connection with proceedings under Section 391" are concerned, Section 643 (1) (b) (iii) enables the Supreme Court to make rules which are "consistent with the Code of Civil Procedure, 1908." Under Section 643 (1) rules can be made for the purpose of carrying out the duties imposed on the Court by the Act, inter alia with regard to "the holding and conducting of meetings to ascertain the wishes of the creditors and contributors".

9. It is true that the Supreme Court has not, so far, made rules for service of notices upon the Central Government under Section 394-A of the Act.

10. The reason for this is obvious. In 1959, when these rules were made, Section 394-A was not on the statute book. The rules, therefore, provide only for

Issue of the summons in form 33 which, as set out above, itself, indicates that notice must be given to "all parties concerned." It is true that there is no specific rule so far laying down who are "the parties concerned" before a decision is taken under Section 391 (1) of the Act. The mere silence of these rules on this question does not, in my opinion, amount to a conflict with the provisions of Act itself. On the other hand, the Form 33 indicates that all parties concerned must be given notice in accordance with R. 67 of the Companies (Court) Rules, 1959.

11. One of the reasons given in the case of Bangeswari Cotton Mills, 1967-37 Com Cas 195 (Cal) (Supra) for adopting the view expressed there was, that the right of a party "to move" the summons ex parte will be defeated if it was necessary to send a notice of proceedings under Section 391 (1) to the Central Government. With great respect, I find it very difficult to adopt this view. Moving a summons ex parte cannot, in my opinion, mean the passing of an order upon an application which had been moved by means of summons. The "moving" is confined to the initial stage at which notices are to be issued to persons concerned. At that stage the proceeding has necessarily to be an ex parte proceeding. But, the "hearing" takes place only after the summons have been served. That hearing cannot be ex parte in accordance with the intendment of the rules as I read it.

12. It is a well established rule of construction that a statute cannot be interpreted in such a way as to limit the ambit of the words used by reading words into it unless there is some overriding need to reconcile a conflict with a statutory provision. I fail to see the need for reading a limitation in Section 394-A of the Act confining the term 'application' to a petition when the rules clearly indicate that the word 'applications' cover applications by summons as well as applications by means of petitions. The limitation can only be introduced by adding words. It was held in *Dr. Iswari Prasad v. Registrar University of Allahabad*, 1955 All LJ 244 = (AIR 1955 All 131): "It is, however, a well known rule of construction that if there is nothing to modify or qualify the language which the Statute contains it must be construed in the ordinary and natural meaning of the words". I find nothing either in the enactment or in the rules to indicate that the word 'application' is used in Section 394-A for applications by petitions only. Nor do I find a conflict between Section 394-A (Sic and?) the Companies (Court) Rules.

13. Coming to the question whether the share-holders have a locus standi or not to be heard at this stage, it is clear that there is no statutory provision, such as

Section 394-A of the Act, for serving notices upon them before a decision to hold a meeting. Nevertheless, the questions which require adjudication in proceedings under Section 391 (1) of the Act, even before the stage of the approval of an arrangement is reached, are given in Rule 69. These are decided when giving "directions at hearing of summons". "Hearing", as contemplated by Rule 69, obviously implies hearing of all sides which are to be heard. The matters to be decided after hearing of the summons are specified as follows:—

".....(1) determining the class or classes of creditors and/or members whose meeting or meetings have to be held for considering the proposed compromise or arrangement;

(2) fixing the time and place of such meeting or meetings;

(3) appointing a chairman or chairmen for the meeting or meetings to be held, as the case may be;

(4) fixing the quorum and the procedure to be followed at the meeting or meetings, including nothing by proxy;

(5) determining the values of the creditors and/or the members, or the creditors or members of any class, as the case may be, whose meetings have to be held;

(6) notice to be given of the meeting or meetings and advertisement of such notice;

(7) the time within which the chairman of the meeting is to report to the Court the result of the meeting, and such other matters as the Court may deem necessary".

14. Now each of the questions specified above involves the interest or at least the convenience of persons whose meetings are to be held.

15. I may also mention here another matter which is said to be involved in the decision of the petition before me. This arises out of the definition of the term "company" given in Section 390 which says. "In Sections 391 and 393 (a) the expression 'company' means any company liable to be wound up under this Act". It has been contended on behalf of the share-holders who desire a hearing to be given to the share-holders before a decision is taken to hold the meeting that the word "company" as used in Sec. 391, is necessarily confined to a company which has incurred the liability to be wound up or is at least one which may have incurred such a liability and that the applicant company is not such a company. On the other hand, it is contended that provisions of S. 391 (2) make a distinction between companies which are not being wound up and those which are being wound up. It is also pointed out that the words "liable to be wound up" used in Section 390 (a), merely indicate that even unregistered companies, which are liable to be wound up under

the Act, may apply under Section 391. There is, I find, some authority to support each of the two views. I do not propose to decide this question at this stage before hearing all parties concerned. The share-holders are, in my opinion, necessary parties before a decision can be taken on this matter and other matters specified in Rule 69.

16. It has also been pointed out that the Central Government may also be interested in drawing the attention of the Court to certain matters which may make the holding of a proposed meeting or meetings necessary or unnecessary. It may be shown, with the help of the information made available by the Company Law Board, that the company proposed to be amalgamated with another is not being run in a satisfactory manner and is liable to be wound up. Or, it may be pointed out that there is no need for holding a meeting of share-holders or creditors for deciding whether an amalgamation should take place because the Central Government itself was about (Sic to?) pass an order under Section 396 that it is essential in public interest that a amalgamation should take place. The share-holders may also be interested in pointing out whether the use of the powers of the Court under Section 391 is at all called for in a case and whether it is not a matter which should be left to voluntary decisions by the members of the companies concerned. These are questions on which a hearing at the initial stage may prevent unnecessary orders under Section 391 (1) and save unnecessary waste of time, energy and money.

17. It may also be mentioned here that even if the rules do not specifically provide for notice, Rule 9 of the Companies (Court) Rules enables this Court, in the exercise of its inherent powers, to issue directions for service of notice upon the parties interested or concerned, if no specific rule was there for this purpose.

As I have already indicated, my view is that both the Central Government as well as the share holders of the Company, who are distinct legal entities apart from the company (See: Charanjit Lal Chowdhury v. Union of India, AIR 1951 SC 41), are entitled to be heard before a decision is taken under Section 391 (1). This is implied, in my opinion, from the nature of the function to be performed by the Court under Section 391 (1). The function is undoubtedly a judicial function in a proceeding which begins with the filing of an application before the Court and terminates in an order under Section 391 (1) before another stage or proceeding under Sec. 391 (2) is commenced and terminated. The correct rule to be applied in such cases is that, unless the right of the parties concerned is necessarily excluded by

some clear statutory provision, notice should be given to them. Accordingly, I hold that both the Central Government as well as the share-holders are entitled to a notice at this stage.

18. The next question which arises is that of form in which notices are to be issued. It is pointed out that there are a very large number of share-holders. The issue of a notice with copies of the affidavit and the proposals may entail unnecessary expense and delay. Rule 32 of the Companies (Court) Rules provides the mode of service. It provides that ordinarily "all notices, summonses, and other documents required to be served on any person, may be served either personally by delivering a copy thereof to such person, or upon his advocate where he appears by advocate, or, except where personal service is required, by prepaid registered post for acknowledgment due addressed to the last known address of such person." It is also provided there that where no acknowledgment signed by the addressee or his duly authorised agent is received orders of Court shall be obtained as to the sufficiency of service or as to such further steps to be taken for service as the Court may direct. The proviso makes it possible for the Court to presume service when a notice, summons, or other document has been sent and has not been returned undelivered to the post office in the ordinary course. This rule is made subject to any order of the Court which may suitably modify or adopt the mode of service to the requirements of a case. It will be noticed that all that the rules require in such a case is the service of the summons and not of other material.

In the present case, the affidavit supporting the summons is a fairly long document. I, therefore, dispense with the need to serve copies of the supporting affidavits upon the share holders. The Central Government has already been served with a copy of the affidavit through its counsel. The share-holders may be served through summons in form 33 by ordinary post and publication. The sending of the summons may be evidenced by certificates of posting. Service by registered post is dispensed with. The next date of hearing of the application is fixed at 13-11-1968 by consent of parties. The affidavits in reply should be filed by that date. As Mr. S. N. Kacker, appearing on behalf of one of the share-holders, has prayed for a copy of the affidavit in support of the summons, he will be supplied with a copy of the affidavit in support of the summons in the course of the day. Other share-holders, who put in appearance and desire copies of the affidavit, may obtain copies by applying similarly for copies on the next date of hearing. This procedure will obviate delay in the hearing of the application which is the main objection of

the applicant against service of notices at this stage on parties concerned.

Order accordingly.

AIR 1970 ALLAHABAD 170 (V 57 C 22)

R. S. PATHAK AND R. L. GULATI JJ.

Mst. Noor Jahan Begum, Appellant v. Muftkhar Dad Khan and others, Respondents.

Special Appeal No. 120 of 1961, D/- 21-5-1969, against order of V. G. Oak, J. in First Appeal No. 115 of 1947, D/- 17-2-1961.

(A) Mahomedan Law — Gift — Validity — Statement in gift deed by donor that possession has been delivered to donee is not conclusive but only gives rise to a rebuttable presumption.

Under the Mahomedan Law a recital in the gift deed that possession has been delivered to the donee of the property gifted gives rise to a presumption only of such delivery and the presumption may be rebutted by those challenging the gift. The presumption may be rebutted by establishing that the subsequent conduct of the donor is inconsistent with the making of the gift or by demonstrating the patent improbability of what is stated by the recital. The subsequent conduct of the donor has been considered by the Courts in India as of great relevance in determining whether possession had been delivered and a valid gift completed. (1889) 16 Ind App 205 and (1879) 5 QBD 188 and (1863) 3 B and S 474 and (1895) ILR 18 All 1 and (1913) 11 All LJ 726 and (1905) ILR 28 All 147 and (1905) ILR 29 Bom 468 and (1907) ILR 30 Mad 305, Dist; AIR 1939 Bom 449 and AIR 1964 Mad 373 and AIR 1931 Oudh 7 and AIR 1937 All 547 and AIR 1958 Mad 527, Ref.; AIR 1932 Cal 497 and AIR 1934 Bom 21, Rel. on. (Paras 17, 18, 33, 43)

(B) Mahomedan Law — Gift — Validity — Relinquishment by donor of all ownership and domain over property is essential. AIR 1923 Pat 481 and AIR 1928 PC 108 and ILR 21 All 165, Rel. on; (1884) ILR 10 Cal 1112 and (1888) 15 Ind App 81 and AIR 1966 SC 1194 and AIR 1964 SC 275 and AIR 1932 PC 13, Dist. (Para 21)

(C) Mahomedan Law — Gift — Essentials — Delivery of possession essential — Registration of gift deed not enough.

One of the three essentials of a gift under the Mahomedan Law is the delivery of possession of the subject of the gift by the donor to the donee. Registration of a deed of gift does not cure the want of delivery of possession nor is the mutation of names a valid substitute for delivery of possession. Muta-

tion of names is not necessary to complete the transfer of possession. But the delivery of possession contemplated is not always the physical delivery. The delivery should be such as the subject of the gift is susceptible of. A constructive delivery, and in some cases a symbolic delivery, has been held to be a good and sufficient compliance with the requirements of the law. AIR 1922 PC 281 and AIR 1932 PC 13, Ref.; AIR 1964 SC 275, Dist. (Para 43)

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- (1889) 16 Ind App 205 = ILR 11 All 460, Sk. Muhammad Mumtaz Ahmad v. Zubadia Jam 13
- (1888) 15 Ind App 81 = ILR 15 Cal 684, Mahomed Baksh Khan v. Hosseini Bibi 24
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- (1875) 2 Ind App 87 = 15 BLR 67, Ammeroonnissa Khatoon v. Abad-oonnissa Khatoon 18
- (1863) 3 B & S 474 = 32 LJQB 91, Ashiptel v. Brayan 16
- Brij Lal Gupta and M. A. Ansari, for Appellant; Rajeshwari Sahai, Krishna Chandra Saxena, B. C. Saxena, for Respondents.

PATHAK J.:— This special appeal is directed against the judgment and decree of a learned single Judge of this Court affirming the dismissal of a suit by the trial Court.

2. Rafi Ullah Khan had a son, Rafi-ul-Qadar. Rafi-ul-Qadar had two wives, of whom the appellant, Noor Jehan Begum, is one. The first respondent, Muftkhar Dad Khan, is a son by the other wife.

3. According to the appellant, on September 5, 1916 Rafi Ullah Khan executed a gift deed in favour of the appellant transferring a grove comprised in three plots with a total area of 16.23 acres situated in Mauja Ahmadpur Niazpur, pergana and tehsil Shahjahanpur, district Shahjahanpur. It is alleged that Rafi Ullah Khan put her in proprietary possession of the grove. Admittedly, no mutation proceedings were taken at the time. In September 1942, Rafi Ullah Khan caused a mutation application to be filed by the appellant and conveyed his written consent to the mutation. Before the mutation proceedings could conclude Rafi Ullah Khan died on September 25, 1942. Thereafter, the first respondent opposed the mutation application and it was rejected. Upon a subsequent application, mutation was effected in favour of the first respondent, the third to tenth respondents and one Shirin Begum, who claimed to be another wife of Rafi Ullah Khan. Alleging that she was the rightful owner of the grove under the gift deed, the appellant instituted the present suit praying for declaration and possession in respect of the grove and also for damages on account of two Shisham trees cut down by the first respondent.

4. The suit was contested by the first and second respondents. The defence in

the main was that Rafi Ullah Khan did not execute any gift deed in favour of the appellant, that in any event he never intended to act upon the gift deed and he continued as before in proprietary possession and enjoyment of the grove and possession never passed to the appellant. It was further, alleged that a few days before his death when Rafi Ullah Khan was unconscious the appellant obtained his thumb impression on some blank papers which were later employed in mutation proceedings in her favour. Subsequently, after Rafi Ullah Khan's death the appellant herself made an application on December 20, 1942 as guardian of the minor heirs of Rafi Ullah Khan praying that mutation be effected in their favour and the other heirs. That resulted in the grove being recorded in the names of the respondents.

5. The trial Court dismissed the suit. It found that the gift deed was executed by Rafi Ullah Khan, that the appellant accepted the gift but that Rafi Ullah Khan, never delivered possession of the grove to the appellant, and that the gift deed was never acted upon. It also found that Rafi Ullah Khan was not in his senses from September 20, 1942 to September 25, 1942 and remained in a stupor up to his death, in which condition his thumb impression was obtained on blank papers which were later written upon purporting to convey his consent to mutation in favour of the appellant.

6. An appeal by the appellant against the decree of the trial Court has been dismissed by a learned single Judge of this Court, and now this special appeal has been preferred.

7. The contention on behalf of the appellant is that there was a completed gift of the grove by Rafi Ullah Khan in favour of the appellant.

8. According to Mulla's "Principles of Mahomedan Law" it is essential to the validity of a gift that there should be (a) a declaration of a gift by the donor (b) an acceptance of the gift, express or implied, by or on behalf of the donee, and (c) delivery of possession of the subject of the gift by the donor to the donee (16th Ed., Section 149, P. 141). There should be a delivery of such possession as the subject of the gift is susceptible Ibid, S. 150, P. 142. If these conditions are complied with, the gift is complete.

9. The gift deed dated September 5, 1916 recited that the donor, Rafi Ullah Khan, had made a gift of the grove to the appellant and had put her in proprietary possession and occupation of it, that he had no right left in the property and she was entitled to get her name entered as proprietor of the grove. The gift deed was forwarded by Rafi Ullah Khan, when he was at Shahjahanpur,

session and put the donee in possession, that, of course, is an admission of the donor of the fact of delivery of possession to the donee. The effect of this is only that the person who contends to the contrary, namely, that no possession was delivered should establish the contention." The learned Judges repelled the contention that in an earlier case decided by the same Court, Mohammad Yusuf Rowther v. Mohamed Yusuf Rowther, AIR 1958 Mad 527, the Court had accepted the proposition stated by the Judicial Committee is laying down an absolute rule. The learned Judges observed:—

"Learned counsel relied upon this decision as if it laid down that the admission is conclusive and would not admit of further enquiry by the Court as to the factum of delivery pursuant to the gift. But Rajagopala Aiyangar, J. himself observed in that decision:—

The proper rule to apply here as regards the burden of proof would be to hold that the declaration by the donor of his having parted with possession was an admission binding upon the parties which however they might by cogent evidence disprove but in the absence of independent proof by them the presumption raised by the admission ought to suffice to support the deed.

The recital in the gift deed as to delivery of possession will as an admission operate as conclusive only in the absence of other proof to the contrary."

The learned Judges, went on to note that the presumption was rebutted among other circumstances by the omission to effect mutation of names or change of Pattas after the execution of the gift deed. And as long ago as Jhumman v. Husain, AIR 1931 Oudh 7, the Oudh Chief Court expressed the same view that the declaration by the donor that possession had been given to the donee could not be regarded as conclusive. This Court in Mt. Jamilunnissa v. Sheikh Mohd. Zia, AIR 1937 All 547 hesitated to accept the proposition as a final statement of the law that the admission by the donor that possession had been delivered was conclusive and binding on him. It was observed that the admission—

"Certainly throws a heavy burden on the donor to show that the statement was untrue and was false."

14. The appellant relies on Sajjad Ahmad Khan v. Kadri Begum, (1895) ILR 18 All 1: but it is of some significance that the learned Judges in that case pointed out that pursuant to the gift deed mutation of names had been effected in favour of the donee and that admittedly he was in possession.

15. There is one case, however, namely Namdar Khan v. Mohammad Siddiq, (1913) 11 All LJ 726, where a learned

single Judge of this Court held that a recital in the gift deed stating that proprietary possession had been given to the donee was sufficient to complete the gift. That decision, however, proceeds upon its own facts and in my opinion cannot serve as authority for the proposition that the recital is conclusive and cannot be rebutted.

16. The appellant also refers to Aship-tel v. Brayan, (1863) 3 B. & S 474 and Simm v. Anglo American Telegraph Co., (1879) 5 QBD 188 at page 202 CA. I am not satisfied that those cases assist the appellant having regard to the facts of the case here.

17. It seems to me that under the Mahomedan Law a recital in the gift deed that possession has been delivered to the donee of the property gifted gives rise to a presumption only of such delivery and the presumption may be rebutted by those challenging the gift. The presumption may be rebutted by establishing that the subsequent conduct of the donor is inconsistent with the making of the gift or by demonstrating the patent improbability of what is stated by the recital.

18. The subsequent conduct of the donor has been considered by the Courts in India as of great relevance in determining whether possession had been delivered and a valid gift completed. In Sultan Miya v. Ajibakhatoon Bibi, AIR 1932 Cal 497 Mitter, J., observed:—

"That subsequent conduct of the donor is of great materiality would appear from the remark made by Sir Barnes Peacock in the course of argument in Ammeroonnissa's case (1875) 2 Ind App 87. Sir Barnes Peacock remarked as follows: 'But the mode in which the father dealt with the profits would be important as regards the bona fides and completeness of the gift as throwing light upon the intention.'

In the case before their Lordships, the intention to make a gift was manifested in a registered hibinama and yet their Lordships referred to the subsequent conduct of the donor, i.e. his acts and conduct after completion of the gift to judge whether the gift was bona fide or not."

Adverting to the facts of the case the learned Judge went on to say:—

"But this presumption in favour of the donee is rebutted by the circumstance that the donor, on every conceivable occasion, when change or mutation of names could be effected, acted contrary to the tenor of the deed of gift. There was no mutation of names in the landlord's sherista, and in the Record of Rights, the name of the donor was entered against this property and the rents and profits were appropriated by the donor. If the intention was to make the gift, one could have expected that the rent and profits issued out of the gifted property would be earmarked for

the infant child and would be dealt with apart from the rest of the donor's properties which would descend after his death to his other heirs. The gift is not valid in the circumstances.

The true rule appears to me to be this. Though a gift might be purported to be made and every overt act appears to have been taken, which this law requires for the completion of the gift, yet, if there is no bona fide intention to make the gift, the transfer will not take effect

19. I might also refer to the observations of Tyabji, J. in *Ebrahim Alibhai Akuji v. Bai Asi*, AIR 1934 Bom 21.

"In all cases in which the question is raised whether a gift governed by Mahomedan law has been completed, the most satisfactory method of dealing with the question is to direct attention to the conduct of the donor and the donee after the time when the gift is said to have been completed.

If, after that time the alleged donor continues to take the benefit of the subject of the gift whether it consists of reaping the harvest, of the recovery of the rents or actual occupation, or of such other benefit, whatever it be, as can accrue to the owner from the ownership of the particular subject of gift then the possession of the subject of the gift has not been transferred. If the donee is permitted, directly or indirectly to receive the benefit, then the possession is transferred."

20. It is apparent from the manner in which Rafi Ullah Khan continued to deal with the property that he had not transferred possession of it to the appellant. The evidence on the record amply demonstrates that his conduct in relation to the property even after the execution of the gift deed is inconsistent with the assertion that he delivered possession of the property to the appellant. Indeed, the recital in the gift deed that possession had been delivered is evidently improbable because about the time when the gift deed was executed Rafi Ullah Khan was in Shahjahanpur while the appellant was residing with her husband at Azamgarh. According to the appellant herself, delivery of possession did not take place until some months after the execution of the gift deed.

21. The authorities are united on the point that to validate a gift it is essential that the donor should divest himself completely of all ownership and domain over the subject of the gift. Macnaghten in his *Principles and Precedents of Moohummadon Law* P. 51, S. 8 says:

"The gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing

given and the gift is null and void when he continues to exercise any act of ownership over it."

22. The Judicial Committee in *Musa Miyan v. Kadar Bux*, 55 Ind App 171 = AIR 1928 PC 108 observed that the relinquishment of control over the subject was necessary to complete the gift. And in *Dalpheroo Mian v. Bangali Mali*, AIR 1923 Pat 481 the Patna High Court pointed out that where the property was not abandoned by the donor after making the gift but the donor continued to consider himself as its owner there was no valid gift. It is necessary that the donor should do all that is in his possession abdicate his ownership and vest it in the donee. If the possession of the property can be given it is essential that it should be. If the property does not admit of actual transfer of possession, there must be some overt act on the part of the donor evidencing the intention to divest himself of the ownership and transfer it to the donee. The principle is precisely stated in *Anwari Begum v. Nizam-ud-din Shah*, (1896) ILR 21 All 165 at pp. 170, 171:

"There is no doubt that the principle of Muhammadan Law is that possession is necessary to make a good gift, but the question is, possession of what? If a donor does not transfer to the donee, so far as he can, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our judgment, nothing in the Muhammadan law to prevent the gift of a right to property. The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely, such rights as he himself has; but this does not imply where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers, what he himself does not possess, namely, the corpus of the property. He must evidence the reality of the gift by divesting himself, so far as he can of the whole of what he gives."

23. It is pointed out by the appellant that what was gifted to her were zamindari rights and it is not possible to make physical delivery of such rights. It is said that as zamindari rights are in the nature of incorporeal rights no delivery is possible in their case. Reference is made to *Mullick Abdool Guffoor v. Muleka*, (1884) ILR 10 Cal 1112. In that case the property, which was the subject of the gift, consisted of several zamindaries and shares in zamindaries let out to tenants, certain malikana rights and a considerable quantity of house property and garden lands. The Calcutta High Court referred to the impossibility of a literal application of the plea requiring actual delivery of possession because, it was observed, lands in India were almost all let out on leases of some kind and what is usually called pos-

session in this country was not actual or khas possession, but the receipt of the rents and profits.

The Court was impressed by the circumstance that if lands let on rent or leases could not be made the subject of a gift then many thousands of gifts which had been made over and over again of zamindari properties would be invalidated. In respect of all the properties before the Court, the consideration which determined the opinion of the learned Judges was that the properties had been let out on lease or represented a chose in action. In that sense, the case before us is distinguishable on its facts. It is not a case where the grove had been leased out and the right conveyed to the donee was the right to realise rent from the tenants.

24. It is urged that delivery of possession is not necessary when the gift deed itself authorised the donee to take possession. We are referred to Mahomed Baksh Khan v. Hosseini Bibi, (1888) 15 Ind App 81 (Cal). It is clear, however, from the opinion of the Judicial Committee in that case that the further circumstance which determined the validity of the gift was that in fact the donees did take possession. We have been referred to the observations of the Supreme Court in Macbool Alam v. Khodaija, AIR 1966 SC 1194 at p. 1197:—

"To validate the gift, there must also be either delivery of possession or failing such delivery, some overt act by the donor to put it within the power of the donee to obtain possession."

In that case, however, the Supreme Court was concerned with property which at the time when the gift was made was in the possession of a trespasser.

25. As I have already said, the evidence on the record amply proves that despite the execution of the gift deed Rafi Ullah Khan continued to exercise proprietary rights in respect of the grove as owner thereof. Not only did the management of the grove continue as before with him, but he continued to enjoy its profits and to appropriate to himself the sale proceeds from its produce. I am fully satisfied that Rafi Ullah Khan did not divest himself of the ownership and domain over the grove.

26. At this stage, reference may usefully be made to the circumstances which persuaded Mitter, J. in AIR 1932 Cal 497 (Supra) to hold that the gift deed did not take effect. The circumstances were.

- (1) There was no mutation of the name of the son in the landlord's sherista,
- (2) In the record of rights finally published within three years of the deed of gift, there is no entry in the name of the son but possession was shown with the father.
- (3) Appropriation of the rent and profits by the donor.

All these circumstances correspond broadly to what has been found in the case before us.

27. In support of the submission that Rafi Ullah Khan had divested himself of the ownership of the grove by handing over the gift deed to the appellant, the appellant also relied upon Valia Peedika-kandi Katheessa Umma v. Pathakkalan Narayanath Kunhamu, AIR 1964 SC 275. That, however, is a case where the gift was made by the husband to his minor wife who had attained puberty and discretion. The Supreme Court relied upon the rule that in the case of a gift made by a husband to his wife actual delivery of possession was not necessary to complete the gift. In Mohammed Sadiq Ali Khan v. Fakr Jahan Begam, 59 Ind App 1 = AIR 1932 PC 13 the Judicial Committee pointed out:

"In case of a gift by a husband to his wife, their Lordships did not think that Muhammadan Law requires an actual vacation by the husband and an actual taking of the possession by the wife. In our opinion the declaration made by the husband followed by the handing over of the deed was sufficient to establish the transfer of possession".

So also no transfer of possession is necessary in the case of a gift by a father to his minor child or by a guardian to his ward. But there is no warrant for extending the rule to the case of gift made by a donor to his daughter-in-law.

28. There are other cases where the Courts have accepted the proposition that delivery of possession is not a sine qua non to the validity of a gift of immovable property. But those are cases where the donor and donee were both residing in the property at the time of the gift. In such a case the gift is completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. The principle was applied in Humera Bibi v. Najim-un-nissa, (1905) ILR 28 All 147 where a Mohammedan lady who had brought up her nephew as her son executed a gift deed, in favour of the nephew, of a house in which they were both residing at the time of the gift. It was also applied in Bibi Khaver v. Bibi Rukhia, (1905) ILR 29 Bom 468 where the gift was made to a daughter-in-law and her children, in Kandath v. Muslium, (1907) ILR 30 Mad 305 where the gift was made by a mother to her daughter, in Baldeo Prasad Bal Govind v. Shubratn, 1936 All LJ 590 where the gift was made by the donor to his daughter-in-law, and in AIR 1937 All 547 (Supra) where the gift was made by the donor to his relation, a Pardahnashin lady, who was also a co-sharer in the property and was, therefore, in constructive possession of it.

29. In the case before us there is nothing to show that at the time when the gift deed was executed by Rafi Ullah Khan the appellant was already in possession of the grove. And, as I have already pointed out, the conduct of Rafi Ullah Khan after the execution of the gift deed establishes that he did not intend to transfer the proprietorship in the grove to the appellant upon the execution of the gift deed.

30. That suffices to dispose of the appeal.

31. I may mention that an application for amendment of the plaint has been made by the appellant. The appellant points out that as a result of the enactment of the U. P. Zamindari Abolition and Land Reforms Act the appellant has acquired the status of a bhumidhar of the grove. The amendment is opposed principally on the ground that it is belated. I see no reason why the amendment should not be allowed, specially when bhumidhari rights are claimed as a result of the change of the law during the pendency of the case. In the circumstances, I would have allowed an opportunity to the respondents to amend their written statements, but as I am for dismissing the appeal I consider it unnecessary to postpone the disposal of the appeal necessitated by the grant of such opportunity.

32. I may, also point out that the first respondent has urged that if the appeal is not dismissed on the merits the suit and the appeal must be held to have abated by reason of Section 5 (2) (a) of the U. P. Consolidation of Holdings Act. The appellant contends that there is no abatement. In the circumstances that I see no force in the appeal, it is not necessary for me to express any opinion on this point.

33. The appeal fails and is dismissed with costs.

34. **GULATI J.:**— This is a plaintiff's special appeal directed against the judgment and decree of a learned single Judge of this Court.

35. It is not necessary to narrate the facts in detail as they have been set out in the judgment of my brother Pathak, J. In brief, the plaintiff's case is that she is the daughter-in-law of Rafi Ullah Khan who gifted to her in 1916 the grove in dispute. After the death of Rafi Ullah Khan, she filed a suit for the declaration that she was the owner of the grove in dispute and also for damages on the allegation that defendant No. 1 had cut away from the grove the two shesham trees. The suit was resisted by Mukhtar Dad Khan who is son of the plaintiff's husband from another wife and the defendant No. 2 the sister of one Shirin Begam, deceased, who claimed to be the second wife of Rafi Ullah Khan. The suit was dismissed by the trial Court and the judg-

ment of the trial Court has been affirmed by the learned Single Judge of this Court.

36. The gift is evidence by a registered deed of gift, which was sent to the donee at Azamgarh where she was residing with her husband Khan Bahadur Mohammad Rafi-ul-Qadar, where he was posted as Deputy Collector. The gift deed was delivered to the plaintiff by her husband which she accepted and was conveyed to the donor by means of a letter.

37. The allegation on behalf of the contesting defendants that the gift deed was a fictitious document, has been disbelieved by the learned Single Judge, and, in my opinion, rightly. The plaintiff's case that a validly executed deed of gift duly registered was sent to her and she conveyed her acceptance thereof, has been proved beyond doubt.

38. The main ground upon which plaintiff has failed is the want of delivery of possession to her of the gifted property. The plaintiff attempted to prove the delivery of possession in two ways. In the first place, she alleged that soon after the receipt by her of the gift-deed, she went to Shahjahanpur where her father-in-law was residing and she along with her husband accompanied Rafi Ullah Khan to the grove where the latter stated that he had made the plaintiff the owner of the grove and put her in possession thereof. According to her she thanked her father-in-law in the grove and said that as she was generally living outside he (father-in-law) should manage the grove. She also stated that she brought some mangoes from the grove.

39. If this part of the story is accepted, the delivery of possession would stand proved but unfortunately for the plaintiff this story of her's has not been accepted by the trial Court nor has it found favour with the learned Single Judge nor indeed with my brother Pathak, J. After giving my anxious consideration, I am also of the opinion that this plea of the plaintiff has not been established. It was not mentioned in the plaint nor is there any evidence in support thereof excepting the plaintiff's own statement. This plea appears to be an afterthought on the part of the plaintiff with a view to making good a serious deficiency in valid gift under the Mohammedan Law which requires not only the acceptance of the gift by the donee but also the delivery of possession of the gifted property by the donor to the donee.

40-41. In the alternative, the plaintiff relied upon the mutation proceedings in her favour initiated just before the death of the donor in September, 1942. According to the plaintiff, Rafi Ullah Khan asked her to file an application for mutation in her favour and he gave his written consent in that behalf but before the mutation could be effected, Rafi Ullah Khan

died. In support of this part of the story, the plaintiff has produced a number of witnesses. One of the witnesses is Abdul Hakim Khan who was then the President of the Judicial Committee, Gwalior State. He is the nephew of the plaintiff. He stated that shortly after the death of Rafi-ul-Qadar, the plaintiff's husband and Rafi Ullah Khan's son, he visited Shahjahanpur to offer his condolences to Rafi Ullah Khan on the demise of his son. There the witness came to know about the deed of gift which was executed by Rafi Ullah Khan in favour of the plaintiff. There was a discussion between the plaintiff and Rafi Ullah Khan about the mutation. The witness advised Rafi Ullah Khan that it was desirable to get mutation in plaintiff's favour. Rafi Ullah Khan is stated to have remarked that he was not aware that a registered deed was not sufficient to create a valid gift. He however, accepted this suggestion, called Mr. Raza Hussain, a pleader and instructed him to have the plaintiff's name mutated. Mr. Raza Hussain has also appeared as a witness. He corroborated the statement of Abdul Hakim Khan to the effect that Rafi Ullah Khan had asked the witness to file an application for mutation on the basis of the gift deed. The witness then wrote out an application and presented it before the Court concerned on September 23, 1942. The application was thumb marked by Rafi Ullah Khan, as according to this witness, Rafi Ullah Khan was very weak and was not in a position to put his signature. The application was also witnessed by Mukhtar Dad Khan, alias Rais Mian who later on was one of the main contesting defendants in the suit.

Mukhtar Dad Khan has not denied his signature on the mutation application. In these circumstances, I am fully satisfied that this part of the story of the plaintiff is also proved. There is no reason to disbelieve the testimony of Abdul Hakim Khan who is a respectable and responsible person and of Raza Hussain, the lawyer. Raza Ali Khan is another witness of this part of the plaintiff's case. He is a nephew of Rafi Ullah Khan deceased. He stated that Rafi Ullah Khan had put his thumb mark on the mutation application in his presence and that Rais Mian and Lalloo Khan had signed the application. Rais Mian, as stated earlier, is defendant No. 1, and Lalloo Khan is the nephew of Rafi Ullah Khan, deceased. Raza Ali Khan indeed is an interested witness as he was the plaintiff's pairokar in the civil suit and was also her mukhtar-i-am. There is evidence of strained relations between him and Rais Mian but since Rais Mian has not denied his signature, I see no reason why Raza Ali Khan should be disbelieved.

From the evidence relating to this aspect of the case, the following things are established.

- (i) That Rafi Ullah Khan had genuinely intended to make the gift and his intention remained unimpaired right upto the time of his death.
- (ii) That Rafi Ullah Khan was all along under the impression that the execution by him of a registered deed of gift and the delivery of the gift deed to the donee was enough to bring about a valid gift.
- (iii) That as soon as he was advised to have the donee's name mutated, he immediately took steps to have the needful done.
- (iv) That he conveyed his consent to the mutation being effected in the name of the donee.

42. The question, however, arises as to whether all this is enough to constitute a valid gift according to Mahomedan Law.

43. One of the three essentials of a gift under the Mahomedan Law is the delivery of possession of the subject of the gift by the donor to the donee. The law seems to be extremely rigid on this point. Registration of a deed of gift does not cure the want of delivery of possession nor is the mutation of names a valid substitute for delivery of possession. Indeed, the mutation of name is not necessary to complete the transfer of possession. But the delivery of possession contemplated is not always the physical delivery. The delivery should be such as the subject of the gift is susceptible of. A constructive delivery, and in some cases a symbolic delivery, has been held to be a good and sufficient compliance with the requirements of the law.

44. It must not be forgotten that at the time when the Mahomedan Law came to be formulated, there did not exist modern laws, like the Transfer of Property Act, the Registration Act and the Revenue Acts. The transfer of physical possession could at that time, be the only mode by which the intention of the donor and the donee could be ascertained beyond dispute. As the society progressed, other modes of achieving the same purpose were evolved. In this context, it would be appropriate to refer to a decision of the Privy Council in *Modh. Abdul Ghani Khan v. Mt. Fakhr Jahan Begam*, AIR 1922 PC 281. At page 288 of the report is to be found the following observations:—

"In considering what is Mohammedan Law on the subject of gift *inter vivos*, their Lordships have to bear in mind that when the old and admittedly authoritative texts of Mohammedan Law were promulgated, there were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, any revenue Courts to record transfer of the possession of land, or any zamindari estates large or small, and that it could not have been intended to lay down for all time

what should alone be the evidence that titles to lands had passed. The object of the Mahomedan Law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift."

45. The Courts in India have since long, been conscious of this fact and have at numerous occasions departed from the rigid requirement of the law viz. donor's handing over actual and physical possession of the gifted property. In AIR 1932 PC 13, the Privy Council itself held that at least between husband and wife Mahomedan Law did not require an actual vacation by the husband and an actual taking possession by the wife. In the opinion of the Judicial Committee the declaration made by the husband followed by the handing over of the deed was sufficient to establish the transfer of possession. This indeed is a departure from the original test of the Mahomedan Law.

46. One of the boldest departures from the strict rule of Mahomedan Law in this regard is to be found in a recent decision of the Supreme Court in AIR 1964 SC 275. That was a case of a gift of certain properties including immoveable property, by the husband to his wife, who was a minor being 15 years and 9 months old. At the time of the gift, the husband was residing with his mother-in-law where also was residing his wife. The husband executed a deed of gift and handed over the deed to his wife's mother. There was no actual handing over of the property to the donee or to someone on her behalf nor was the gift deed handed over to the wife. The gift was held to be invalid by the Courts below as well as by the High Court but the Supreme Court held the gift to be valid. Hidayatullah, J., (as he then was) observed at page 279:—

"The intention to make the gift was clear and manifest because it was made by a deed which was registered and handed over by Mammotty to his mother-in-law and accepted by her on behalf of the minor. There can be no question that there was a complete intention to divest ownership on the part of Mammotty and to transfer the property to the donee. If Mammotty had handed over the deed to his wife the gift would have been complete under Mohammedan Law and it seems impossible to hold that by handing over the deed to his mother-in-law in whose charge his wife was during his illness and afterwards Mammotty did not complete the gift. In our opinion both

in texts and authorities such a gift must be accepted as valid and complete."

47. In the instant case, there is no doubt about the donor's intention to make the gift and the donee's acceptance thereof. The gift was made by a registered document which was duly delivered to the donee. That it was a genuine gift cannot be doubted for a moment. The gift purports to have been made out of love and affection for the donee and any oblique motive on the part of the donor to defraud his creditors has not been proved. As soon as the donor became aware of the necessity of having the donee's name mutated in the revenue papers, he took immediate steps to bring that about. The property was a zamindari property which was not capable of being physically delivered to the donee like a house or a chattel.

48. It is true that the donor continued to manage the gifted property even after the execution of the gift deed and the donee did not object to it nor did she care to ask for the usufruct; but that circumstance to my mind is not very material. The subsequent conduct of the donor and the donee is relevant only to determine the true intention of the parties. That intention, however, has been proved otherwise. It was open to Rafi Ullah Khan even after handing over the possession of the grove to the donee to have stipulated that the donee shall permit him to enjoy the usufruct for the rest of his life. Such a gift would have been valid. There is no reason why the gift should be invalidated merely because there was no such express stipulation and the donee did not object to the donor's managing the property and appropriating the sale proceeds of the mangoes of the grove. The real crux of the matter is as to whether the gift had been completed at the time when it was made and that would depend on whether the possession had been delivered to the donee of the gifted property. The gifted property is a Zamindari property of which only a constructive or symbolic possession would have sufficed.

49. In such circumstances, one feels greatly tempted to extend the principle enunciated by the Supreme Court in Valia Peedikakandi Katheessa Umma's case (Supra) and to hold that there was complete transfer of title when the donor handed over to the donee a duly executed and registered gift deed. But all cases where the Courts have shown a departure from the strict Mohamedan Law, are confined to a narrow class of gifts—gifts between husband and wife and gifts to a minor. The present case does not fall in that class. Hidayatullah, C. J. who enunciated the rule in Valia Peedikakandi Katheessa Umma's case, AIR 1964 SC 275 (Supra) has himself administered a warning against the attempts by the Courts to liberalise the application of

Islamic Law. In the preface to the 16th edition of Mulla's Principles of Mahomedan Law", of which he is the author, his Lordship has issued the warning in the following words:—

"These attempts to liberalise the application of Islamic law to concrete cases are commendable but lest this practice becomes the rule, it should be stated that such advances may only be made rarely and only if the Koran, Hadia and Ijmas are not contradicted and when no other course is open to avoid a failure of justice."

50. It is a pity indeed that a gift which, without hesitation, could have been held valid according to the modern concept of transfer of property should fail because of the rigid tenets of the Islamic Law. The weight of judicial authorities on the point involved in the present case is so overwhelmingly against the appellant that I see no other alternative except to agree with my brother Pathak, J. even though I am doing so most reluctantly.

BY THE COURT

51. For the reasons set out in our respective judgments, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1970 ALLAHABAD 180 (V 57 C 23)

FULL BENCH

JAGDISH SAHAI, YASHODANANDAN
AND R. L. GULATI JJ.

Shri Narendra Bahadur, Applicant v.
Shri Shanker Lal, Opposite Party.

Supreme Court Appeal No. 116 of 1966,
D/-31-1-1969.

(A) Constitution of India, Art. 133 (1) (a), (b)—Certificate to file appeal—When can be granted under Cl. (b) — Distinction between Cls. (a) and (b)—Civil P. C. (1908), S. 110 (1), (2).

Even though on the date when the suit was filed, the valuation was much below Rs. 10,000 or Rs. 20,000 if on the date when the application for certificate to file appeal before the Supreme Court is made to the High Court or on the date when the High Court passes the judgment or the decree, the valuation of the property which is directly or indirectly involved is Rs. 10,000 or Rs. 20,000 as the case may be, a certificate under Cl. (b) of Art. 133 (1) of the Constitution and the second part of Section 110, Civil P. C., has to be granted. (Para 11)

The use of the word 'or' after Cl. (a) indicates that Cl. (b) is an independent provision wholly unconnected with Cl. (a) of Art. 133 (1) of the Constitution of India. The same word has been used in S. 110, Civil P. C. Therefore, the second clause of Section 110, Civil P. C. is also independent of the provisions of Section 110 (1),

Civil P. C. Under Cl. (a) what is decisive is the amount or value of the subject-matter in the Court of first instance and 'still in dispute' in appeal to the Supreme Court; under Cl. (b) it is the amount or value of the property respecting which a claim or question is involved in the judgment sought to be appealed from. It is settled law that what has to be seen under Cl. (b) is the value of the property at the time of the proposed appeal to the Supreme Court. AIR 1965 SC 1440 and AIR 1966 SC 1445, Foll. (Paras 8, 10)

(B) Constitution of India, Art. 133 (1) (a), (b) — Certificate to file appeal under Cl. (a) or (b) — Certain property forming subject-matter of litigation — Valuation of constructions added to it during pendency of litigation cannot be taken into consideration — Civil P. C. (1908), Section 110 (1), (2). (Point conceded). (Para 7)

Cases Referred: Chronological Paras

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| (1966) AIR 1966 SC 1445 (V 53) = | |
| 1966-2 SCJ 762, Ramesh v. Gendal Motilal | 8 |
| (1965) AIR 1965 SC 1440 (V 52) = | |
| 1965-2 SCR 751, Chittarnal v. Shah Panna Lal Chandulal | 8 |
| (1932) AIR 1932 Bom 543 (V 19) = | |
| ILR 56 Bom 526, Krishnabai v. Framroz Edulji Dinshaw | 10 |
| (1932) AIR 1932 Lah 526 (V 19) = | |
| 38 Pun LR 647, Nasar Ahmad v. Mt. Saidunissa | 10 |
| (1917) AIR 1917 Cal 496 (V 4) = | |
| ILR 44 Cal 119, Surendra Nath v. Dwarka Nath | 10 |
| (1913) ILR 35 All 445 = 21 Ind Cas | |
| 617, Sri Kishan Lal v. Kashmiro | 10 |
| (1906) ILR 33 Cal 1286, Dagleish v. Damodar Narain Chaudhuri | 10 |

K. C. Saksena, for Applicant; A. N. Kaul, for Respondent.

JAGDISH SAHAI J.:— In the application No. 116 of 1966 made by defendant-petitioner under Art. 133 (1) (b) and (c) read with Art. 135 of the Constitution of India, the questions raised were whether in the circumstances of the case a certificate could be granted under Cls. (b) and (c) of Art. 133 (1) of the Constitution. Mr. Saksena learned counsel for the defendant-petitioner conceded before the Division Bench before which the matter had originally came up that Cl. (a) does not apply.

2. The facts giving rise to this application in short are that the plaintiff-opposite party filed suit No. 54 of 1946 in the Court of Munsif (City) Saharanpur for the possession over a plot of land situate in the city of Saharanpur after demolition of certain constructions made by the defendant-petitioner. The suit for the purpose of jurisdiction was valued at Rs. 1500 in the plaint.

3. In the written statement, it was pleaded that the value of the construc-

tions made by defendant-petitioner was Rs. 7000.

4. The learned Munsif held that the correct valuation of the constructions made by defendant petitioner on the land in dispute was Rs. 6,000.

5. Mr. Saksena contended before the Division Bench hearing the case that the case would fall under Cl. (b) of Art. 133 (1) of the Constitution. His submission was that the judgment and the decree of this Court directly involves a question respecting property the value of which is over Rs. 10,000. It was urged that inasmuch as the decree provides for the demolition of the constructions made by the defendant-petitioner and the value of those constructions is far in excess of Rs. 10,000 the judgment and the decree of this Court involves directly a question relating to the property the value of which is over Rs. 10,000. This proposition was contested by Sri Kunzru with the result that the division Bench referred the following two questions of law for the decision of this Court.

"1. Whether in considering an application under Art. 133 (1) (a) and (b) and Section 110 (1) and (2), Civil P. C., the High Court would take into account constructions made subsequent to the filing of the suit?

2. Can the High Court, while dealing with an application as mentioned above, certify a case as one fit for appeal to the Supreme Court of India if on the date when the suit was filed the valuation was much below Rs. 10,000 or Rs. 20,000 but on the date when the application for certificate was made in the High Court or on the date when the High Court passed the decree, it was over Rs. 10,000 or Rs. 20,000 as the case may be?"

6. Inasmuch as Mr. Saksena has conceded before us that Cl. (a) of Art. 133 (1) of the Constitution does not apply to the instant case, we are confining our judgment to the question as to whether or not the case can fall under Cl. (b) of Article 133 (1) of the Constitution and the second part of Section 110 of the Code of Civil Procedure.

7. With regard to the first question we may state that Mr. Saksena had to concede that the valuation of the constructions which were added during the pendency of the present litigation would not be taken into account and the valuation of only those constructions would be taken into consideration which existed at the time when the suit giving rise to this application was filed. For this reason, we would answer the first question referred to us in the negative against the defendant-petitioner and in favour of the plaintiff-opposite party.

8. With regard to the second question the point for consideration is whether Cl. (b) of Art. 133 (1) of the Constitution or the second part of Section 110, Civil P. C. are independent of Art. 133 (1) (a) and Section 110(1), Civil P. C. respectively. In our judgment, the use of the word 'or' after Cl. (a) indicates that Cl. (b) is an independent provision wholly unconnected with Cl. (a) of Art. 133 (1) of the Constitution of India. The same word has been used in Section 110, Civil P. C. Therefore, we hold that the second clause of Section 110, Civil P. C. is also independent of the provisions of Section 110 (1), Civil P. C. Apart from the clear language of the statute, we find support for our view from *Chittarmal v. Shah Panna Lal Chandulal*, AIR 1965 SC 1440. It was held in that case as follows:—

"The variation in the language used in Cls. (a) and (b) of Art. 133 (1) pointedly highlights the conditions which attract the application of the two clauses. Under Cl. (a) what is decisive is the amount or value of the subject matter in the Court of first instance and 'still in dispute' in appeal to the Supreme Court; under Cl. (b) it is the amount or value of the property respecting which a claim or question is involved in the judgment sought to be appealed from. The expression 'property' is not defined in the Code, but having regard to the use of the expression 'amount' it would apparently include money. But the property respecting which the claim or question arises must be property in addition to 'or other than' the subject-matter of the dispute. If in a proposed appeal there is no claim or question raised respecting property other than the subject-matter, Cl. (a) will apply; if there is involved in the appeal a claim or question respecting property of an amount or value not less than Rs. 20,000 in addition to or other than the subject-matter of the dispute Cl. (b) will apply." (underlined (here in ') by us).

A similar view was expressed in *Ramesh v. Gendalal Motilal*, AIR 1966 SC 1445 where while considering the provisions of Cls. (a) & (b) of Art. 133 (1) of the Constitution their Lordships observed:—

"Under sub-cls. (a) & (b) of Cl. (1) of this Article an appeal lies on certificate of the High Court. That certificate may only be issued in cases in which the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal to the Supreme Court was or is not less than Rs. 20,000 or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value....."

9. If the valuation of the constructions made by the defendant-petitioner by the time the suit giving rise to this application was filed, is over Rs. 10,000 then the

judgment and the decree of this Court would undoubtedly involve a claim or question respecting property of the value of over Rs. 10,000.

10. The words 'Judgment and decree' occurring in Cl. (b) of Art. 133 (1) of the Constitution mean the judgment and decree of the High Court. We have, therefore, to find out whether on the date when the judgment or decree was passed by this Court or at the time of the proposed appeal to the Supreme Court, there was or is involved a question relating to property of the value of more than Rs. 10,000. It is settled law that what has to be seen is the value of the property at the time of the proposed appeal to the Supreme Court. See: Surendra Nath v. Dwarka Nath, AIR 1917 Cal 496; Nasar Ahmad v. Mt. Saidunissa, AIR 1932 Lah 526; Krishnabai v. Framroz Edulji Dinshaw, AIR 1932 Bom 543; Sri Kishan Lal v. Kashmiro, (1913) ILR 35 All 445 and Dalglish v. Domodar Narain Chaudhry, (1906) ILR 33 Cal 1286.

11. Our answer to the second question, therefore, is that if on the date when the application for certificate was made to the High Court or on the date when the High Court passed the judgment or the decree, the valuation of the property which is directly or indirectly involved is Rupees 10,000 or Rs. 20,000 as the case may be, a certificate under Cl. (b) of Art. 133 (1) of the Constitution and the second part of Section 110, Civil P. C., would have to be granted. Let the record of the case be sent back to the Bench which had made the reference of this case.

Order accordingly.

AIR 1970 ALLAHABAD 182 (V 57 C 24)

B. DAYAL AND B. N. LOKUR JJ.

Ram Swarup, Petitioner v. State Transport Appellate Tribunal, Uttar Pradesh and another, Respondents.

Civil Misc. Writ No. 3052 of 1963, D/- 28-11-1968.

(A) Motor Vehicles Act (1939), S. 64 (f) — Variation of conditions of permit — Only permit-holder can appeal and not third party. AIR 1957 Raj 312 (FB), Dissent.

The right of appeal under Section 64 (j) is confined to the permit-holder alone, the conditions of whose permit have been varied. The section does not give a right of appeal to any other person. Clause (b) confers a right of appeal in three situations: firstly, where the grievance is against the revocation of the permit; Secondly, where the grievance is against the suspension of the permit, and thirdly, where the grievance is against any varia-

tion of the conditions of the permit. In the first two situations, the person aggrieved is the permit-holder and none else; if the first two situations relate to the permit-holder, the third situation in the same clause must necessarily relate to the permit-holder; it does not stand to reason that the clause dealing with three situations refers to the permit-holder in two of them but to any one else in the third situation. AIR 1967 All 336, Approved AIR 1957 Raj 312 (FB), Dissent; Case discussed. (Para

(B) Motor Vehicles Act (1939), Ss. (8), 64 (f) — Application for varying conditions of permit — Fiction of law created by S. 57 (8) extends merely to procedure prescribed by S. 48 and not to right of appeal under S. 64 (f).

Section 57 (8), which provides that application for varying the conditions of permit shall be treated as an application for the grant of a new permit, does not have the effect of converting an application to vary the conditions of permit into an application for grant of a new permit. The fiction of law extends merely to procedure prescribed by Section 48 and not also to the right of appeal provided in Section 64 (f). AIR 1967 All 163, Followed. (Para

Cases Referred: Chronological

(1967) AIR 1967 All 163 (V 54),
Bhan Singh v. R. T. A. Meerut 1,
(1967) AIR 1967 All 336 (V 54),
Bhan Singh v. R. T. A. Meerut 4,
(1965) AIR 1965 Andh Pra 115
(V 52) = (1964) 2 Andh WR 426,
Janardhana Rao v. Dy. Transport
Commr.

(1961) AIR 1961 Madh Pra 81 (V 48)
= 1961 Jab LJ 133, Jasram v. State
Transport Authority

(1961) AIR 1961 Pat 313 (V 48) =
1960 BLJR 685, Nandlal Thana
Ram v. Ghani Ram

(1960) AIR 1960 Ker 18 (V 47) =
1959 Ker LJ 876, V. G. K. Bus
Service v. Kerala State Transport
Appellate Tribunal

(1957) AIR 1957 Raj 312 (V 44) =
1957 Raj LW 477 (FB), Jairamdas
v. R. T. A.

(1952) AIR 1952 Mad 545 (V 39) =
ILR (1952) Mad 595, Kali Mudaliar
v. Vedachala Mudaliar

S. K. Dhavan, for Petitioner; Standi
Counsel, for Respondents.

LOKUR, J.:— This petition under Article 226 of the Constitution has been referred to a Division Bench by Hon'ble Asthana, J. The material undisputed facts may be stated thus: The petitioner, Ram Swarup, and six others were holding stage carriage permits on Meerut-Rohta-Bhnauli-Baraut route under the Motor Vehicles Act, 1939. On a proposal of these operators, the Regional Transport Authority decided, with the approval

of the State Transport Authority, to take the route viz., Barnawa and the modified route was Meerut Rohta Barnasa Binauli Baraut. Thereupon the Regional Transport Authority invited applications for the modified route and the petitioner, Ram Swarup, and others made applications for variation in their permits in accordance with the modified route. Meerut Sardhana Passenger Transport Association objected to the variation in the permits of the petitioner and others, but the Regional Transport Authority held the objection as time-barred and granted variation in the permits of the petitioner and others.

Raghunandan Prasad, who is a member of the Meerut Sardhana Passenger Transport Association but who had not filed any objection in his personal capacity, filed an appeal to the State Transport Appellate Tribunal against the grant of variation in the permits of the petitioner and others. The petitioner contended that no such appeal lay at the instance of Raghunandan Prasad since he had filed no objection before the Regional Transport Authority. The Appellate Tribunal, however, relying upon a decision of the Rajasthan High Court, held that the appeal was competent under Section 64 (b) of the Motor Vehicles Act. The petitioner then presented this petition under Art. 226 of the Constitution contending that the appeal filed by Raghunandan Prasad is incompetent and praying that the order of the State Transport Appellate Tribunal be quashed. Asthana J. who heard the petition, felt that since under sub-section (8) of S. 57 of the Motor Vehicles Act an application to vary the conditions of a permit has to be treated as an application for grant of a new permit, the variation in the permits of the petitioner and others could be appealable under S. 64 (f) of the Act, but a Division Bench of this High Court having taken the view, in *Bhan Singh v. Regional Transport Authority, Meerut*, AIR 1967 All 163, that an application to vary the conditions of a permit cannot be deemed to be an application for grant of a permit, his Lordship considered that the decision required reconsideration and referred the case to a larger Bench.

2. It was not argued before us on behalf of Raghunandan Prasad that the appeal under consideration was competent under Section 64 (f) on the ground that, in view of sub-section (8) of S. 57, the applications of the petitioner and others for variation of the permits ought to be regarded as applications for new permits for the modified route. The only point pressed before us on his behalf was that the appeal is maintainable under Section 64 (b) of the Act. On behalf of the petitioner on the other hand it was urged that Section 64 (b) is not applicable in the circumstances of the case.

Section 64, omitting the unnecessary parts thereof, reads thus:—

"Any person—

- (a) aggrieved by the refusal of the State or a Regional Transport Authority to grant a permit, or by any condition attached to a permit granted to him, or
- (b) aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof, or
-
- (f) being a local authority or police authority or an association which, or a person providing transport facilities who, having opposed the grant of a permit, is aggrieved by the grant thereof or by any condition attached thereto, or
-
- (i) may appeal to the prescribed authority
-"

3. The true scope and meaning of Cl. (b) of Section 64 have been discussed by several High Courts including this High Court.

4. In *Bhan Singh v. Regional Transport Authority, Meerut*, AIR 1967 All 336 a Single Judge of this High Court held that the words "the permit" and the definite article "the" before the word "permit" in Cl. (b) connote that reference is to the permit mentioned in Cl. (a) and, accordingly, "the permit" in Cl. (b) does not mean any permit but the permit granted to the person who is aggrieved; on this interpretation, it was held that, under Cl. (b), only the person the conditions of whose permit have been varied can file an appeal and not a third person. According to this decision, Raghunandan Prasad would have no right of appeal against the order varying the conditions of the permits of the petitioner and others.

5. A similar construction is placed upon Cl. (b) by the High Courts of Madras, Kerala, Patna and Andhra Pradesh.

6. In the Madras case, *Kali Mudaliar v. Vedachala*, AIR 1952 Mad 545, the time-table of an operator was varied and another operator preferred an appeal, contending that such variation affected his business. A Single Judge, Subba Rao, J., held that the order was administrative and was not liable to be quashed by a writ of certiorari but observed that the appeal was otherwise competent under Section 64 (b). In the Letters Patent Appeal, a Division Bench was of the opinion that the time-table was not a condition of the permit and expressed considerable doubt as to the correctness of the conclusions of Subba Rao, J., so far as Clause (b) was concerned. Nevertheless, the learned Judges proceeded to state that even if the time-table could be said

to be a condition attached to the permit, that clause did not confer a right on one person to appeal against an order varying the conditions of a permit granted to another person. They observed:

"The expression 'the permit' in that clause must obviously refer to the permit mentioned in Clause (a). That permit is a permit granted to any person by the Transport Authority. We think the proper construction of that clause is to confine its application to persons aggrieved by the revocation or suspension of the permits granted to them or again aggrieved by any variation of the conditions of such permits granted to them."

7. A Full Bench of the Rajasthan High Court, however, took a different view in *Jairamdas v. Regional Transport Authority*, AIR 1957 Raj 312. The learned Judges pointed out that the variation of the conditions of the permit of a person might affect the rights of every person who has been providing transport facilities in that or connected area and every such person would certainly be aggrieved by the variation and a right of appeal under Section 64 (b) cannot be denied to him. They appreciated that the clause is not intended to permit an appeal by an indeterminate and undeterminable body of persons such as the public at large or the inhabitants generally of the area concerned. The correct position, according to their Lordships, is thus:—

"Ordinarily and in the vast majority of cases it is only the permit-holder under this clause who would be competent to file an appeal against an order varying the conditions of his permit, because such variation would by and large adversely affect his interests only. But a class of cases also arises where such variation may or may not adversely affect the holder of the 'permit', a condition whereof is under variation but adversely affects another permit-holder in the same area or a neighbouring area and, if so, the applicability of Cl. (b) cannot be legitimately denied in a case of this type or in such other similar cases and where such situation arises this clause cannot but be held also to permit an appeal by the party so affected."

8. Referring to the Madras case (*Supra*), their Lordships observed that it merely cast doubt on the conclusion of the learned Single Judge so far as Cl. (b) was concerned and all that it decided positively was that a variation as to the timings of a bus was not a variation of any of the conditions of the permit.

9. In *V. G. K. Bus Service v. Kerala State Transport Appellate Tribunal*, AIR 1960 Ker 18, a Single Judge of the Kerala High Court followed the aforesaid decision of the Madras High Court, observing that the view expressed by the Appellate Judges that Cl. (b) does not permit an

appeal by a third party is unequivocal and in the nature of obiter dicta. The learned Judge was unable to agree with the view of the Full Bench of the Rajasthan High Court. His Lordship pointed out that Section 64 (f) gave a right of appeal to a person providing transport facilities on certain conditions in specified situations and observed that it was not for the Court to consider as to why the Legislature gave a right only to such person.

10. A Division Bench of the Patna High Court held in *Nandlal Thana Ram v. Ghani Khan*, AIR 1961 Pat 313 that the language of Section 64 (b) must be read in the colour and context of the language of Cl. (a) and if these clauses are read together, the expression "the permit" in Cl. (b) must refer to the permit mentioned in Cl. (a) and it follows that the proper construction of Section 64 (b) is to confine its application to the persons aggrieved by the revocation of such permits granted to them. Their Lordships were of the opinion that Section 64 (b) does not confer a right on a third party to appeal against the order varying the conditions of the permit granted to another person. Their Lordships followed the decision in the Madras case and were unable to accept the decision in the Rajasthan case as correct.

11. The Madhya Pradesh High Court, in *Jasram v. State Transport Authority*, AIR 1961 Madh Pra 81, also held that only the permit-holder who is aggrieved by the variation of the conditions of his permit can appeal under Section 64 (b) and other persons providing transport facilities are disentitled to appeal thereunder; in coming to this conclusion, their Lordships relied upon the Madras case and the Kerala case but did not agree with the Rajasthan case. Their Lordships, however, observed that the right of appeal by persons providing transport facilities and aggrieved by a variation has been specifically provided in Section 64 (f) and the provisions of that clause would be otiose if Cl. (b) be regarded as conferring an unfettered right of appeal to those persons. Thus, their Lordships held that other persons providing transport facilities over a route, which is included by variation under sub-section (8) of Sec. 57 in another permit, can appeal under Cl. (f).

12. In *Janardhana Rao v. Deputy Transport Commissioner*, AIR 1965 Andh Pra 115, a Single Judge of the Andhra Pradesh High Court was of the opinion that an operator was not competent either under Section 64 (b) or S. 64 (f) to prefer an appeal against the variation of the timings prescribed for another operator. The learned Judge expressed agreement with the decision of the Madras case and did not accept the decision of the Rajasthan case. His Lordship observed:—

"It does not appear reasonable to say that out of the three grounds for grievance mentioned in Cl. (b), the first two will apply only to the permit-holder, but the third will apply not only to him but also to every outsider. Such a construction would permit fanciful and speculative appeals being preferred by rank strangers and officious busy bodies. But it is said that Section 64 (b) must be so construed as to confine its ambit within reasonable limits. This would be importing into the interpretation vague and uncertain factors and virtually attempting to legislate. And in the process, an otherwise simple position would be rendered needlessly complex."

13. It will thus be observed that it is only the Rajasthan High Court which has so far taken the view that a person other than a permit-holder can prefer an appeal against an order varying the conditions of the permit of another person. We, on our part, are unable to agree with the Rajasthan High Court. We respectfully consider that the view of the other High Courts discussed above is the correct view on a reasonable interpretation of Section 64 (b). Clause (b) confers a right of appeal in three situations: firstly, where the grievance is against the revocation of the permit, secondly, where the grievance is against the suspension of the permit, and thirdly, where the grievance is against any variation of the conditions of the permit. It cannot be disputed that in the first two situations, the person aggrieved is the permit-holder and none else: if the first two situations relate to the permit-holder, the third situation in the same clause must necessarily relate to the permit-holder; it does not stand to reason that the clause dealing with three situations refers to the permit-holder in two of them but to any one else in the third situation. We do not discountenance the possibility of a third party being aggrieved by the variation of the conditions of a permit, but it is not for us to consider why the Legislative policy has denied the right of appeal to such party.

It may be mentioned that Act, as originally enacted, provided for variation of the conditions of the permit of a permit-holder suo motu by the Regional Transport Authority (vide Section 48 (3) (xxi) (a), S. 51 (2) (viii) (a) and S. 56 (2) (viii) (a)). This power to vary the conditions of a permit was obviously conferred upon the Regional Transport Authority to be exercised in the public interest and no opportunity was contemplated for other operators of transport facilities to object to such variation. Where the Authority made a variation in the conditions of the permit in exercise of these powers, the permit-holder alone could prefer an appeal. It was perhaps therefore, that Section 64 (b) did not provide for an appeal by parties other than the permit-holder.

It was only by the amendment of 1956 that Cl. (8) of Section 57 was introduced enabling a permit-holder to apply for variation of the conditions of his permit. Though this clause provides that the application to vary conditions of the permit shall be treated as an application for grant of a new permit, implying thereby that other persons providing passenger transport facilities could make representations against the variation applied for, no change, it is significant, was made in Section 64 (b) and the earlier position that the permit-holder alone could prefer an appeal was maintained. If a change was intended and persons other than the permit-holder were permitted to file appeals under Section 64 (b) against the variation of the conditions of the permit of a permit-holder, there should have been a provision as in Cl. (f); otherwise the right of appeal would extend to all the sundry and this could not have been in contemplation of Section 64 (b). For these reasons, we adhere to the conclusion reached by a Single Judge of this High Court in AIR 1967 All 336.

14. We have stated earlier that the question whether an appeal is maintainable under Section 64 (f) has not been pressed before us. Nevertheless, we wish to state that we, with respect, agree with the decision of the Division Bench in AIR 1967 All 163 that Section 57 (8), which provides that an application for varying the conditions of permit shall be treated as an application for the grant of a new permit, does not have the effect of converting an application to vary the conditions of permit into an application for grant of a new permit. The fiction of law extends merely to the procedure prescribed by Section 48 and not also to the right of appeal provided in S. 64 (f).

15. In the result, the appeal filed by Raghunandan Prasad to the State Transport Appellate Tribunal is incompetent and the order passed by the Appellate Tribunal, dated 30-4-1963, is quashed. The Appellate Tribunal is hereby directed to dismiss the appeal as not maintainable. In the circumstances of the case, the parties shall bear their own costs.

Order accordingly.

AIR 1970 ALLAHABAD 185 (V 57 C 25)
K. B. ASTHANA, J.

Smt. Gauri Devi, Appellant v. Bishwanath Banerjee, Respondent.

F. A. F. O. No. 44 of 1966, D/-10-12-1968, against order of Civil J., Varanasi, D/- 21-10-1965.

(A) Criminal P. C. (1898), Section 488
— Order for maintenance under Sec-

EM/GM/C271/69/NYR/D

tion 488 — Civil suit to set aside order made after contest — Suit barred — Order challenged on ground of fraud or concealment — Suit not barred — (Civil P. C. (1908), S. 9 — Barred by Criminal P. C.)

No doubt, a Civil Court will have no jurisdiction to set aside an order duly and properly passed by a Magistrate under Section 488 of the Criminal P. C. That is to say, if an order is made against a husband for payment of maintenance to his wife after a contest it could only be modified or set aside in appeal or revision by the higher Court as provided by the Criminal P. C. But where the order of the Magistrate is challenged on the ground that it was obtained by fraud having been played upon the Court and the cause of action is based on the fraudulent conduct of a party who obtained that order in his or her favour, its validity could always be questioned by way of a suit in the Civil Court as ultimately that order affects the Civil rights of the parties concerned relating to status, money and property. AIR 1964 SC 322 and AIR 1963 All 143 and AIR 1956 Trav-Co. 204, Ref. (Para 5)

(B) Civil P. C. (1908), S. 20 — Order for maintenance by Court of A State — Enforcement of order in B State — Civil suit to set it aside on ground of fraud or concealment — Part of cause of action held arose in B State — Civil Court in B State therefore, had jurisdiction to entertain civil suit — (Criminal P. C. (1898), S. 488). (Para 4)

Cases Referred: Chronological Paras

- (1964) AIR 1964 SC 322 (V 51) =
 (1964) 1 SCR 752, Firm of Illurh Subbayya Chetty & Sons v. State of Andhra Pradesh 5
 (1963) AIR 1963 All 143 (V 50) =
 1962 All LJ 786 = 1963 (1) Cri LJ 394, Km. Nafess Ara v. Asif Saadat Ali Khan 6
 (1956) AIR 1956 Trav-Co 204 (V 43) =
 1956 Cri LJ 1098, Johnson v. Sarasama 6
 Narendra Kumar Verma, for Appellant.

JUDGMENT:— This appeal is directed against an order of remand passed by the lower appellate Court to the effect that the suit to be reheard and decided in accordance with law and in the light of the observations made by the lower appellate Court.

2. The suit which has given rise to this appeal was filed by Vishwanath Banerji, the plaintiff-respondent, in the Court of the Munsif of Varanasi for a declaration that an order dated 19-7-1961 passed by Sri H. K. Sharma, Magistrate First Class, Deoghar District Santhal Parganas Bihar in Criminal Case No. 376 of 1961, misc., case No. 125 of 1961, Smt. Gauri Banerji v.

Vishwanath Banerji, under S. 488, Criminal P. C., was illegal, ultra vires, void, ineffective and unenforceable and for a permanent injunction restraining the defendant from taking any steps to realise by distress warrants or otherwise any sum of money from the plaintiff in pursuance of the said order. Admittedly Vishwanath Banerji and Smt. Gauri Banerji are husband and wife having been married at Deoghar in Bihar in 1958. Admittedly both of them last resided in Varanasi.

It was alleged by the plaintiff that his wife Smt. Gauri went away to her father's place in May 1959 to see her ailing father but refused to return to him despite his best efforts. The plaintiff then took proceedings under Section 9 of the Hindu Marriage Act against his wife Smt. Gauri Devi for restitution of conjugal rights and it was registered as case No. 29 of 1960 in the Court of District Judge, Varanasi. During the pendency of the said proceedings for restitution of conjugal rights Smt. Gauri Banerji applied for interim maintenance and expenses for defending the case. This application was rejected. It was then alleged that without the knowledge of the plaintiff and without any notice being served upon him, Smt. Gauri took proceedings before the Magistrate in Deoghar under Section 488, Criminal P. C. and that she and her father fraudulently before the Court having represented that the notices had been served, got an order behind the back of the plaintiff directing the plaintiff to pay a sum of Rs. 70 per month as maintenance. It was also alleged that the plaintiff only knew of the said order when distress proceedings were started against him by the police at Varanasi and a threat was made for attachment of his properties. To protect himself from the alleged illegal attachment the plaintiff filed the suit giving rise to this appeal and for the relief mentioned above.

3. The learned First Additional Munsif before whom the instant suit came up for hearing held that the Civil Court had no jurisdiction to entertain a suit for setting aside of an order duly passed by a Magistrate under Section 488 of the Cri. P. C. and dismissed the suit on this preliminary point. On appeal by the plaintiff the learned Judge of the lower appellate Court took a contrary view and held that the suit was cognizable by a Civil Court as it was based on a cause of action alleging fraud and because the order of the Magistrate of Deoghar passed under Section 488, Criminal P. C. was impugned as vitiated not having been duly passed. The learned Judge set aside the decree of the learned Munsif and remanded the suit for rehearing in accordance with law. It is against this order that Smt. Gauri Banerji the defendant, has filed this appeal.

4. On behalf of the appellant it was urged by her learned counsel that an order passed under Section 488 of the Criminal P. C. even assuming there was some procedural irregularity could not be set aside by a Civil Court and the only remedy which was open to the aggrieved party was to file an appeal or revision under the Criminal Procedure Code. It was also urged that the Court at Varanasi had no jurisdiction as no part of the cause of action arose within its jurisdiction. The submission was that the impugned order was passed by the Magistrate in Deoghar in Bihar and even if a suit would lie in a Civil Court for a declaration that the said order was null and void and for an injunction restraining the defendant from enforcing that order, it could be filed only in the Civil Court at Deoghar which will have jurisdiction and where the defendant resided.

4-A. In order to meet the second contention of the learned counsel for the appellant indicated above, the learned counsel for the plaintiff-respondent submitted that since the order of the Magistrate under S. 488 was tried to be enforced in Varanasi through the police of Varanasi and a threat was made by the police at Varanasi to attach the property of the plaintiff, it was always open to the plaintiff to seek a declaration that his property was not attachable in execution of the said order and for such a suit the cause of action, at any rate, a part of it, arose at Varanasi within the jurisdiction of the Civil Court of Varanasi. The learned counsel for the defendant-appellant strenuously contended in reply that no such plea was raised in the plaint and no such relief was sought in the plaint so as to bring the suit within the jurisdiction of the Civil Court at Varanasi. On a reading of the plaint and the reliefs claimed it did appear to me that the real intention of the plaintiff was to seek such a relief and the cause of action based on the process issued by the local police can be said to be pleaded.

But I thought it proper, as the suit was still in its infancy, to allow an opportunity to the plaintiff to amend his plaint so that what was implicit in the plaint be made explicit. The learned counsel for the plaintiff-respondent filed an application for amendment of the plaint which despite time having been granted to the learned counsel for the defendant-appellant has not been opposed. I have allowed the amendment to be incorporated in the plaint. It would be open to the defendant to file a fresh written statement to meet the explicit pleas raised for which reasonable time will be granted by the lower Court after the record had been received by it from this Court. The pleas of a specific nature having been raised in

the plaint and the proper relief having been sought, the Court at Varanasi will have jurisdiction to entertain the suit.

5. Coming to the main question arising on the appeal, namely, the competency of the Civil Court to set aside an order passed by the Magistrate under Section 488, Criminal P. C., I have no doubt in my mind that a Civil Court will have no jurisdiction to set aside an order duly and properly passed by a Magistrate under Section 488 of the Criminal P. C. That is to say, that if an order is made against a husband for payment of maintenance to his wife after a contest it could only be modified or set aside in appeal or revision by the higher Court as provided by the Criminal Procedure Code. But where the order of the Magistrate is challenged on the ground that it was obtained by fraud having been played upon the Court and the cause of action is based on the fraudulent conduct of a party who obtained that order in his or her favour, its validity could always be questioned by way of a suit in the Civil Court as ultimately that order affects the civil rights of the parties concerned relating to status, money and property.

The learned Munsif relied upon certain reported cases in support of his view that the Civil Court will have no jurisdiction to set aside an order passed under Section 488, Criminal P. C. All the cases relied upon by the learned Munsif are distinguishable on facts. In none of them the suit which was filed in Civil Court was based on a cause of action attributing fraud or concealment to the defendant. It appears to me that in the instant case the attempt of the defendant Smt. Gauri Banerji to enforce that order against the plaintiff, her husband, in Varanasi involving a threat to his property could only be warded off by the husband by filing a suit in the Civil Court at Varanasi for a declaration that the order was null and void and was not binding on him and for an injunction restraining the defendant from enforcing that order. If the order passed under Section 488, Criminal P. C. by the Magistrate at Deoghar is ultimately found to have been duly passed the suit will fail on merits. But what is found here is that the plaintiff has challenged the very jurisdiction of the Magistrate at Deoghar and his competency in law to pass such an order.

Where an order under Section 488 is not duly passed any action taken on the basis of that order affecting the status and property of an aggrieved party can always be questioned in the Civil Court by seeking the appropriate relief, order or injunction. It is only a suit expressly or impliedly barred from the cognizance of the Civil Court which would not be tri-

able by it as provided by Section 9 of the Civil P. C. The learned counsel for the defendant-appellant has failed to satisfy me that a suit for a declaration that an order passed by a Magistrate under Section 488, Criminal P. C. is vitiated by fraud and concealment of true facts and has been fraudulently obtained, is expressly or impliedly barred by the provisions of Criminal Procedure Code or any other law. It has been observed by the Supreme Court in the case of *Firm of Illurh Subbayya Chetty & Sons v. State of Andhra Pradesh*, AIR 1964 SC 322, in para 6 of the report as follows:—

"In dealing with the question whether Civil Courts' jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind the fact that there is a general presumption that there must be a remedy in the ordinary Civil Courts to a citizen claiming that an amount has been recovered from him illegally and that such a remedy can be held to be barred only on very clear and unmistakable indications to the contrary. The exclusion of the jurisdiction of the Civil Courts to entertain civil cases will not be assumed unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may not by itself necessarily exclude the jurisdiction of the Civil Courts to deal with a case brought before it in respect of some of the matters covered by the said statute."

6. From the above quoted observations it is clear that the Supreme Court enjoins that the Civil Courts ought not to readily infer in favour of excluding their jurisdiction to entertain a civil cause unless it is found that a statute expressly or by necessary implication excludes their jurisdiction. The observations of B. N. Nigam, J. in the case of *Km. Nafess Ara v. Asif Saadat Ali Khan*, 1962 All LJ 786 = (AIR 1963 All 143) tend to show that a Civil Court has jurisdiction to declare an order under Section 488, Criminal P. C. to be not binding on a party to it. In the case of *Johnson v. Sarasamma*, AIR 1956 Trav-Co 204 a Division Bench of Travancore Cochin High Court seem to favour the view that a Civil Court has jurisdiction in such matters. I need not notice the other reported cases which had been cited before me at the Bar by the learned counsel for the parties as I am of the view that the validity of the order under Sec. 488, Cri. P. C. having been questioned on the alleged fraud played upon the Court by the defendant Smt. Gauri Banerji, the suit was cognizable by a Civil Court at Varanasi where a part of cause of action arose when the said order was tried to be enforced at Varanasi against the plaintiff-appellant.

7. For the reasons given above, I dismiss this appeal but make no order for costs.

Appeal dismissed.

AIR 1970 ALLAHABAD 188 (V 57 C 26)

S. N. SINGH J.

Pooran Mal Bansal, Defendant-Applicant v. Smt. Chhutto Devi, Plaintiff-Op-posite Party.

Civil Revn. No. 1076 of 1968, D/-16-1-1969 against judgment and order of Mun-sif, Agra, D/- 25-4-1968.

Court-fees and Suits Valuations—Court-fees Act (1870), S. 7 (9) (U. P.) — Suits Valuation Act (1887), Ss. 4, 8 (U. P.) — Mortgage in favour of two persons advancing equal amounts — Mortgagor acquiring interest of one mortgagee — Suit for redemption of remaining half — Amount advanced by mortgagee whose interest was not acquired would be principal amount as contemplated in S. 7 (9) — (Transfer of Property Act (1882), S. 60).

A mortgaged his property in favour of two persons for a consideration of Rupees 8500 and each of the mortgagees had advanced Rs. 4250. The mortgagor acquired the interest of one of the mortgages and brought a suit for redemption and valued the suit at Rs. 4250.

Held, that the valuation was proper within meaning of Section 7 (9), Court-fees Act. For all practical purposes the interest of the two mortgagees were quite distinct and with the acquisition of the right of one of the mortgagees by the mortgagor half of the mortgage stood extinguished and only half of it remained to be redeemed and the mortgage money secured expressed in the instrument would be deemed to be Rs. 4250 for the purposes of redemption. In such a case the integrity of the mortgage could not be held to be broken. AIR 1955 Punj 96 & AIR 1948 All 55 & (1886) ILR 8 All 438 (FB) & (1882) ILR 6 Bom 324, Rel. on; AIR 1941 All 357 & (1885) ILR 10 Bom 41 & AIR 1946 All 304 & AIR 1948 All 55 & AIR 1953 All 240 & AIR 1955 Punj 96, Dist. (Paras 7, 8, 10)

The case not having been covered by Section 4 of the Suits Valuation Act the suit has to be valued in terms of Section 7 sub-clause (9) of the Court-fees Act read with Sec. 8 of the Suits Valuation Act, as such the valuation for the purposes of jurisdiction will be the same as that for the purposes of court-fees. AIR 1948 PC 36, Dist. (Paras 7, 10)

Cases Referred: Chronological Paras
(1955) AIR 1955 Punj 96 (V 42) =
56 Pun LR 498, Narain Singh v.
Teja Singh 5, 7

(1953) AIR 1953 All 240 (V 40) =
1952 All LJ 650, Pokhan Singh v.
Radhey Lal 5
(1948) AIR 1948 PC 36 (V 35) =
ILR (1947) Lah 727, Mohammad
Akbar Khan v. Mt. Motai 6
(1948) AIR 1948 All 55 (V 35) =
1947 All LJ 244, Shiva Harakh
Rai v. Akbar Ali 6, 7
(1946) AIR 1946 All 304 (V 33) =
ILR (1946) All 409, Basant Lal
v. Lalta Prasad 5
(1941) AIR 1941 All 357 (V 28) =
ILR (1941) All 469, Abdul Haq
v. Shamsuddin 5, 8
(1886) ILR 8 All 438 = 1886 All
WN 146 (FB), Amanat Begum v.
Bhajan Lal 6, 9
(1885) ILR 10 Bom 41, Umarmkhan
v. Mahomed Khan 5, 8
(1882) ILR 6 Bom 324, Balkrishna
Dhondo v. Nagvekar 6, 9

K. C. Agarwal, for Applicant; K. N.
Seth, for Opposite Party.

ORDER:— This revision is directed
against the decision of Munsif, Agra, decid-
ing the issue of jurisdiction.

2. The issue about jurisdiction arose
in the following circumstances. It ap-
pears that the plaintiff in the instant suit
is successor-in-interest of the mortgagors
who had mortgaged the property in dis-
pute on 8th March 1943 in favour of two
persons Sri Hazari Lal Jain and Sri
Raghubir Saran for a consideration of
Rs. 8500. The mortgage deed which had
been executed in favour of these two per-
sons showed that each one of them had
advanced Rs. 4250 and in the mortgage
deed it was recited that the mortgage had
been executed in favour of the two mort-
gagors (sic mortgagees) giving them pos-
session over half of the property. The
words used in the mortgage deed are "Ba
hissa masawi rehan dakhli kiya". This
would show that Hazari Lal was put in
possession over half of the property for
a consideration of Rs. 4250 and Raghubir
Saran was put in possession over the other
half of the property for a consideration of
Rs. 4250. The plaintiff mortgagor acquir-
ed the interest of one of the mortgagees
Sri Hazari Lal whose heir executed a
document to this effect in favour of the
plaintiff. The plaintiff by the instant suit
sought redemption of the mortgage dated
8th March, 1943 and valued the suit at
Rs. 4250.

3. An objection was raised on behalf
of the contesting defendants that the suit
should have been valued at Rs. 8500 the
amount secured under the mortgage dated
8th March 1943, with the result that the
Court of the Munsif had no jurisdiction
to entertain the suit.

4. An issue about jurisdiction was rais-
ed and the Munsif has decided the issue

in favour of the plaintiff opposite party
necessitating the filing of the present revi-
sion.

5. It has been argued on behalf of the
petitioner that the present suit being one
for redemption Section 7, sub-clause (9)
of the Court-fees Act read with Section 8
of the Suits Valuation Act applied to the
facts of the case, with the result that the
suit should have been valued for the pur-
poses of jurisdiction at Rs. 8500 the
amount expressed to have been secured
by the instrument. It was further argued
that on the facts of the present case the
integrity of the mortgage not having been
broken there was no escape for the plain-
tiff but to value the suit at Rs. 8500. Re-
liance was placed on the cases of Abdul
Haq v. Shamsuddin, AIR 1941 All 357,
Umarmkhan v. Mahomedkhan, (1885) ILR
10 Bom 41, Basant Lal v. Lalta Prasad,
AIR 1946 All 304, Shiva Harakh Rai v.
Akbar Ali, AIR 1948 All 55, Pokhan Singh
v. Radhey Lal, AIR 1953 All 240 and
Narain Singh v. Teja Singh, AIR 1955
Punj 96.

6. On the other hand it was contended
on behalf of the plaintiff opposite party
that the valuation put by the plaintiff in
the instant case was correct. It was sub-
mitted that on the facts of this case half
of the original mortgage was extinguish-
ed by the acquisition of the right of one
of the mortgagees by the plaintiff mort-
gagor as such the mortgage money ex-
pressed in the instrument of the mort-
gage which remained to be redeemed was
Rs. 4250. Reliance was placed on a Full
Bench decision of this Court in Amanat
Begam v. Bhajan Lal, (1886) ILR 8 All 438
& Balkrishna Dhondo v. Nagvekar, (1882)
ILR 6 Bom 324. The view of the trial
Court that in the instant case the suit
could not be valued in terms of Section 7
sub-clause (9) of the Court Fees Act was
also sought to be supported by relying on
the case of Mohammad Akbar Khan v.
Mt. Motai, AIR 1948 PC 36 at page 38.

7. I have considered the respective
submissions of the learned counsel for the
parties and in my opinion the decision of
the Munsif about jurisdiction has to be
upheld but on a different reason than the
Munsif has given in this case. Before the
learned Munsif the plaintiff opposite party
contended that on the facts of the present
case it was clear that there were as a
matter of facts two mortgages joined in a
single document of mortgage and since
one of the two mortgages had been ex-
tinguished the plaintiff was entitled to
redeem the remaining mortgage which was
only for a sum of Rs. 4250. It was also
argued that the integrity of the mortgage
having been broken the plaintiff was en-
titled to value the suit at Rs. 4250. The
learned Munsif repelled both these argu-
ments but came to the conclusion that in
a suit for redemption of this type the suit

could not be valued in terms of Sec. 7, sub-clause (9) of the Court-fees Act with the help of Section 8 of the Suits Valuation Act. He held that *prima facie* on the basis of the plaintiff allegation since the plaintiff has alleged full payment and extinction of half the mortgage the suit was within jurisdiction of the Court and it was immaterial what amount was secured under the mortgage. I agree with the decision of the Munsiff so far as the question of the breaking of the integrity of the mortgage is concerned. The Munsif is right that on the facts alleged and found in this case the integrity of the mortgage could not be held to be broken. The view of the learned Munsif is well supported by the decision cited by the learned counsel for the petitioner in the cases of AIR 1955 Punj 96 and AIR 1948 All 55. However, I am not in agreement with the view of the learned Munsif that Section 7, sub-clause (9) of the Court-fees Act is not applicable to the facts of this case. In my opinion having regard to the various provisions of the Suits Valuation Act as well as the Court-fees Act it has to be held that the present case not having been covered by Section 4 of the Suits Valuation Act the suit has to be valued in terms of Section 7, sub-clause (9) of the Court-fees Act read with Section 8 of the Suits Valuation Act as such the valuation for the purposes of jurisdiction will be the same as that for the purposes of court-fees. Having come to this conclusion it has to be seen whether the valuation put by the plaintiff in the instant case is the correct valuation.

8. Having considered the respective arguments of the learned counsel for the parties and having looked into the various authorities cited by the learned counsel I am inclined to accept the argument put forth on behalf of the plaintiff opposite party that for all practical purposes the interest of the two mortgagees were quite distinct and with the acquisition of the right of one of the mortgagees by the mortgagor half of the mortgage stood extinguished and the mortgage money secured expressed in the instrument would be deemed to be Rs. 4250 for the purposes of redemption in this case. Having come to this conclusion it is necessary to notice the relevant cases cited by the learned counsel for the parties on this point. The two cases relied on by the learned counsel for the petitioner in support of his argument on this point in my opinion are distinguishable. In the case of AIR 1941 All 357 it was that in a second appeal or first appeal from a decree in a suit against a mortgagee for the recovery of the mortgaged property the court-fee must be paid *ad valorem* on the principal sum secured by the mortgage. In the body of the judgment it was observed that if there was a mortgage securing a debt of one

lac rupees and the plaintiff came to Court on the allegation in a suit for redemption that only Rs. 50 were due even then the plaintiff would be required to pay court-fees on the full amount of Rupees one lac. The facts of this case are distinguishable. The other case relied on by the learned counsel for the petitioner on this point is the case of (1885) ILR 10 Bom 41. In this case it appears that there was a mortgage of Rs. 1152/15/4 in favour of two persons. The decree for redemption directed the payment of Rs. 568/9/8 to one defendant and Rs. 584/5/8 to another defendant. Two appeals were filed and the Bombay High Court held that each memorandum of appeal should be valued at Rs. 1152/15/2 for the purposes of the payment of court-fees. Both the above cases are distinguishable from the facts of the present case.

9. As against these two cases reliance was placed by the plaintiff opposite party on the cases of (1886) ILR 8 All 438 and (1882) ILR 6 Bom 324. In the case of (1886) ILR 8 All 438 it was held that "where on account of purchase of a portion of equity of redemption by the mortgagee, the mortgage debt has been pro tanto extinguished and some of the mortgagors became entitled to recover a portion only of the mortgaged property, in a suit for redemption of such portion, "the principal money expressed to be secured" on which the court-fees for the suit is to be calculated under Art. 9, Section 7 of the Court-fees Act, must be taken to be the proportionate amount of the debt for which the portion sought to be redeemed would be liable." In the case of (1882) ILR 6 Bom 324 it was held that "in cases in which it is competent to the mortgagor to sue to recover a portion of the mortgaged property, the debt must be regarded as distributed over the whole property; and as regards the portion of the property sued for, "the principal money expressed to be secured" must be taken to be the proportionate amount of the debt for which such portion of the property is liable."

10. The facts of these two cases are also not similar to the facts of the present case, but the principle of law enunciated in these two cases can safely be applied to the facts of the instant case. In the present case on the allegations in the plaint it is clear that half of the original mortgage stood extinguished by the act of the parties. The mortgagor having acquired the rights of one of the mortgagees half of the mortgage got extinguished and only half of it remained to be redeemed. The principal amount of this remaining half is Rs. 4250 and in my opinion this should be deemed to be the principal amount expressed in the instrument of the mortgage as contemplated by S. 7, sub-cl. (9) of the Court-fees Act. The other cases relied on

by the learned counsel for the petitioner other than those already noticed above relate to Section 23 of the Agriculturist Relief Act and are not relevant for the purposes of this case; hence they need not be noticed.

11. In view of what has been said above this revision cannot succeed. Accordingly it is dismissed but there will be no order as to costs.

Revision dismissed.

AIR 1970 ALLAHABAD 191 (V 57 C 27) FULL BENCH

S. N. DWIVEDI, R. S. PATHAK AND
R. L. GULATI, JJ.

Commissioner, Sales Tax, U. P., Lucknow, Applicant v. M/s. Prayag Chemical Works, Naini, Allahabad, Opposite Party.
Sales Tax Reference No. 195 of 1965, D/- 20-2-1969.

Sales Tax — U. P. Sales Tax Act (15 of 1948), Section 3-A (1), Notification under dated 31-3-1956, Entry 7 — Expression 'chemicals of all kinds' — Interpretation of — Sodium silicate is a chemical within the meaning of the entry.

Sodium silicate is a chemical within the meaning of the expression 'chemicals of all kinds' used in Entry 7 in the notification and is liable to tax. (1967) 20 S. T. C. 246 (All), Affirmed (Paras 18, 27, 39)

Having regard to the differing purposes and differing environments of science and Sales Tax Act and two meanings of the term 'chemical' in science itself the term should not be given the stricter meaning. On the other hand, having regard to the principles of interpretation concerning Sales Tax Acts, the word should be construed in the commercial sense. And so construed, it certainly comprehends sodium silicate. (Para 14)

It is now well settled that while interpreting items in statutes like the Sales Tax Acts, resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense. (Case law discussed.) (Paras 10 and 24)

The mere fact that sodium silicate as used in the manufacture of soap is not a chemical according to the scientific meaning of the term will not take it out of the expression 'chemicals of all kinds' in the notification. (Paras 5, 28, 39)

Per Gulati, J. :—

Even taking into consideration scientific meaning of the word "chemical", according to one of the definitions of the word "chemical" any substance which is produced by a chemical process is regarded

as a chemical. Sodium silicate is manufactured by chemical process. The mere fact that sodium silicate does not take part in a chemical reaction in the manufacture of soap does not make it any the less chemical. (Para 39)

Cases Referred: Chronological Paras

- (1968) 1968-21 STC 295 (All),
Avadh Sugar Mills Ltd. v. Sales Tax Officer 12
(1967) AIR 1967 SC 1454 (V 54) =
1967-19 STC 469, Commr. of Sales Tax, Madhya Pradesh v. Jaswant Singh Charan Singh 10, 24
(1967) 1967-20 STC 246 (All),
Commr. of Sales Tax v. Banaras Chemicals 4, 16, 20, 36
(1961) AIR 1961 SC 1325 (V 48) =
1962-1 SCR 279, Ramavatar Budhai Prasad v. Asst. Sales Tax Officer 23
(1951) 1951 CLR (Ex) 122, His Majesty the King v. Planters Nut and Chocolate Co., Ltd. 11, 23
Standing Counsel, for Applicant.

DWIVEDI J. :— Section 3 of the U. P. Sales Tax Act imposes a tax on the sale of goods. S. 3-A (1) empowers the State Government to notify that the turnover in respect of any goods or class of goods shall be liable to tax at such single point in the series of sales by successive dealers as it may specify in the notification. Section 3-A (2) empowers the Government to fix the rate of tax not exceeding the maximum mentioned therein.

2. Acting under Section 3-A, the Government issued a notification on March 31, 1956. Head 7 of the notification specifies 'chemicals of all kinds.' According to the notification, sales of chemicals of all kinds, which are manufactured in Uttar Pradesh, shall be liable to tax at the point of sale by the manufacturer and in case of goods imported from outside U. P., at the point of sale by the importer.

3. The opposite party is a manufacturer of, and dealer in, sodium silicate and washing soap. In the assessment year 1958-59 the opposite party admittedly sold sodium silicate manufactured by it for Rs. 98,028,000. The Sales Tax Officer treated sodium silicate as a chemical and charged sales tax in accordance with the aforesaid notification. His order was affirmed in appeal. But the Judge (Revisions) reversed his decision. He took the view that sodium silicate was not a chemical. But at the instance of the Commissioner, Sales Tax, the applicant has referred to this Court this question:

"Whether sodium silicate as used in the manufacture of soap is included in 'chemicals of all kinds' appearing at item 7 of the notification dated 31-3-1956."

4. A Division Bench of this Court has already given an affirmative answer to this

this prima facie presumption can be rebutted by evidence to the contrary."

Then their Lordships proceeded to consider the relative scope of Section 19 of the Representation of the People Act 1950 and Section 36 of 1951 Act, and held that—

"Thus when a presumption is raised under Section 36(7) it may mean prima facie that the person concerned is not less than 21 years of age and is ordinarily resident in that constituency; but for the validity of the nomination paper it has to be proved that the candidate has completed 25 years of age."

Once again, the Supreme Court by this decision, reiterated the jurisdiction of the Election Tribunal to go into the question in respect of the age of the candidate and that the entry in the electoral roll is not conclusive or final.

21. The Madras High Court had an occasion to consider this question in a very recent decision of a Division Bench in *S. V. Viswanathan v. Rangaswamy*, AIR 1967 Mad 244. That was a case which arose under the Madras District Municipalities Act. In an election to a Municipal Council both the writ petitioner and the first respondent secured equal number of votes. Lots were cast, as prescribed by the procedure, which resulted in the writ petitioner being declared elected. The first respondent questioned the election of the petitioner in an election petition. The material ground on which the election was challenged was, that one of the votes which were polled in favour of the petitioner was invalid, because on the date of the poll, the voter was below 21 years of age and was, therefore, incompetent to vote. After taking evidence, the Election Commissioner found that the said allegation was established. That decision resulted in the petitioner securing one vote less than the first respondent. Therefore, the Election Commissioner set aside the election of the petitioner and declared the first respondent to have been duly elected. The writ petition was filed against that decision of the Election Commissioner. This is thus a case where the validity of a vote was in question. The Writ Petition was allowed by a Single Judge of the High Court, on the ground that investigation into the disqualification of a voter, by reason of his being below 21 years of age, within the meaning of Article 326 of the Constitution, was outside the jurisdiction of the Election Tribunal. Thereupon the first respondent filed the Letters Patent Appeal which was considered by the Division Bench. Ramakrishnan J., who delivered the main judgment, reviewed the entire case law and observed in paragraph 14 that:

"Before us, learned counsel Sri M. K. Nambiar, appearing for the appellant, does not dispute the broad proposition thus laid down, that there is no provision in the District Municipalities Act which incorporates the age disqualification under Art. 326 of the

Constitution; but he urged that if it is found by the Tribunal that the voter in question, suffered a constitutional disability, it would have the effect of rendering the electoral roll, so far as his inclusion therein is concerned non est and void. The reception of his vote would, therefore, be a case of an improper reception of a vote within the meaning of the first part of Rule 10(c), because it would amount to the receiving of the vote of a non-existent voter. This argument no doubt involves a fiction, the fiction being to treat the actual entry in the roll, of a voter's name, when the voter suffers from a fundamental constitutional disability, as null and void. The problem that we have been asked to consider in this case, is whether such an approach to the question can be permitted in the light of the various legal principles that have been pressed before us."

Later summing up the discussion the learned Judge, observed in the last sub-paragraph of paragraph 14 that—

"Learned counsel for the appellant urges that the case before us, is one where the action of the Returning Officer in receiving the vote of the disputed voter was improper because by a fiction his name itself should be deemed to have been not in the roll. We have to observe that the point stressed before us in this form, by the learned counsel for the appellant was not urged by him either before the Election Commissioner or before the learned Judge. This point was also not considered in the Full Bench decision of the Allahabad High Court quoted earlier and which was followed by Srinivasan, J. Learned counsel urges that it is the duty of Courts of Law as well as of Tribunals, to act in accordance with the provisions of the Constitution, and whenever and at whatever stage, their attention is drawn to the fact that there has been a patent violation of a constitutional provision, whether in legislating an enactment or in preparing a statutory instrument, the Court as well as Tribunals have a duty to give effect to the Constitution. In the present case, apart from the question about the self-contained nature of the District Municipalities Act and the rules framed thereunder, limiting the scope of investigation of Election Tribunal and determining their jurisdiction, when a specific breach of the Constitution in the preparation of the statutory instrument, whose contents have to be relied upon for decision in the present dispute, has been brought to the notice of the Election Tribunal, as well as of this Court, effect will have to be given to the consequences which will follow from such a breach. In the light of the authorities quoted above, we are of the opinion that such a constitutional breach involves the rendering of the electoral roll a nullity so far as the disputed voter's name is concerned, and his name entered in the roll must be deemed as non est, for the purpose of acceptance or reception of his vote."

In that view their Lordships allowed the appeal and set aside the election of the Writ Petitioner confirming the order of the Election Tribunal.

22. The case law above discussed would yield the result, that the mere entry in an electoral roll is not final or conclusive in regard to the age of the candidate and it is open to the Election Tribunal to enquire, in an election petition, into the age of the candidate and to find out whether he was duly qualified to seek the election. If a person does not complete the age of 21 years, when his name is registered in the electoral roll, he suffers a constitutional disability and, therefore, the very entry of his name in the electoral roll is null and void and is non est. When such is the case, the Election Tribunal can set aside the election, as the election has been vitiated by non-compliance with the Act and the rules made thereunder.

23. The learned counsel for the petitioner, however, has relied upon some decisions of this Court, the Supreme Court and other High Courts, which according to him take a different view. He has strongly relied upon a Division Bench decision of this Court in (1961) 2 Andh WR 23. In fact the conflict that is apparent between this decision and the earlier Division Bench decision of this Court, in (1960) 2 Andh WR 308, has led to the reference of these cases to a Full Bench. The question that arose in *Ramachandram v. D. Seshaiya*, (1961) 2 An WR 23, was whether an election could be impeached on the ground that voters who exercised their franchise were minors. It was also a case of an election of a village panchayat, held under the provisions of the Madras Village Panchayats Act (10 of 1960). The contention raised there was that the electoral roll published for a Panchayat is final and conclusive as to the qualifications of the voters registered therein and that the election tribunal had no jurisdiction to go behind that electoral roll and enquire into the age of the voters. This contention found acceptance with the learned Judges. Chandra Reddy, C. J., speaking for the Division Bench observed:

"Hence, an elector who is a minor, i.e., who has not attained the age of 21, is not debarred from exercising his franchise when once his name is entered in the electoral roll. The minority of a person is more an absence of qualification than a disqualification, which imposes a restriction on the recording of his vote."

In that view, their Lordships held that there was neither an improper reception of the votes nor was there an infraction of the provisions of the Act or the Rules made thereunder, so as to bring the reception of the votes of the minors within the mischief of Rule 11 (c). In coming to this conclusion, their Lordships placed reliance on the Full Bench decision in *Ghulam Mohiuddin v.*

Election Tribunal, for Town Area, Sakit, AIR 1959 All 357 (FB), which we will presently refer to. But, what is to be noted in this case is, the contention that the voters who were found to be below the age of 21 years suffered a constitutional disability and for that reason their registration as voters was null and void and non est, was not raised before their Lordships and was not considered there.

24. What is more, when two earlier decisions of this Court including the one in (1960) 2 Andh WR 308, were relied on before them, their Lordships distinguished them by saying that the said two decisions

"afford no parallel to the instant case. Those two cases dealt with the disqualification of a candidate. They were not cases of persons below the age of 21 casting their votes. The question in both the cases was whether a candidate was qualified to stand for election to the Village Panchayat in one case and to the Municipal Council in the other. It was laid down in both the cases that a person below the age of 21 was not competent to stand as a candidate and the election of such a candidate was contrary to law. The qualifications requisite for a candidate have relation to the election process. Hence those two decisions cannot give us much assistance in the context of the present enquiry."

Thus a distinction was sought to be made between the lack of qualification in a voter and lack of qualification in a candidate. In the present Act also distinction between the right of a person whose name appears in the electoral roll, to poll his vote and his right to seek election is very much borne out by the difference in the language of Sec. 14 (5) and Sec. 16 of the Act, which has already been adverted to above. That apart, it is very doubtful, to what extent a person, who has incurred the constitutional disability in regard to the age, can validly exercise his vote, simply because his name finds a place in the electoral roll. If he has suffered a constitutional disability, in regard to age, and if for that reason, the very entry of his name in the electoral roll is null and void and non est, that would mean that he is not a voter and cannot, therefore, exercise his vote. That might lead to the result, that when such persons exercise their franchise in an election, such election would be vitiated by non-compliance with the provisions of the Act or the rules made thereunder. Anyway, the question of validity of a vote is not before us and it is not necessary for us to decide that question in these writ petitions. We do not, therefore, propose to deal with that question in these writ petitions.

25. But, the fact remains that in this decision in (1961) 2 Andh WR 23, the objection to the reception of the votes on the basis of the constitutional disability of the voters was not raised and the learned Judges themselves in the case kept the distinction

between the voter's right to vote and the qualification of a candidate to seek election, when he is below the age of 21, in view. They, therefore, limited their decision to the case of a person below the age of 21 years exercising his vote and did not throw any doubt on the principle of the earlier decision of this Court in (1960) 2 Andh WR 308. Therefore, the decision in (1961) 2 Andh WR 23, does not render any assistance to the petitioner's contention.

26. The next decision that has been relied upon is the Full Bench decision in AIR 1959 All 359 (FB). That is also a case, where only the question of the validity of the reception of the votes of persons whose age was less than 21 years, was raised and on that basis the election was impugned. The majority view (Sahai J., dissenting) was that the fact of non-attainment of 21 years of age was not a disqualification for a person to exercise his franchise, once his name finds a place in the electoral roll. This conclusion was based upon the reasoning that in the provisions of the Uttar Pradesh Municipalities Act, which fell for consideration before the learned Judges, the fact of non-attainment of 21 years of age was not specifically mentioned as a disqualification either for entry in the electoral roll or to vote. That Act provided that persons, whose names were, for the time being, entered in the electoral roll would be the electors for the purpose. The absence of such a disqualification and the provision empowering all persons, whose names appear in the electoral roll, to exercise their franchise, were the two reasons on which the learned Judges came to the aforesaid conclusion. It should be noted that the aspect of the constitutional disability of the voter and for that reason the voter's name should be deemed not to have been in the electoral roll, was not placed before the Full Bench and it was not, therefore, considered. For that reason, and also for the reason that the case before the Allahabad High Court also, was limited to the reception of a vote and not a case of the qualification of a candidate, we must hold that this decision also does not help the contention of the petitioners. Before we part with this Full Bench decision of the Allahabad High Court we must refer to the view of Dayal J., that—

"Though the electoral roll prepared is not open to question with respect to the correctness of the entries noted therein, the election Tribunal can consider whether any of the persons entered in that roll suffered from any disqualification and the fact that a person had not attained the age of 21 years or did not reside within the particular ward does not amount to disqualification." Chaturvedi J., also held that:—

"The electoral roll is to be deemed final and conclusive as far as the fulfilment of qualification of a voter is concerned, but it is not to be deemed final and conclusive by

the election tribunal so far as the disqualifications attaching to such persons are concerned."

Sahai J., who expressed the minority view went further and held that:—

"The result of unqualification or want of qualification is that a person cannot at all be enrolled as a voter, but the result of a disqualification is that though he is entitled to be recorded as a voter his name is liable to be struck off on any of the grounds on which he can be disqualified under the law." and also expressed the opinion that:—

"the language of Rule 48 of the Rules is wide enough to entitle an election tribunal to decide whether or not a particular person was correctly enrolled as a voter."

Therefore, this Full Bench decision of the Allahabad High Court also upheld the power of the Election Tribunal to enquire into the matter and find out whether a person whose name is entered in the electoral roll suffers from any disqualification.

27. Next, the learned counsel for the petitioners strongly relied upon the decision of the Supreme Court in Ramaswamy v. B. M. Krishnamurthy, AIR 1963 SC 458. That case arose under the Mysore Village Panchayats and Local Boards Act (10 of 1959). An election petition was filed for a declaration that the appellant was not duly elected and for a further declaration that the first respondent was duly elected. The case of the first respondent was that on the date fixed for filing of nominations, the appellant's name was not in the authenticated list of voters. A further contention was also raised that the appellant was not ordinarily a resident of the village, and therefore, he was disqualified from standing for election from that constituency. The election Tribunal held that the appellant was ordinarily a resident of the said village and was therefore, qualified to be included in the electoral roll of the Panchayat. It further found that the appellant's name was not included in the authenticated list of voters. On that finding it set aside the election of the appellant and declared the first respondent as elected. On appeal, the High Court did not agree with the finding of the Election Tribunal that the appellant's name was not included in the authenticated list of voters. But, finding that the inclusion of the appellant's name was in direct violation of Rule 26 of the Representation of the Peoples Rules 1956, the High Court held that the inclusion of the appellant's name was void. In that view, the High Court also set aside the appellant's election. Allowing the appeal, their Lordships of the Supreme Court relied upon Section 30 of the Representation of the People Act, 1950 wherein it is provided that no Civil Court shall have jurisdiction to question the legality of any action taken by and under the authority of the Electoral Registration Officer. Their Lordships, therefore said:

"The terms of Section 30 are clear and the action of the electoral registration officer including the name of the person in the electoral roll, though illegal, cannot be questioned in a civil Court; but it could be rectified only in the manner prescribed by law i.e., by preferring an appeal under R. 27 of the Rules or by resorting to any other appropriate remedy."

After stating this, a distinction was made between illegality and nullity. It was held that the action of the electoral registration officer could not be considered a nullity, because he had made the order without giving notice, as required by the rules, that the non-compliance with the prescribed procedure did not affect his jurisdiction; and that such non-compliance could not make the officer's act non est. Their Lordships did not express any view about a case where an entry is non est or a nullity, though by necessary implication it should mean that any entry which is non est, cannot confer any qualification or right for a person, to seek election. Relying upon Section 10 of the Mysore Act which was before them their Lordships laid down that:—

"Every person whose name is in the list of voters of any Panchayat constituency shall, unless disqualified under this Act or under any other law for the time being in force, be qualified to be elected as a member of the Panchayat....."

Their Lordships of the Supreme Court held that since none of the disqualifications enumerated in Section 11 of the Act was attached to the appellant the appellant was certainly qualified to be elected as a member of the Panchayat.

28. Strong reliance has been placed by the learned counsel for the petitioners on the following observations of the Supreme Court in Para. 10 of its judgment:

"In view of Sec. 10 of the Act, it cannot be said that there is any improper acceptance of the nomination of the appellant, for, his name being in the list of voters, he is qualified to be elected as a member of the Panchayat. There is, therefore, no provision in the Act which enables the High Court to set aside the election on the ground that though the name of candidate is in the list, it had been included therein illegally."

This observation of the Supreme Court, does not afford any support to the contention of the petitioners in this case. It should be borne in mind that their Lordships were dealing with a case where the election of the appellant was questioned on the ground that he had not acquired the residential qualification. Absence of a residential qualification is not a constitutional disability. Article 326 of the Constitution lays down two qualifications for a person to be registered as a voter; viz., that he should be a citizen of India and that he should not be less than 21 years of age. Therefore, absence of a residential qualification is not a constitu-

tional disability unlike the age qualification. Therefore, their Lordships of the Supreme Court considered the inclusion of the name of a person who did not have the residential qualification as a mere illegality which could be rectified by an appeal or in any other manner prescribed by law. That was why their Lordships made a distinction between an illegality and a nullity. Even in the passage above quoted, their Lordships once again reiterated the distinction, by stating that the High Court was not empowered to set aside the election when the name of the candidate had been included in the electoral roll illegally. It is thus clear that the Supreme Court decision is no authority for the proposition that even in cases of the entries being null and void and non est, the person would have the right to seek election and that the Election Tribunal would have no jurisdiction to enquire into the validity of such an election. On the other hand, in our view, it is suggestive of the opposite view, which we have taken.

29. A decision of the Bombay High Court in *Dhondba Adku v. Civil Judge, Junior Division, Hinganghat*, AIR 1967 Bom 232, has also been brought to our notice. It was a case which arose under the Bombay Village Panchayats Act. The ground on which the election was questioned there was, that the voters' list did not conform to the wards, framed by the Collector. It was contended before Bombay High Court that having regard to the provisions of Sec. 13 of the Bombay Act, it was not open to the respondents to challenge the finality of the voters list in an election petition. The Bombay High Court took the view that once the voters' list is got corrected and finally published, it would be conclusive evidence under Section 13 (3) and could not be challenged. As has already been stated, the ground on which the electoral roll was questioned was that it did not conform to the wards, framed by the Collector. Obviously it is not a case, where certain voters incurred the constitutional disability and the entries relating to their names should be considered non est. Therefore, this decision does not give any support to the petitioners' contention.

30. The above discussion results in the conclusion that the Election Tribunal has jurisdiction to enquire into the age qualification of a candidate and set aside the election, if the successful candidate has not acquired the qualification in regard to age despite the fact that his name has appeared in the electoral roll, as a voter. It would, therefore, follow that the Writ Petitions fail and are dismissed with costs of the respondents. Advocate's fee Rs. 100.

Petitions dismissed.

AIR 1970 ANDHRA PRADESH 70

(V 57 C 9)

FULL BENCH

P. JAGANMOHAN REDDY C. J.,
VENKATESAM AND SAMBASIVA RAO, JJ.

Andhra Provincial Potteries Ltd., Tadepalli, and others, Accused, Petitioners v. Registrar of Companies, Andhra Pradesh, Hyderabad, Complainant, Respondent.

Criminal Revn. Case No. 360 of 1968 and Criminal Revn. Petn. No. 313 of 1968, D/-18-3-1969 decided by Full Bench on order of reference made by Sharfuddin Ahmed and A. D. V. Reddy, JJ.

Companies Act (1956), Ss. 220, 166, 159 to 162 and 210 — Prosecution under — Prerequisites for — Holding of Annual General Meeting and laying before it of Balance sheet and Profit and Loss Account is essential for prosecution under S. 220 (3) — Holding of meeting however, not necessary for prosecution for default under Ss. 159 to 162, 166 and 210 — (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and 1963 (1) Cri LJ 521 (Cal) and 39 CWN 1152 and AIR 1948 Cal 42 and (1967) 2 Comp LJ 92 (All), Dissented from; AIR 1963 Andh Pra 389, Overruled.

The holding of the annual general meeting and the laying before it of the balance sheet and the profit and loss account is a sine qua non for filing of the copies thereof before the Registrar. If no general body meeting is held, the persons concerned cannot be prosecuted under Sec. 220 (3). While it is open to the Registrar to prosecute the persons who have committed default under Sections 166, 159 to 162 and 210 by wilfully not holding meeting and not fulfilling the requirements of these provisions for which no period of limitation is prescribed under the Act, any prosecution under S. 220 would be premature without such a meeting being in fact held. (Paras 7 and 17)

The reference to Section 210 by the use of the word "aforesaid" and the emphasis indicated by the words "were so laid" in Sec. 220 make the filing of copies of the balance sheets and the profit and loss accounts which are laid before the general body meeting an essential prerequisite. If no general body meeting is held, it is obvious that no copies of the balance sheet and profit and loss accounts can be filed even though the default may be wilful. Both under Section 134 of the old Companies Act and Section 220 of the Act, the laying of the balance sheet and the profit and loss account before an annual general meeting is a condition precedent to the requirement that copies of such documents so laid should be filed before the Registrar. The intention is made further clear by the provision under sub-section (2) of the respective sections of both the Acts that, if the balance sheet is

not adopted at the general meeting before which it is laid, a statement of that fact and of the reasons therefor have to be annexed to the balance sheet and to the copies thereof required to be filed with the Registrar. If no balance sheet is laid before a general body, there can be no question of that balance sheet not being adopted nor of complying with the requirements of the sub-section (2) of Section 134 of the old Companies Act or Section 220 of the Act as the case may be, though wilful omission to call a general body meeting and omit to lay the balance sheet and profit and loss account before it may expose the person responsible to punishment under other provisions of the Act, it certainly does not make him liable under the aforesaid provisions. AIR 1963 Andh Pra 389, Overruled; AIR 1948 Bom 357 held not overruled by AIR 1961 SC 186; (1935) 39 Cal WN 1152 and AIR 1948 Cal 42 and (1967) 2 Comp LJ 92 (All) & (1964) Mad WN 103 and AIR 1966 Mad 415 and AIR 1963 Raj 134 and 1963 (1) Cri LJ 521 (Cal), Dissented from. Case law discussed.

(Para 7)

| Cases Referred: | Chronological | Paras |
|--|---------------|------------------|
| (1967) 1967-2 Com LJ 92 = (1966) 36 Com Cas 585 (All), Rama Chandra and Sons (P) Ltd. v. State | | 16 |
| (1966) AIR 1966 Mad 415 (V 53) = 1966 Cri LJ 1279, Ambalavana Chettiar P. S. N. S. and Co. (P.) Ltd. v. Registrar of Companies | | 16 |
| (1964) 1964 Mad WN 103 = (1964) 34 Com Cas 1, Neptune Studios Ltd. v. State | | 16 |
| (1963) AIR 1963 Andh Pra 389 (V 50) = 1963 (2) Cri LJ 368, Public Prosecutor v. H. R. Basava Raj | | 2, 17 |
| (1963) 1963 (1) Cri LJ 521 = 1962-32 Com Cas 1143 (Cal), Dulal Chandra Bhar v. State of West Bengal | | 16 |
| (1963) AIR 1963 Raj 134 (V 50) = 1963 (2) Cri LJ 48, State v. T. C. Printers (P.) Ltd. | | 16 |
| (1961) AIR 1961 SC 186 (V 48) = 1961 (1) Cri LJ 319, State of Bombay v. Bhandhan Ram | | 2, 4, 8, 15, 16 |
| (1953) AIR 1953 Mad 558 (V 40) = 1953 Cri LJ 1062, Viswanathan v. Assistant Registrar of Joint Stock Companies Madras | | 13 |
| (1952) AIR 1952 Mad 800 (V 39) = 1953 Cri LJ 19, In re G. Appayya | | 13 |
| (1948) AIR 1948 Bom 357 (V 35) = 49 Cri LJ 515, Emperor v. Pioneer Clay and Industrial Works | | 2, 4, 14, 15, 16 |
| (1948) AIR 1948 Cal 42 (V 35) = 48 Cri LJ 236, Bhagirath v. Emperor | | 11, 13 |
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 Edmonds v. Foster 9

A. V. Koteswara Rao, for Petitioners;
 Public Prosecutor, for the State.

P. JAGANMOHAN REDDY C. J.: The question before us is whether, under S. 220 of the Companies Act, 1956 (I of 1956), (hereinafter referred to as the 'Act'), the holding of an annual general meeting of a company and laying before it the balance sheet and the profit and loss account are prerequisites for a prosecution under Section 220 (3).

2. The High Court of Bombay in *Emperor v. Pioneer Clay and Industrial Works*, AIR 1948 Bom 357, and earlier, the Madras High Court in *Lakshmana v. Emperor*, AIR 1932 Mad 497 and *In re, Narasimha Rao*, AIR 1937 Mad 341 had held under Sec. 134 and the analogous provisions of the Indian Companies Act, 1913 (hereinafter called the 'old Companies Act') corresponding to Section 220 of the Act that the omission to file with the Registrar the balance-sheet and the profit and loss account of a company is not a contravention of those provisions in as much as either no general meeting was held at which the balance-sheet was laid, or no general meeting was due to be held. After the decision of the Supreme Court in *State of Bombay v. Bhandhan Ram*, AIR 1961 SC 186, some of the High Courts have taken the view that the decision of the Bombay High Court in AIR 1948 Bom 357 has been overruled and that therefore the Directors cannot take shelter in the defence that no general meeting was held, when the non-holding of the general meeting was due to their own default. It may be stated that even after the Supreme Court's decision, this Court in *Public Prosecutor v. H. R. Basava Raj*, AIR 1963 Andh Pra 389, took a similar view to that taken by the Bombay High Court, AIR 1948 Bom 357 (*supra*). But having regard to the decisions of several High Courts which have taken a contrary view, *Sharfuddin Ahmed* and *A. D. V. Reddy, JJ.*, have referred this matter to a Full Bench.

3. The petitioners who are the Directors of the Andhra Provincial Potteries Limited, have been prosecuted for contravention of the provisions of Section 220 (1) of the Act

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32. (1) "Every company having a share capital shall within eighteen months from its incorporation and thereafter once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in

viz., for not filing the balance sheet and the profit and loss account with the Registrar of Companies, as contemplated in that section within the prescribed time. On 14th December 1967, a notice was issued by the Registrar of Companies, informing the petitioners that the annual general meeting of the company ought to have been held at the latest on 30-9-1967, that the balance sheet and the profit and loss account ought to have been laid before the said annual general meeting and that they should have been filed before the Registrar on or before 30th October 1967 in accordance with the provisions of Section 220 (1) of the Act. Inasmuch as the said balance sheet and profit and loss account were not filed, they being the directors of the company, it would be presumed that they are the officers of the company in default within the meaning of Section 5, and as such, are liable to be prosecuted. The Registrar therefore asked them to make good the default mentioned above within one month from the date of issue of the notice. To this, a reply was sent on 17th February 1968 by one of the petitioners, stating that they were arranging to send the concerned documents immediately and requesting for condonation of delay. As no balance sheet and profit and loss account were filed, a complaint was lodged.

4. A preliminary objection was raised before the VI City Magistrate that prosecution will not lie under Section 220 (3) of the Act, inasmuch as no annual general meeting as required under Section 166 of the Act was held without which the question of filing copies of the balance sheet and the profit and loss account would not arise. In a considered order, the Magistrate applying the principles laid down by the Supreme Court in AIR 1961 SC 186, and taking the view that that decision had overruled the Bombay High Court's decision in AIR 1948 Bom 357, dismissed the objection. It was throughout admitted by both the prosecution and the accused that no general meeting was held on the date when the complaint was filed, namely the 4th March 1968. The learned Advocate for the petitioners, however, states that the meeting was held on the 9th March 1968 and the documents lodged on 19th March 1968.

5. Inasmuch as several decisions dealing with the provisions of the old Companies Act, 1913 and the Act have been cited before us, we give below the relevant provisions of the old Companies Act and the Act as they would assist in the understanding of the question before us.

COMPANIES ACT, 1956 (I OF 1956)

159. (1) "Every company having a share capital shall, within sixty days from the day on which each of the annual general meeting referred to in Section 166 is held, prepare and file with the Registrar a return containing

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the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

- (2)
(3)
(4)

(5) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty".

76. (1) "A general meeting of every company shall be held within eighteen months from the date of its incorporation thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting.

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the particulars specified in Part I of Schedule V, as they stood on the day, regarding—

- (a)
(b)
(c)
(d)
(e)
(f)
(g)

Proviso.....

Explanation — Any reference in this section or in Section 160 or 161 or in any other section or in Schedule V to the day on which an annual general meeting is held or to the date of annual general meeting shall, where the annual general meeting for any year has not been held be construed as a reference to the latest day on or before which that meeting should have been held in accordance with the provisions of this Act

(2)

160. (1) "Every company not having a share capital shall, within sixty days from the day on which each of the annual general meeting referred to in Section 166 is held, prepare and file with the Registrar a return stating the following particulars as they stood on that day :—

- (a)
(b)
(2)

161. (1) "The copy of the annual return filed with the Registrar under Section 159 or 160, as the case may be, shall be signed both by a director and by the managing agent, secretaries and treasurers.....

(2)

162. (1) "If a company fails to comply with any of the provisions contained in Section 159, 160 or 1761, the company, and every officer of the company who is in default shall be punishable with the fine which may extend to fifty rupees for every day during which the default continues.

(2) For the purposes of this section and Sections 159, 160 and 161, the expressions "officer" and "director" shall include any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act.

166. (1) "Every company shall in each year hold in addition to any other meetings a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it; and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

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(2) If a default is made in holding a meeting in accordance with the provisions of this section, the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

131. (1) "The Directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period in the case of the first account since the incorporation of the company and in any other case since the preceding account made up to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interest outside British India by more than twelve months.

Provided that the Registrar may for any special reason extend the period by a period not exceeding three months.

(2) The balance-sheet and the profit and loss account or income and expenditure account shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there will be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of such balance-sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditor's report to the registered address of every member of the company, at least fourteen days before the meeting at which it is to be laid before the members of the company, shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period

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Provided that a company may hold its first annual general meeting within a period of not more than eighteen months from the date of its incorporation; and if such general meeting is held within that period it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation or in the following year:

Provided further that the Registrar may, for any special reason, extend the time within which any annual general meeting (not being the first annual general meeting) shall be held, by a period not exceeding three months.

210. (1) "At every annual general meeting of a company held in pursuance of Section 166, the board of directors of the company shall lay before the company—

(a) a balance sheet as at the end of the period specified in sub-section (3); and

(b) a profit and loss account for that period,

- (2)
- (3)
- (4)

(5) If any person, being a director of a company fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Provided that in any proceedings against a person in respect of an offence under this section, it shall be a defence to prove that a competent and reliable person was charged with the duty of seeing that the provisions of this section were complied with and was in a position to discharge that duty:

Provided further that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.

(6) If any person, not being a director of the company, having been charged by the Board of Directors with the duty of seeing that the provisions of this section are complied with, makes default in doing so, he shall in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may ex-

INDIAN COMPANIES ACT
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of at least fourteen days before that meeting.

134. (1) "After the balance sheet, and profit and loss account (or the income and expenditure account as the case may be) have been laid before the company at the general meeting three copies thereof signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of Section 32.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the copies thereof required to be filed with the registrar.

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by Section 32 for a default in complying with the provisions of that section.

COMPANIES ACT, 1956
(I of 1956)

tend to one thousand rupees or with both:

Provided that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully."

220. (1) "After the balance-sheet and the profit and loss account have been laid before a company at an annual general meeting as aforesaid, there shall be filed with the Registrar (within thirty days from the date on which the balance sheet and the profit and loss account were so laid).

(a)three copies of the balance-sheet and the profit and loss account, signed by the managing director, managing agent, secretaries and treasurers, manager, or secretary of the company, or if there be none of these, by a director of the company, together with three copies of all documents which are required by this Act to be annexed or attached to such balance sheet or profit and loss account:

Provided further that—

(i) in the case of a private company which is not a subsidiary of a public company, or

(ii) in the case of a private company of which the entire paid up share capital is held by one or more bodies corporate incorporated outside India, or

(iii) in the case of a company which becomes a public company by virtue of Section 43A, if the Central Government directs that it is not in the public interest that any person other than a member of the company shall be entitled to inspect or obtain copies of the profit and loss account of the company no person other than a member of the company concerned shall be entitled to inspect or obtain copies of the profit and loss account of that company under Section 610.

(2) If the annual general meeting of abefore which a balance sheet is laid as aforesaid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance sheet and to the copies thereof required to be filed with the registrar.

(3) If default is made in complying with the requirements of sub-sections (1)

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and (2), the company, and every officer of the company who is in default, shall be liable to the like punishment as is provided by Section 162 for a default in complying with the provisions of Sections 159, 160 and 161.

the Act provide that, after these documents viz., the balance sheet and the profit and loss account have been laid before a general meeting, three copies of the balance sheet and profit and loss account should be filed before the Registrar of Companies. It is also necessary where the balance sheet is not adopted by the general body, a statement to that effect and all the reasons therefor shall be annexed to the balance sheet and to the copies thereof required to be filed before the Registrar. In default of these two requirements viz., of filing the balance sheet and the statement of the balance sheet not being adopted where it is not so adopted, the company and every officer of the company who is in default shall be liable to punishment as provided in Section 32 of the Old Companies Act or Section 162 of the Act, for not complying with the provisions of Sections 159, 160 or 161.

7. Before the Explanation to Section 159 of the Act was added defining the day on which the annual general meeting is to be held as the latest day on or before which that meeting should have been held under the provisions of Section 166 of the Act, Courts had been called upon to interpret that expression under Sections 32, 76 and 77 of the Old Companies Act. It would appear that in some cases no difference was noticed between these sections and Section 134. It may be stated that both Section 134 of the Old Companies Act and Section 220 of the Act do not use the words "on the day" or "from the day on which", which are used in Section 32 of the Old Companies Act and in Sections 159 and 160 of the Act. An examination of the language of these sections significantly demonstrates the conclusion when it is stated that after the balance-sheet and the profit and loss account have been so laid before the company at the general meeting, three copies of the same should be filed with the Registrar, that they should be the copies of the very same balance sheet and profit and loss account which are in fact laid before the annual general meeting and not those which would have been laid before an annual general meeting had such a meeting been called. Under Section 134 (1) of Old Companies Act, the time within which these documents should be filed is the same as for filing copies of the annual list of members and summary prepared in accordance with Section 32. Section 220 (1) of the Act varies the language by specifying the time viz., that after the balance-sheet and the profit and loss account had been laid before a company at an annual general meeting as aforesaid, that is to say, as required

6. A comparison of the conspectus of the sections under the Old Companies Act and the Act would show that Section 32 of the Old Companies Act has been replaced by Sections 159, 160, 161 and 162 of the Act with this difference that under the Old Companies Act, there was nothing to indicate as to what was meant by "the day of the first or only ordinary general meeting in the year," while under the Act, the Explanation to Section 159 clearly indicates that a reference to "the day on which an annual general meeting" in that section or Sections 160 or 161 or in any other section or Schedule shall be construed as a reference to "the latest day on or before that meeting should have been held in accordance with the provisions of the Act." It is apparent under Section 166 (1) of the Act that the company has to hold in each year, a general meeting as its annual general meeting not more than fifteen months from the date of the previous general meeting, unless of course the Registrar, for any special reason, extends the time within which any annual general meeting, not being the first annual general meeting, shall be held, by a period not exceeding three months. It is clear from these provisions that an annual general meeting, not being the first annual general meeting has to be held within fifteen months or eighteen months, where it is extended, from the date of the last general meeting. At such an annual general meeting, both under the Old Companies Act and the Act, the balance sheet and the profit and loss account etc., have to be laid, in default of which punishment has been provided therefor. It is also apparent, at any rate from the specific provision of the Act, that this punishment is attracted even in cases where no meeting has been held due to wilful default of those on whom the duty was cast to call the meeting and lay the specified documents before it. That this was also the position under the Old Companies Act, has been the view taken by the highest Court.

Now the question is whether the company or its Directors, agents and servants can be held liable, on the analogy of the same principle as applicable in the case of non-holding of the annual general meeting or the omission to lay before that general meeting the documents specified in the earlier provisions for not fulfilling the requirements of Section 220 of the Act, notwithstanding the fact that no annual general meeting was held and no balance sheet or profit and loss account laid before that annual general meeting. Both Section 134 of the Old Companies Act and Section 220 of

under Section 210, they shall be filed with the Registrar within thirty days on which the balance-sheet and the profit and loss account were so laid.

The reference to Section 210 by the use of the word "aforesaid" and the emphasis indicated by the words "were so laid" make the filing of copies of those balance-sheets and the profit and loss accounts which are laid before the general body meeting an essential prerequisite. If no general body meeting is held, it is obvious that no copies of the balance sheet and profit and loss accounts can be filed even though the default may be wilful. Both under Section 134 of the Old Companies Act and Section 220 of the Act, the laying of the balance sheet and the profit and loss account before an annual general meeting is a condition precedent to the requirement that copies of such documents so laid should be filed before the Registrar. The intention is made further clear by the provision under sub-section (2) of the respective sections of both the Acts that, if the balance sheet is not adopted at the general meeting before which it is laid, a statement of that fact and of the reasons therefor have to be annexed to the balance sheet and to the copies thereof required to be filed with the Registrar. If no balance sheet is laid before a general body, there can be no question of that balance sheet not being adopted nor of complying with the requirements of the Sub-section (2) of Section 134 of the Old Companies Act or Section 220 of the Act as the case may be, while wilful omission to call a general body meeting and omit to lay the balance sheet and profit and loss account before it may expose the person responsible to punishment under other provisions of the Act, it certainly does not make him liable under the aforesaid provisions. The punishment under these sections is for default in filing copies of the balance sheet or the profit and loss account which are laid before a general body and for not sending a statement of the fact that the balance sheet was not adopted. It may be that copies of the balance sheet so laid before the general body may have been forwarded under sub-section (1) of Section 134 of the Old Companies Act or sub-section (1) of Sec. 220 of the Act but nonetheless if the requirements of sub-section (2) of the respective sections have not been complied with, even then, the persons concerned would be liable for punishment for that default.

In our view, these provisions unmistakably indicate, as we said earlier, that the holding of the annual general meeting and the laying before it of the balance sheet and the profit and loss account is a sine qua non for filing of the copies thereof before the Registrar. If no general body meeting is held, the persons concerned cannot be said to have committed a default in complying with those provisions.

8. An examination of the case law would, in our view, show that the difference in the

language on the one hand of Section 134 of the Old Companies Act and 220 of the Act and on the other of the provisions of Sections 32, 76 and 77 of the Old Companies Act and analogous provisions of the Act has not been taken note of in most of the cases. Their Lordships of the Supreme Court in AIR 1961 SC 186 pointed out this difference. Notwithstanding this, cases decided subsequently in the several High Courts, in our view, with great respect, failed to appreciate the significant difference.

9. In Part v. Lawton, (1911) 1 KB 588, a similar question arose for consideration under Section 26 of the English Companies (Consolidation) Act, 1908, which is analogous to Section 32 of the Old Companies Act. In that case, information was laid against the respondents by the appellant, who was a staff officer of the Companies Registration Department of Somerset House, alleging that the respondents knowingly and willingly permitted default to be made by the English Traders Limited in forwarding to the Registrar of Companies at Somerset House a copy of its list of members, with summary as to capital and shares etc., for the year 1909 as required under Section 26 of the Companies (Consolidation) Act, 1908 and that the said default had since continued for the space of sixty-seven days thereafter and still continued. Though the General meetings of the Company were duly held on November 15, 1907 and on December 7, 1908 and the annual list of members and summary for those years were duly forwarded to and filed by the Registrar at Somerset House, the Justices convicted the respondents of the offence charged in the first information.

It was contended that the words "on the fourteenth day after the first or only ordinary general meeting in the year" were words directory as to time only; and that the company was in default in not forwarding the annual list of members and summary. The respondents, however, contended that no general meeting having been held in 1909, it was impossible to make up the list required by Section 26 and that the respondents could not, therefore, be convicted of a default for omitting to do that, which, in fact, was impossible for them to do—and further, that the time did not begin to run until after the date of the meeting mentioned in Section 26. This contention was negated by Lord Alverstone, C. J., (with whom Hamilton and Avory, JJ. concurred) who said at page 592: "the cases of Gibson v. Barton, (1875) 10 QB 329 and Edmonds v. Foster, (1875) 45 LJ (MC) 41", are clear authorities "that a person" charged with an offence under Section 26 is not entitled by way of defence to "plead the impossibility of complying with Section 26 by reason of no general meeting; in other words, a person charged with an offence cannot rely on 'his own default as an answer to the charge.'"

10. Nearer home, Mitter, J. in Ballay Dass v. Mohan Lal Sadhu, (1935) 39 Cal

WN 1152, was considering the case of the petitioner-director of the Cash Insurance Bank Limited who had been convicted under clause (4) of Section 32 clause (6) of Sec. 77 and clause (4) of Section 134 of the Old Companies Act and sentenced to pay a fine. The statutory meeting of the company had not been held within time mentioned in Section 77. The statutory report required to be forwarded under clause (2) of Section 77 was not forwarded to any member of the petitioner company and there could be no doubt that the petitioner knew of the said fact. Even after the prosecution was started on the 14th April, 1935, the register of share-holders was not prepared in accordance with the provisions of Section 32 and there was no doubt that the petitioner also knew of the fact. The balance sheet of the company was not prepared and placed at a general meeting, nor filed with the Registrar of the Joint Stock Companies. In fact the general meeting was never held and the petitioner also knew of the fact. According to the learned judge, the provisions of Section 134 were therefore not complied with; and in his view, in order to sustain a conviction under those sections, the only thing the prosecution had to prove was that a particular officer knowingly and wilfully authorised or permitted these defaults. It was further held that the offence was also complete, if the officer of the company knew of the defaults and permitted the defaults.

11. In *Bhagirath v. Emperor*, AIR 1948 Cal 42, Lodge, J., was also dealing with Sections 32 and 134 of the Old Companies Act and while observing that he was supported by the decision in *Ballav Das's case*, (1935) 39 Cal WN 1152, said at p. 45: "In England it has been consistently held that a director who is prosecuted, for knowingly and wilfully permitting a company to default in respect of filing the balance sheet and profit and loss account with the Registrar, cannot plead the impossibility of doing so when that impossibility is due to his own previous default. The same view has been taken in India...." Both these decisions, in our view, did not consider the difference in the language of the several sections under which the petitioners were convicted, particularly the difference between the requirements of Section 134 and other sections of the Old Companies Act.

12. In AIR 1932 Mad 497, Walsh, J., took a different view, though in fact the time for holding the general meeting had not yet come, and therefore it may possibly be contended that what he said was obiter. In AIR 1937 Mad 341, Pandrang Row, J., considered the applicability of Sections 131 and 134 and held that—

"The same persons cannot be charged in respect of the same years with offences punishable both under Sections 131 and 134, Companies Act, because Section 134 clearly contemplates the sending of a copy of the balance-sheet only

after it has been placed before the Company at a general meeting under Sec. 131. Where in a case there is no such placing of the balance-sheet before the Company at a general meeting, the offence under Sec. 134 cannot be committed."

Some of the cases cited before him dealt with the non-sending of a copy of the balance-sheet after it had been laid before a general meeting of the company. The prosecution against the persons was for default made in preparing a balance-sheet or placing it before a general meeting of the company, which took place long before they ever became directors or officers of the company, and indeed even before they were share-holders.

13. As against this, *Ramaswami, J. in Re. G. Appayya*, AIR 1952 Mad 800 and *Viswanathan v. Assistant Registrar of Joint Stock Companies*, Madras, AIR 1953 Mad 558, dealing in the former case with Section 133 (3) and in the latter with Sections 76 and 131 did not refer to the previous decisions of the Madras High Court. However, reliance was placed on 1911-1 KB 588 and AIR 1948 Cal 42. While these cases may be an authority for the proposition that under the provisions of Sections 76 and 131, the wilful non-holding of an annual general meeting or the non-laying before such a meeting of the balance-sheet and the profit and loss account amounts to a default of the provisions, there is nothing in these decisions which throws any light on the interpretation of Sec. 134.

14. A Bench of the Bombay High Court consisting of Chagla Ag. C. J. and Gajendra-gadkhar, J. (as he then was) in AIR 1948 Bom 357 did consider the question which is now before us viz., whether default was committed under Section 134 (4). The facts on which the prosecution was founded alleged that the accused had failed, as required by Section 134 (4) of the Old Companies Act, to file with the Registrar of Companies three copies of the balance-sheet and accounts of the company for the year 1944. It was common ground that no general meeting of the company had been called, at which the balance-sheet and the profit and loss account for the year 1944 had been laid. After referring to sub-sections (1) and (4) of S. 134, the learned Acting Chief Justice observed at page 357: "it is to be noted that what is made penal is default in complying with the requirements of the section and the requirements of Section 134 (1) are that there is an obligation cast upon the company to file three copies of the balance-sheet and the profit and loss account after they have been laid before the company at the general meeting. There is no obligation cast upon the company to file any such copies if no general meeting has been called."

It was contended by the Government Pleader in that case that the directors are themselves in default in not calling a general meeting and it is not open to them to

plead in their own defence their own fault. Dealing with this contention, the Bench pointed out that under Section 76 (1), there is an obligation to hold a general meeting within eighteen months from the date of the company's incorporation, in default of which a penalty was prescribed under sub-section (2) of Section 76. Again Section 131 provides that the directors of every company must lay before the company in general meeting a balance-sheet and profit and loss account at the time stated in that section, and the failure to do so is made penal by Section 133 (3). "Therefore", it was observed at page 358, "on the facts which are not disputed it is clear that the directors have failed to comply with the requirements both of Section 76 (1) and also of Section 131 (1). The Government, instead of prosecuting them for what they have failed to do as required by the law and in respect of which they seem to have no defence whatever, have thought fit to launch a prosecution under Section 134 (4) when the obvious defence which is put forward by the accused is that the stage has not arrived when they can be called upon to send copies of the balance-sheet and the profit and loss accounts, because that stage can only be reached after a general meeting has been called and balance-sheet and profit and loss account have been placed before that meeting."

15. This decision is on all fours with the one we are considering. But as we noted earlier, an impression has gained ground that their Lordships of the Supreme Court in AIR 1961 SC 186, have overruled the decision of the Bombay High Court in AIR 1948 Bom 357. We do not think this is a valid assumption. Their Lordships, after referring to the Bombay decision, pointed out at page 189, "the language of that section is to a certain extent different from the language used in Sections 32 and 131. After examining the language of Section 134 (1), Sarkar, J. (as he then was) speaking for the Court observed: "if the language of Sec. 134 (1) makes any difference as to the principle to be applied in ascertaining whether a breach of it has occurred or not—as to which we say nothing in this case—then that case can be of no assistance to the respondents. If however no such difference can be made, then we think that it was not correctly decided." Perhaps, the last sentence has given rise to the impression that their Lordships have overruled the decision in AIR 1948 Bom 357. But that is not so, because the subsequent observations clearly indicate that while Chagla, C. J., did not question the correctness of the decision in (1911) 1 KB 588, which he was asked to follow, all that he said with regard to that case was that the scheme and the terms of the section on which it turned were different from Sec. 134 of the Companies Act, 1913. While saying "that may or may not be so", Sarkar, J., observed at page 189 "there is however no difference

between Sec. 26 of the English Companies Act, 1908, on which Parker's case, 1911-1 KB 588, turned, and which apparently" through some mistake Chagla C. J., cited as S. 36 and S. 32 of the Indian Companies Act of 1913, except that the English Section required the summary to include a statement in the form of a balance-sheet containing certain particulars mentioned, whereas our section does not require that, Section 131 of our Act contains some provision about the laying of the balance-sheet before the general meeting. This provision was inserted in the Act by the Amending Act of 1936.

The fact, that one of the requirements of the English Sec. 26 is not present in Sec. 32 of our Act cannot create any material difference between Section 32 of our Act and Sec. 26 of the English Act. If the principle that a person charged with an offence cannot rely on his default as an answer to the charge is correct, as we think it is, and which we do not find Chagla C. J., saying it is not, then that principle would clearly apply when a person is charged with a breach of Sec. 32 of our Act. The decision of the Supreme Court is only an authority in respect of Ss. 131 and 132 of the Old Companies Act and not for Section 134. In so far as Section 32 is concerned the Supreme Court decided (i) that the fact that no general meeting of the company was held was, in the circumstances, no defence to the charge of not complying with the requirements of Section 32. A person charged with an offence could not rely on his own default, as an answer to the charge and (ii) as in the case of Section 32 and for the same reasons, it was no defence to the charge under Sec. 131 to say that a general meeting was not called.

16. Subsequent to Supreme Court's decision Kailasam, J. in Neptune Studios Ltd. v. State, (1964) Mad WN 103, Anantanarayan, J. (as he then was) in Ambalavana Chettiar P. S. N. S. and Co. (P.) Ltd. v. Registrar of Companies, AIR 1966 Mad 415 and a Bench of the Rajasthan High Court consisting of J. S. Ranawat, C. J. and P. N. Shinghal, J. in State v. T. C. Printers (P.) Ltd., AIR 1963 Raj 134 and Amaresh Roy, J. in Dulal Chandra Bhar v. State of West Bengal, (1962) 32 Com Cas 1143 = (1963) 1 Cri LJ 521 (Cal), apart from other sections, have dealt with prosecutions under Sec. 220 of the Act. In all these cases, it was assumed that the Supreme Court in AIR 1961 SC 186, applied the principle in (1911) 1 KB 588, to cases under S. 134 of the Act which, as we have pointed out with great respect, is not the case. Kailasam, J. in (1964) Mad WN 103, however did not say that the Supreme Court has in terms overruled the decision in AIR 1948 Bom 357, but nonetheless thought that the Bombay decision cannot be of much guidance. According to him, the effect of the Supreme Court's decision is that a person charged with failure to carry out the requirements of the section cannot take advantage of his own default. Applying the principles

laid down therein, it was held that the appellants cannot be heard to plead their own default in not convening the general meeting for the submission that they are not guilty of an offence under Section 220 (3) of the Act. Anantanarayanan, J. (as he then was) in (1964) Mad WN 103 and Ranawat, C. J. and Shinghal, J. in AIR 1963 Raj 134, held that the principles enunciated by the Supreme Court in AIR 1961 SC 186, apply to cases under Section 220.

D. P. Uniyal, J. in Ramachandra and Sons (P.) Ltd. v. State, (1967) 2 Com LJ 92 (All), did consider the contention that Section 220 was differently worded. In his view that section was not very happily worded, in that, the opening words of the section indicate that the balance-sheet and the profit and loss account required to be filed with the Registrar must be such as have been laid before the annual general meeting. But in his view that does not and cannot absolve the company or its directors from performing their statutory duty in filing the balance-sheet and the profit and loss account before the Registrar within the stated time. With great respect, we are unable to agree with his conclusion particularly when the learned Judge had held that the effect of the opening words would indicate that the balance-sheet and the profit and loss account required to be filed before the Registrar, must be such as have been laid before the annual general meeting. Where there are clear words which justify a certain conclusion, in our view, that conclusion must be reached.

Amaresh Roy, J. in (1962) 32 Com Cas 1143 = (1963) (1) Cri LJ 521 (Cal), expressed the view at page 1149, that in AIR 1961 SC 186, their Lordships of the Supreme Court stated that the principle enunciated in (1911) 1 KB 588, would apply, when a person is charged with breach of the Indian Companies Act. While applying the principle to the case before him which was under Section 220, the learned Judge, however, did not refer to the passages of Sarkar, J. in the Supreme Court decision in which the learned Judge distinguished the Bombay case. These decisions in terms do not notice the difference in the language and the requirements of S. 220 on the one hand and Sections 159 to 162, 166 and 210 of the Act on the other.

17. It appears to us, on a consideration of the relevant provisions of the Act, that the wilful failure to hold a general meeting cannot be pleaded as a defence for default committed in preparing the statements of members of the company as required under Section 32, or for failure to lay before the general meeting, the balance-sheet and profit and loss account, or in the case of a company not trading for profit an income and expenditure account. One cannot plead one's own default in defence. The principle of (1911) 1 KB 588, however cannot be held to

be applicable to the requirements of S. 134, because the actual holding of an annual general meeting is a condition precedent or a sine qua non for the filing of the copies of the balance-sheet and profit and loss account, which are so laid before an annual general meeting with the Registrar within thirty days from the day when they are so laid. We have already noticed that the language of Section 134 (1) and (2) requires only copies of that balance-sheet and profit and loss account or a statement that the balance-sheet has not been adopted with full reasons therefor should be filed before the Registrar, which have been laid at an annual general meeting, which in fact and in reality have been held and not copies of those documents which would have been filed, had such a meeting been held, if the persons concerned had not wilfully defaulted in calling the meeting. As already pointed out, the language of the relevant provisions of the present Companies Act (the Act) is somewhat different, and if anything, lends further weight to this conclusion. It is clear that the default in not holding an annual general meeting and preparing statements or returns and filing them before the Registrar, or in not laying of the balance-sheet and the profit and loss account before that meeting as required under Sections 166, 159 to 161 and 210 cannot be pleaded in defence of prosecution.

The contrary view taken in AIR 1963 Andh Pra 389, that the holding of an annual general meeting would be necessary for the prosecution under Sections 166 and 210 of the Act is, in our view, with respect no longer good law, having regard to the decision of the Supreme Court on the analogous provisions of the Old Companies Act. While this is so, the defence that no general meeting was in fact held for the non-filing of the copies of the balance-sheet or profit and loss account or the non-attachment of the statement that the balance-sheet has not been adopted with the explanation therefor before the Registrar within the time specified, will however be open to the persons prosecuted under Section 220 (3). While it is open to the Registrar to prosecute the persons who have committed default under Sections 166, 159 to 162 and 210 by wilfully not holding a meeting and not fulfilling the requirements of these provisions for which no period of limitation is prescribed under the Act, any prosecution under Section 220 would be premature without such a meeting being in fact held.

18. In the view we have taken the criminal revision case is allowed and the prosecution is quashed.

Revision allowed.

Section 9 (1) and to pay out of the estate of the deceased dealer, to the tax and/or any penalty assessed or levied as payable by the deceased dealer.

(2):—The provisions relating to appeals and revision shall be applicable to assessments made under sub-rule (1) as if the Executor, Administrator, successor in title or other legal representative were himself the dealer.

(3):—The provisions of sub-rules (1) and (2) shall apply mutatis mutandis to a partnership firm of which the managing partners have died."

4. The contention put forward on behalf of the respondent is that Rule 23 (1) was obviously framed under the powers conferred by Section 39 (2) (o). It should, therefore, be strictly limited to and confined within the power conferred by the said clause (o) of Section 39 (2). Clause (o) refers only to "the assessment and recovery of tax under this Act". Rule 23 (1), however, travels beyond this scope and provides for the levy of penalty also, which does not come within the amplitude of the power conferred. The omission of any reference to penalty in Section 39 (2) (o) is said to be for the obvious reason that the legal representatives cannot be held responsible for the irregularities committed by the deceased dealers. It is, therefore, contended that Rule 23(1) is ultra vires the powers conferred on the rule-making authority. Simply stated, this is the argument of the respondent on this part of the case.

5. Sri P. Ramachandra Reddy, the learned Principal Government Pleader appearing for the State seeks to sustain Rule 23(1) and the power to levy penalty thereunder on the basis of three arguments. In the first place, he argues that levy of penalty is incidental to the assessment proceedings. It is part of the machinery adopted for assessment of a dealer and to levy tax on him. Penalty is nothing but an additional tax imposed on the dealer, when he tries to evade tax. He seeks to invoke, in aid of this argument, the decision of the Supreme Court in *C. A. Abraham v. Income-tax Officer, Kottayam*, AIR 1961 SC 609. That is a case, which arose under the Travancore Income-tax Act and the Indian Income-tax Act 1922. A partnership firm was assessed to income-tax. One of the partners died and the surviving partner submitted returns of the income of the firm. In the course of the assessment proceedings, it was discovered that the firm had carried on transactions in different commodities in fictitious names and had failed to disclose them. After giving show cause notice, the Income-tax Officer imposed penalty upon the firm. The surviving partner then applied in a writ petition to the High Court of Judicature praying to quash the order of assessment, which the High Court rejected. He, therefore, carried the matter in appeal before the Supreme Court. It was urged before the Supreme

Court, that a proceeding for imposition of penalty and a proceeding for assessment of income-tax are matters distinct, and Section 44 may be resorted to for assessing tax due and payable by a firm, business whereof has been discontinued, but an order imposing penalty under Section 28 of the Act cannot by virtue of Section 44 be passed.

6. Repelling this contention, Shah, J. who spoke for the Court observed:

"The expression 'assessment' as has often been said, is used in the Income-tax Act with different connotations A review of the provisions of Chapter IV of the Act sufficiently discloses that the word 'assessment' has been used in its widest connotation in that Chapter. The title of the Chapter is 'Deductions and Assessment.' After a review of the different Sections in that Chapter the learned Judge proceeded to observe at page 612.

"The expression 'assessment' used in these sections is not used merely in the sense of computation of income and there is, in our judgment, no ground for holding that, when by Section 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income under Section 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof. Nor has the expression, all the provisions of Chapter IV shall apply so far as may be, to such assessment a restricted content: in terms it says that all the provisions of Chapter IV shall apply so far as may be to assessment of firms which have discontinued their business. By Section 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest contumacious conduct of the assessee. It is true that this liability arises only if the Income-tax Officer is satisfied about the existence of the conditions which give him jurisdiction and the quantum thereof depends upon the circumstances of the case. The penalty is not uniform and its imposition depends upon the exercise of discretion by the Taxing Authorities; but it is imposed as a part of the machinery for assessment of tax liability".

Then, refuting the contention of the appellant that, if the process of assessment includes taking steps for imposing penalties, the legislature has inadvertently left a lacuna in the Act, the learned Judge laid down:

"This plea may be accepted only if the court is compelled, in view of unambiguous language, to hold that such was the intention of the Legislature. Here the language used does not even tend to such an interpretation. In interpreting a fiscal statute, the Court cannot proceed to make good deficiencies if there be any; the court must interpret the statute as it stands and in case of doubt in a manner favourable to the taxpayer. But whereas in the present case, by

the use of words 'capable of comprehensive import', provision is made for imposing liability for penalty upon tax-payers guilty of fraud, gross negligence or contumacious conduct, an assumption that the words were used in a restricted sense so as to defeat the avowed object of the Legislature qua a certain class will not be lightly made".

This decision which is based upon the provisions of the Income-tax Act has no bearing on the instant case which arises under the Sales Tax Act. Their Lordships of the Supreme Court, after a review of Chapter IV of the Income-tax Act 1922, stated that by the use of the words "capable of comprehensive import" provision is made therein for imposing penalty along with tax upon assessee guilty of fraud etc. But the position is different under the Sales Tax Act. A clear dichotomy is kept up between tax and penalty throughout the Act. Sections 11, 14, 15, 17, 18, 21(4) (a)(i) and (ii) and 30(1)(a) use tax and penalty in juxtaposition and keep them distinct and separate. Imposition of tax does not always include levy of penalty. Section 14 maintains this distinction in clearer terms. In fact, this is the provision under which assessment of tax and levy of penalty are made. Sub-section (1) of the section makes provision for the assessment on the basis of the return submitted under Section 13 and also provides for making a best judgment assessment, if the return appears to the Assessing Authority, incorrect or incomplete. Sub-section (2) empowers the assessing authority to impose penalty also, while making assessment to the best of the judgment under sub-section (1). The best judgment assessment itself can be made only after giving the dealer a reasonable opportunity for proving the correctness or completeness of the return submitted by him and making such enquiry as the Assessing Authority deems necessary. It is very important to note the language of sub-section (2) in this context. It reads:

"14(2):—When making an assessment to the best of judgment under sub-section (1), the assessing authority may also direct the dealer to pay in addition to the tax so assessed a penalty as specified in sub-section (8) on the turnover that was not disclosed by the dealer in his return".

Similarly sub-s. (3) also provides for making best judgment assessment and imposition of penalty "in addition" to the tax in certain cases, where a dealer fails to submit the return, or fails to produce the accounts etc. before the date prescribed in that behalf, or when he submits a return subsequent to the date of inspection. Sub-ss. (2) and (3) clearly state that penalty is in addition to the tax assessed under the Act. Sub-section (8) lays down the limits within which the penalty can be levied under sub-sections (2) and (3). It is, thus, clear that penalty is clearly separate and distinct from tax, under the Sales Tax Act. The usual proceedings taken for the assessment of the tax are not

sufficient for the levy of penalty also. There is, thus, no doubt that under the Sales Tax Act, penalty is not merely incidental to assessment proceedings, as the learned Government Pleader contends. The word 'tax' as used in the Act does not include 'penalty'. The two are treated therein as distinct and separate. Gopal Rao Ekbote, J. expressed the same view in *Morisetty Bhadrappa v. Sales Tax Appellate Tribunal*, (1964) 15 STC 787 (AP) while dealing with Section 21(6) of the Andhra Pradesh General Sales Tax Act 1957 and the Amending Act 26 of 1959. We have, therefore, no hesitation in repelling this argument advanced for the State.

7. The second contention of the learned Government Pleader is that, though the return submitted relates to the business done by the deceased dealer, since the respondent himself has submitted it, he should also be liable for the penalty. According to him, the respondent must be held responsible for all the defects in the return. This theory cannot be countenanced even for a single minute, because the respondent was obliged to file a return under Rule 23(1). It is not in dispute that the return is based upon the accounts maintained by the deceased dealer. It is not anybody's case that the respondent has manipulated the accounts. Obviously, the deceased dealer himself was their author. In fact, the Sales Tax Officers inspected the accounts and found the irregularities, when the dealer was alive. It is, therefore, futile to argue that the respondent himself is responsible for the return and the defects therein. Moreover, it should be noted that Rule 23(1) does not make the legal representative personally liable to pay penalty or the tax. They are levied on and recoverable from the estate of the deceased dealer. There is, therefore, no justification in making the respondent liable for anything in the return, simply because he had discharged the duty of submitting the return, cast on him under law.

8. There remains the third contention advanced by the learned Government Pleader. According to him, Rule 23(1) has been made by the Government, as much under Section 39(1) as under Sec. 39(2)(o). Section 39(1) confers a general power. The various items enumerated in sub-section (2) are only illustrative cases, but not exhaustive or restrictive of the general power, to make rules, conferred under R. 23(1). The learned Government Pleader contends that, in exercise of the general power conferred under R. 23(1), the State Government may make any rule to carry out the purposes of the Act. Therefore, even if clause (o) of sub-section (2) does not confer power to make a rule for imposition of penalty, nonetheless, the State Government can make such a rule in exercise of the general power under sub-section (1), because imposition and collection of penalty is one of the purposes of the Act.

9. We are satisfied that this contention has considerable force and it must be accepted. The two sub-sections of the Section 39 are not mutually exclusive. Having laid down the general power of rule-making under sub-section (1), the Legislature proceeded to give in sub-section (2) several illustrations of that general power. In fact, it is clear from the reading of the two Sections, that it is sub-section (1) that confers rule-making power on the State Government and the power under sub-section (2) merely emanates and flows from out of the general power that is conferred under sub-section (1). It has to be noticed that every item included in sub-section (2) is only an instance of the several purposes of the Act, for which rules can be made. In other words, they are only illustrative cases of the general power referred to in sub-section (1). Nor could it be said that the instances enumerated in sub-section (2) exhaust all the purposes and subjects on which rules can be made. The very language of the first portion of sub-section (2) makes this position clear. It states: "In particular and without prejudice to the generality of the foregoing power, such rules may provide for". Thus the language of sub-section (2) specifically declares that the several subjects enumerated therein are only particular or illustrative instances of the general power conferred under sub-section (1) and that they are without any prejudice and not restrictive of that power. It cannot, therefore, be said that, simply because a particular subject is not included in the illustrative list contained in sub-section (2), the State Government cannot make a rule in regard to it, even though it is one of the purposes of the Act.

10. This position is well established and beyond pale of controversy and doubt. We will cite only a few instances where the highest Courts have dealt with this problem and laid down the view which we have expressed above. In *Emperor v. Sibnath Banerji*, AIR 1945 PC 156, the Privy Council construed Section 2 of the Defence of India Act 1939, as amended by the Amending Act 1940. There also, sub-section (1) conferred general power and sub-section (2) provided a long list of cases, in respect of which rules could be made. Overruling the decision of the Federal Court, the Privy Council stated the law at page 160 in the following terms:—

"In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and "the rules", which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)". There can be no doubt — as the learned Judge himself

appears to have thought — that the general language of sub-section (1) amply justifies the terms of Rule 26 and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2)".

Rule 26 of the Defence of India Rules, impugned in that case, conferred power on the Central or Provincial Government to detain a person, if he was acting, in the view of the Government, in a manner prejudicial to the Government etc.... The Federal Court took the view that Rule 26 was ultra vires, because none of the items enumerated in sub-section (2) clearly included the power to make a rule in regard to detention. It was this opinion of the Federal Court that was set aside by the Privy Council, holding that the rule clearly comes within the general power conferred under sub-section (1) of Section 2.

11. The Supreme Court of India followed this decision in *State of Kerala v. M. Appukutty*, (1963) 14 STC 242 = (AIR 1963 SC 796). The question there was, whether Rule 17 of the Madras General Sales Tax Rules 1939 was beyond the rule-making power of the State Government, as conferred under Section 19. While holding that Rule 17(1) and (3)(a) ex facie fall under Section 19(2)(f), their Lordships of the Supreme Court went further and observed that in any event they would come within the general power conferred by sub-section (1) of Section 19 of the Madras General Sales Tax Act 1939. Expressing this view, Kapur, J. speaking for the court, observed at p. 246 (of STC) = (at p. 798 of AIR).

"In any event as was said by the Privy Council in AIR 1945 PC 156 the rule-making power is conferred by sub-section (1) of that section and the function of sub-section (2) is merely illustrative and the rules which are referred to in sub-section (2) are authorised by and made under sub-section (1). The provisions of sub-section (2) are not restrictive of sub-section (1) as expressly stated in the words "without prejudice to the generality of the foregoing power" with which sub-section (2) begins and which words are similar to the words of sub-section (2) of Section 2 of the Defence of India Act which the Privy Council was considering. Now sub-section (1) of Section 19 of the Act provides that "the State Government may make rules to carry out the purposes of this Act" and the long title of the Act is "an Act to provide for the levy of general tax on the sale of goods in the State of Madras." Therefore, in our opinion, Rule 17 and the various clauses thereof made under Section 19 are not beyond the rule-making power of the State Government as contained in Section 19."

12. The above statement of law by the Supreme Court was only by way of reiteration of what it had earlier stated in *Santosh Kumar Jain v. The State*, 1951 SCJ 291 = (AIR 1951 SC 201). There,

the Supreme Court was considering the scope of Section 3 (1) and (2) of the Essential Supplies (Temporary Powers) Act 24 of 1946 and the scope of the power conferred thereunder on the Central Government. The question posed therein was one relating to the legality of the order for seizure of sugar in a factory. The contention was raised that seizure was not one of the powers specifically referred to in sub-section (2) of Section 3, which conferred on the Central Government the power to make rules and therefore the seizure of the appellant-company's sugar should be regarded as unauthorised and illegal. The Supreme Court repelled this contention, by holding at page 295 (of SCJ) = (at p. 203 of AIR):

"It is manifest that sub-section (2) of Section 3 confers no further or other powers on the Central Government than what are conferred under sub-section (1), for it is "an order made thereunder" that may provide for one or the other of the matters specifically enumerated in sub-section (2) which are only illustrative, as such enumeration is "without prejudice to the generality of the powers conferred by sub-section (1). Seizure of an article being thus shown to fall within the purview of sub-section (1), it must be competent for the Central Government, or its delegate, the Provincial Government, to make an order for seizure under that sub-section apart from and irrespective of the anticipated contravention of any other order as contemplated in clause (j) of sub-section (2)".

13. In coming to this view, the learned Judges of the Supreme Court relied on AIR 1945 PC 156. There is, therefore, no doubt, whatever, that Rule 23(1) clearly comes within the purview of the general power of rule-making, conferred on the State Government, under Section 39(1).

14. Nevertheless, Sri P. Rama Rao, the learned counsel for the respondent, raised the contention that sub-section (1) confers power to make rules only to carry out "the purposes of the Act," and since levy and collection of penalty are not the purposes of the Act, Rule 23 (1) does not fall within the purview of sub-section (1) of Section 39. According to him, there is only one purpose of the Act, namely, to assess and collect sales tax and levy of penalty is not its purpose. We cannot uphold this argument. In the first place, it should be noticed that Section 39 (1) does not use the singular word 'purpose.' On the other hand, it uses the plural word 'purposes.' Therefore, it envisages more than one purpose of the Act. All those purposes are referred to and provided for by the different provisions of the Act. Imposition and collection of penalty also are clearly dealt with in a number of provisions of the Act. It must necessarily be so. In a taxing statute of this nature, the Legislature must envisage and provide for cases,

where the assessee attempts to contravene the provisions of the Act and to evade payment of rightful tax levied thereunder. If such contingencies are not visualised and such leaks are not plugged, no taxation law can be effective and satisfactorily implemented. In order to satisfactorily and effectively implement their provisions, penalties are generally provided in all taxation laws. Without such a sanction, there is the danger of evasion of tax. Thus, provision for levy and collection of penalties for contravening their requirements, has become an integral part of such enactments and one of their purposes. The argument that it does not form part of the purposes of the Act, is thus a wholly untenable one.

15. Even then, Sri Rama Rao argues that Rule 23(1) does not, in terms, apply to a penalty leviable under Section 14 of the Sales Tax Act. He relies for this contention, on the language of Rule 23(1), which refers to assessment under Sections 5, 5-A, 6 or 11 or any notification under Section 9(1). He, therefore, seeks to limit the scope of Rule 23(1) to the assessments under these Sections alone. But there is a clear fallacy in this argument. The aforesaid sections of the Sales Tax Act are only charging sections. The assessment is actually made under Section 14, either on the basis of the return or according to the best judgment. It is futile to argue that the application of Rule 23(1) is confined only to the tax or penalty levied under the aforesaid sections, because no tax is actually levied under them. The assessment is actually made under Section 14 and the tax is levied, when assessment is made, in accordance with the several charging sections referred to in Rule 23(1). What Rule 23(1) says is that the legal representative of the deceased dealer is liable to submit the returns which are liable to assessment under the charging sections 5, 5-A, 6 or 11 or any notification under Section 9(1), and that the legal representative should pay out of the estate of the deceased dealer, the tax and/or any penalty assessed or levied, as payable by the deceased dealer. Therefore, there is no limitation in Rule 23(1) as contended for by the learned counsel for the respondent.

16. Any tax and/or any penalty assessed or levied under the Sales Tax Act, as payable by the deceased dealer, is payable out of the estate of the deceased dealer. It should be borne in mind that the legal representative is not made personally liable to pay the tax and/or penalty payable by the deceased dealer. Rule 23(1) clearly provides that they are to be paid only out of the estate of the deceased dealer. Such a provision, appears to us to be quite reasonable also. If the deceased dealer had to pay tax and also penalty because of certain irregularities committed, his estate should not be permitted to escape from such liability. Had he been alive, they would have been collected from him and from his estate. It

is unreasonable to permit the estate to escape this liability, because the dealer had died. If the tax is recoverable from his estate after his death penalty also should equally be recoverable from it. The legal representative is liable to pay the said tax and penalty only to the extent and limit of the deceased dealer's assets in his hands. He is not mulcted with any personal liability. This, in our view, is pre-eminently reasonable.

17. The view of the Appellate Tribunal that the principle *actio personalis moritur cum persona* is applicable to this case is clearly erroneous. That principle has no application, where the law clearly provides for the survival of the liability after the death of the concerned person. The Sales Tax Act and the Rules made thereunder provide for the survival of the liability of the deceased dealer. When that is so, the dealer's liability to pay tax and/or penalty does not disappear with his death. The Appellate Tribunal clearly erred in applying this principle.

18. Thus, we see no force in either of the two objections raised by Sri Rama Rao. We, therefore, hold that Rule 23(1) is not ultra vires the powers of the rule-making authority, but is valid and enforceable. It, therefore, follows that the levy of penalty in this case is valid and in accordance with law. The tax revision case is accordingly allowed with costs. Advocate's fee Rs. 100.

Petition allowed.

AIR 1970 ANDHRA PRADESH 86
(V 57 C 11)

FULL BENCH

KUMARAYYA, KRISHNA RAO, AND
OBUL REDDI, JJ.

His Highness Prince Azam Jah, Appellant v. Expenditure Tax Officer, Income-tax Cum-Wealth-tax, Hyderabad, Respondent.

Writ Appeals Nos. 67 to 69 of 1964, D/-14-4-1967, decided by Full Bench on order of reference made by Manohar Pershad C. J. and Mohammed Mirza, J.

(A) Expenditure Tax Act (1957), S. 16 — Notice for reopening assessment — When can be issued — Failure of assessee to disclose in returns his relationship with dependant and expenditure incurred by her — Notice issued by Expenditure Tax Officer is valid.

All that is required for the Expenditure Tax Officer for issuing a notice under Section 16 is that he should have reason to believe under clause (a) that as a result of the assessee's failure to make a return or disclose fully the particulars of his expenditure, expenditure has escaped assessment. Under Clause (b), the Officer should have reason to believe in consequence of the

information in his possession that the income has escaped assessment. (Para 8)

Hence, where a scrutiny of the returns filed by the assessee shows that all the material facts are not disclosed by the assessee in the first instance and even after notice is given under Section 16 (b) there is no disclosure of the expenditure incurred by his wife, the Expenditure Tax Officer is competent to issue a notice under Section 16 for assessing or reassessing such escaped expenditure although the wife has her own source of income and has filed separate return. (Para 8)

(B) Constitution of India, Article 246, Schedule 7, List I, Entry 97 — Expenditure Tax Act (1957), is not invalid for want of legislative competency.

The Expenditure Tax Act (1957) is not void for want of legislative competency. (Para 9)

The Expenditure tax which is not specifically provided for in any of the Entries in List II and List III falls well within the ambit or scope of Entry 97 of List I and as such, exclusively is within the legislative competency of the Parliament. So long it is in fact a tax on expenditure, the mere fact that in furtherance of legislative intent and object the expenditure on which the tax is sought to be levied is not necessarily confined to the expenditure actually incurred by the assessee himself, does not render it other than the expenditure tax. AIR 1965 SC 1375, Disting. (Para 10)

(C) Expenditure Tax Act (1957), (as amended by Finance Act, 1959), S. 2 (g) (i) — Word "dependant" in relation to assessee as individual — Means his or her spouse irrespective of fact of their dependancy and persons wholly and mainly dependant on assessee for their support and maintenance — (Words of Phrases — 'Dependant').

Per Majority: The wife of the assessee even if she is supporting herself and is not dependant upon the assessee for her maintenance and support, is a "dependant" within the meaning of Section 2 (g) (i) of the Act. (Paras 20, 21)

Under the unamended section a spouse or a child in order to come within the meaning of 'dependant' of an assessee who is an individual had to be dependent wholly or mainly on the assessee for support and maintenance. After the amendment, obviously enough, where the assessee is an individual, 'dependant' would necessarily mean his or her spouse or minor child. That is by reason of their very relationship and irrespective of the fact whether they are wholly or mainly dependent on him for maintenance or support. Persons other than these, be they his own adult children, may be included within this definition only if they are wholly or mainly dependant on assessee for support and maintenance. (Para 20)

Per Krishna Rao J. (Contra):

On a proper construction of Section 2 (g) (i) of the Act, the qualifying clause "wholly or mainly dependant on the assessee for support or maintenance" not only qualifies the word "person" which immediately precedes the said clause but also the earlier words "his or her spouse or minor child". Hence the question whether the assessee's spouse is wholly or mainly being maintained by the assessee has got to be determined by the assessing authority during the course of his investigation. (Para 47)

The word "dependant" may involve various elements, such as dependency in the matter of merely taking advice or mere protection. But the test laid down by the Act is that the assessee should maintain the dependant. Hence the essential test is that the expenditure in relation to the maintenance of the particular dependant must be incurred by the assessee. It, therefore, excludes all expenditure which has been incurred by the members of the family out of their own resources and separate property. Merely by virtue of the very personal relationship and the personal law, the wife or the child cannot be presumed to be a dependant of the assessee and it is necessary to find out whether the said dependant is actually being maintained by the assessee. Case law discussed. (Para 46)

(D) Expenditure Tax Act (1957), (as amended by Finance Act, 1959), S. 4 (ii) — Distinction between assessee as "individual" and as "Hindu undivided family" stated.

Per Majority: After the amendment a distinction is made between the assessee where he is an "individual" and where he is not an "individual" but is "a Hindu undivided family". Where the assessee is an individual any expenditure incurred by any dependant of the assessee is included in computing the expenditure of the assessee. But where the assessee is a Hindu undivided family, only such expenditure incurred by any dependant as is met from or out of any income or property transferred directly or indirectly to him by the assessee is to be included in computing the expenditure of a Hindu undivided family. That can be the only interpretation that the language used is susceptible of. This is clear from opening clause of Section 4 viz., "the following amounts shall be included in computing" read with the distinction drawn between the two clauses in Sec. 4(ii) by using the words "where the assessee is an individual" and where the assessee is a "Hindu undivided family". It is obvious that the said clause governs only where the assessee is a Hindu undivided family. The amended provision, which is marked by a substantial departure from the previous provision conveys to that effect the obvious intention of the legislature. (Para 24)

Krishna Rao, J. (Contra): The qualifying clause in Section 4 (ii), namely, "from or out of any income or property transferred

directly or indirectly to the dependant by the assessee" refers to each of the cases, namely (i) where the assessee is an individual, any expenditure incurred by any dependant of the assessee; and (ii) where the assessee is a Hindu undivided family, any expenditure incurred by any dependant. (Para 48)

There would have been no difficulty in the interpretation of sub-clause (ii) of Section 4 if there had been a comma between the word "dependant" and the qualifying expression "from or out of any income or property transferred directly or indirectly to the dependant by the assessee". But the guiding factor in the interpretation of a statute is really the context and not the presence or absence of the punctuation marks. (Para 48)

(E) Expenditure Tax Act (1957), (as amended by Finance Act, 1959), S. 2 (g) (i) — Classification of dependant of assessee into his or her spouse and or minor child and other persons wholly and mainly dependant upon him — Classification is reasonable and not arbitrary and does not violate Art. 14 — (Constitution of India, Art. 14).

Where in relation to the assessee as individual the definition in S. 2(g)(i) of the Expenditure Tax Act (1957), as amended by the Finance Act (1959), has regarded his or her spouse or minor child as a dependant by reason of that very relationship and for any other person it lays down the test that he or she should wholly and mainly depend for maintenance and support on the assessee, it cannot be said that such classification of dependant is unreasonable or arbitrary. (Para 39)

The Parliament after some experience of the working of the Act has come to the conclusion that the wife and minor child are necessarily to be included in the definition of dependants of an assessee who is an individual. Indeed the Parliament has considered them as constituting the integral unit of the family and this for good reasons, viz., having regard to the social conditions of the country for effective working of the legislative enactment and avoiding devices of evading tax. The Parliament was concerned with the object of promoting thrift in the family expenditure. It was therefore necessary to include the income and expenditure of these dependants in the income and expenditure of the assessee and that is what the Parliament has done. When the Parliament after taking into account the historical background, the family relationship, the social and economic conditions of the family has made such classification to effectuate the purposes for which the Act was brought the classification cannot be said to have suffered from the vice of discrimination and hit by Article 14. (Para 40)

The mere fact that the Parliament has not prescribed any rules in relation to the choice of the assessee in case of spouses, the law does not become bad on that account. The

under Section 13 of the Act on the assessee to file a return in the prescribed form and verify in the manner prescribed, setting forth his expenditure for the previous year. By virtue of the amendment of Section 2 (g) by the Finance Act, 1959, the Princess is admittedly a dependant of the assessee and her expenditure was not shown in the original returns of the assessee and therefore there is reason to believe that the assessee failed to disclose truly and fully all the material facts in respect of the expenditure of his wife which are necessary for the completion of his assessment. The actual expenditure incurred by his wife was disclosed by her returns and in consequence of the information available from the returns filed by the Princess, the respondent had reason to believe that expenditure of the assessee chargeable to tax had escaped assessment for three assessment years in question and consequently the provisions of Section 16 of the Act were invoked for reopening assessments. The respondent is entitled to issue the impugned notice dated 5-5-1962 if in consequence of the information in his possession he had reason to believe that there was an escape-ment of assessment of the assessee's total expenditure within 4 years from the year of assessment. It is also averred by the respondent that the contention of the assessee that Section 4 (ii) of the Act is ultra vires of the Constitution offending Article 14 is without substance. Section 3 of the Act, the charging section makes the expenditure incurred by any individual or Hindu undivided family liable to tax at the rate or rates specified in the schedule. There is no discrimination between one individual assessee and another individual assessee but the distinction has been made by the legislature for proper and valid grounds between the individual assessee and the assessee who is a Hindu undivided family. The expression "equal protection of laws" in Article 14 means "the right to equal treatment in similar circumstances both in the privileges conferred and the liabilities imposed by the laws." Equality before law means law should be equal and should be equally administered and there should be no discrimination in the same class. The power of the State to classify for the purpose of taxation is of wide range and flexibility. The class of persons being different, the distinction cannot be claimed to be discriminatory as to offend Article 14 of the Constitution. The other contention of the assessee, that the provisions of Section 4 (ii) read with Sec. 2 (g) of the Act are hit by the provisions of Articles 19 and 31 of the Constitution, is devoid of any merit or substance. There is no fundamental right involved in the circumstances of the case, nor is there any deprivation of the right of assessee to property.

4. The learned Judge negatived all the contentions of the assessee and dismissed his writ petitions. On the first contention, the

learned Judge held that the respondent was empowered to reopen the assessment under Section 16 of the Act. Regarding the main question under Article 14 turning on the interpretation of Section 4 (ii) of the Act, it was held by the learned Judge that different kinds of property may be subject to different rates of taxation, but so long as there is a rational basis for classification Article 14 will not be in the way of such a classification, resulting in an unequal burden on different classes of properties. The learned Judge also observed that in a tax legislation, incidence of tax falls on different classes of assessee and for that reason it cannot be said that it is a class legislation without any classification or without having any rational relation to the object sought to be achieved by the enactment. The object of the enactment is to raise taxes and augment if from time to time as and when such exigencies require it and because some classes are taxed higher than others or some are given concessions while others are not, it cannot be said that there has been discrimination within the meaning of Article 14. He also held that the right to hold property is not affected merely because a tax is imposed, and dismissed the three writ petitions.

5. Mr. Narasaraju appearing for the assessee has assailed the findings of the learned Judge in the main (1) that the respondent has no jurisdiction to reopen the assessments and the notice dated 5-5-62 issued by him is without jurisdiction (2) that the amendment of the definition 'dependant' in Section 2 (g) and Section 4 (ii) of the Act as amended by Section 24 of the Finance Act is ultra vires of the Constitution (3) that the amendment is beyond the legislative competence and (4) that the amendment has brought about an unreasonable discrimination as between the two units of the assessee viz., individuals and Hindu undivided families and as such, the provisions of Section 4, clause (ii) are violative of Article 14 of the Constitution. Developing the argument further, Mr. Narasaraju contended that on a proper interpretation of 'dependant' occurring in Section 2 (g) it means that the spouse or minor child should be a person wholly or mainly dependent on the assessee for support and maintenance, as otherwise there will be no basis for classification between the spouse and a minor child on the one hand and other dependants which term includes any person wholly or mainly dependent on the assessee for support and maintenance.

6. Before going into the question as to the legislative competence and the effect of the amendments introduced by virtue of Section 24 of the Finance Act, 1959 in the definition of 'dependant' in Section 2 (g) and also the substituted provisions in Section 4, clause (ii) it may be necessary in the first instance to examine the contention of the learned counsel for the assessee that the res-

pondent has no jurisdiction to reopen the assessments by issuing the notice dated 5-5-1962. Section 16 of the Act deals with expenditure escaping assessment. "If the Expenditure Officer has reason to believe that by reason of the omission or failure on the part of the assessee to make a return of his expenditure under Section 13 for any assessment year, or to disclose fully and truly all material facts necessary for his assessment for that year, the expenditure chargeable to tax has escaped assessment for that year, whether by reason of under-assessment or assessment at too low a rate or otherwise" he may reopen at any time within 8 years and serve a notice on the assessee or if under Sec. 16 (b) in consequence of any information in his possession he has reason to believe that notwithstanding that there has been no such omission or failure as referred to in clause (a) the expenditure chargeable to tax has escaped assessment for any assessment year, the Expenditure Tax Officer may at any time within 4 years at the end of the assessment year serve a notice on the assessee. In this case, the notice issued by the respondent merely shows that it is issued under Section 16 of the Act. In response to the notice the assessee filed returns disclosing identical items of expenditure which were disclosed earlier in the returns prior to the issue of notice. Mr. Kondayya appearing for the respondent contended that the fact that the Princess (the wife of the assessee) had spent Rupees 1,74,267, Rs. 435,267 and Rs. 3,48,567 in the three respective relevant assessment years was not brought to the notice of the respondent either in the original returns or in the course of the enquiry before the completion of the assessment and therefore the assessee had failed to disclose fully and truly all the material facts in respect of the expenditure of his wife which disclosure was necessary for completing or finalising the assessments of the assessee. It is on this ground Mr. Kondayya contended that the provisions of Section 16 (a) are attracted in the instant case.

7. It is unnecessary to go into the question whether the notice is under Sec. 16 (a) or Section 16 (b): for, the respondent can issue a notice if he has reason to believe that there has been any omission or failure on the part of the assessee to disclose fully and truly all material facts, or under Sec. 16 (b) if in consequence of any information in his possession he has reason to believe that the expenditure chargeable to tax has escaped assessment for any assessment year or by reason of any under-assessment or assessment at too low a rate. The Supreme Court, in *Kamal Singh v. Commissioner of Income-Tax, Bihar and Orissa*, 1959-35 ITR 1 = (AIR 1959 SC 257), dealing with a case arising under Section 34 (1) (b) of the Income Tax Act relating to escaped assessment which is in similar terms held that "two conditions must be satisfied before the In-

come Tax Officer can act under Section 34 (1) (b); he must have information which comes into his possession subsequent to the making of the original assessment order, and that information must lead to his belief that income chargeable to tax has escaped assessment, has been under-assessed or assessed at too low a rate, or has been made the subject of excessive relief.

8. Therefore the words "in consequence of any information in his possession" in Section 16 (b) would include information as to the truth and correct state of law, as pointed out by the Supreme Court, the only limitation on the powers of the Expenditure tax officer being if notice is given under Sec. 16 (a), it should be at any time within 8 years and in cases falling under clause (b), it should be at any time within 4 years. In this case notice was served within 4 years. All that is required for the Expenditure Tax Officer is that he should have reason to believe under clause (a) that as a result of the assessee's failure to make a return or disclose fully the particulars of his expenditure, expenditure has escaped assessment. Under clause (b), the officer should have reason to believe in consequence of the information in his possession that the income has escaped assessment. A scrutiny of the returns filed by the assessee for the three relevant years would show that all the material facts are not disclosed by the assessee in the first instance and even after notice was given under Section 16 (b), there was no disclosure in the return that the Princess was his wife and she had her own sources of income and that she had filed separate returns. Under Column 1 to Annexure 5 of the returns it is incumbent on the assessee to disclose particulars of his 'dependant' and as there is no disclosure of dependants, the expenditure tax officer can proceed to assess or re-assess such escaped expenditure of the dependant under Section 16 (b). Therefore, it is manifest that the respondent was competent to issue the notice under Section 16 of the Act.

9. It is next contended by Mr. Narasaraaju that this enactment is void ab initio for want of legislative competency. According to him, there is no entry in list "of Seventh Schedule or in List III regarding tax on expenditure. But there is Entry 97 which as a residuary entry must comprehend the tax of the kind. It is, however, contended that for a concept of expenditure tax there must of necessity be some direct relation or at least a rational nexus between the tax and the expenditure of the assessee. But it must be borne in mind that it would be inappropriate to apply the test popularly known or traditionally prescribed to such concepts as the legislative intents must have particular connotation. If the legislature for purposes of expenditure tax takes a certain group of persons as one unit, unless that group is hit by constitutional inhibitions, it cannot be

contended that the expenditure of the assessee alone as distinct from that of the units should be taken into consideration. The rule of rational nexus as contended for on behalf of the petitioner-appellant does not so circumscribe the power of the legislature. The Supreme Court's decision on which reliance is placed by the learned counsel does not advance his theory. In fact the Supreme Court in *Navnit Lal C. Javeri v. App. Asst. Commissioner of Income Tax, Bombay*, AIR 1965 SC 1375 at p. 1379, dealing with the question raised therein, challenging the impugned provisions as beyond the legislative powers of Parliament observed thus:

"In dealing with this point, it is necessary to consider what exactly is the denotation of the word "income" used in the relevant entry. It is hardly necessary to emphasise that the entries in the lists cannot be read in a narrow or restricted sense, and as observed by Gwyer, C. J. in the *United Provinces v. Atiq Begum*, 1940 FCR 110 = AIR 1941 FC 16, each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. What the entries in the Lists purport to do is to confer legislative powers on the respective legislatures in respect of areas or fields covered by the said entries; and it is an elementary rule of construction that the widest possible construction must be put upon their words. This doctrine does not, however, mean that Parliament can choose to tax as income an item which in no rational sense can be regarded as a citizen's income. The item taxed should rationally be capable of being considered as the income of a citizen. But in considering the question as to whether a particular item in the hands of a citizen can be regarded as his income or not, it would be inappropriate to apply the tests traditionally prescribed by the Income Tax Act as such."

10. It is clear and manifest from Entry 97 in List I that on any other matter not enumerated in List II or III including any tax not mentioned in either of those lists, the Parliament has exclusive power under Article 246 to make laws. The expenditure tax which is not specifically provided for in any of the Entries in the said lists falls well within the ambit or scope of Entry 97, and as such exclusively is within the legislative competency of the Parliament. So long it is in fact a tax on expenditure, the mere fact in furtherance of legislative intent and object the expenditure on which the tax is sought to be levied is not necessarily confined to the expenditure actually incurred by the assessee himself, does not render it other than the expenditure tax.

11. Mr. Narasaraju next contended that a fiscal statute has to be strictly construed and if a provision in the statute is susceptible of two interpretations, the one in favour of the assessee or the subject should be

adopted and that the various provisions of the statute should be read together and a harmonious interpretation should be placed thereon in order to ascertain and give effect to the intention or object of the legislature. It is his further contention that there should be some reasonable nexus between the expenditure of the dependant and the assessee to render it taxable expenditure of the assessee and if there be no such nexus, imposition of tax thereon is beyond legislative competence and invalid. Learned Counsel argues where the husband has no control over the expenditure of the wife, who lives separate and is possessed of independent means, it is but fair, just and legitimate that he should not be taxed for such expenditure.

12. Referring to the Finance Act of 1959 in so far as it amended the definition of dependant in Section 2 (g) and substituted Section 4 (ii) by introducing a new clause, learned counsel argues that though the definition refers to two categories viz. (1) "his or her spouse or minor child" and (2) "any person wholly or mainly dependent on the assessee for support and maintenance"; on a proper construction the first category of persons should also satisfy the condition as in the second category, namely, they must be mainly or wholly dependent on the assessee for support and maintenance. It is thus urged that in fact there is no real classification as every one is controlled by the same pre-essential condition of support and maintenance; and on the other hand if the first part be construed to mean that it is unqualified by the said condition, the classification must be held to be arbitrary and artificial, not based on any intelligible or reasonable differentia distinguishing persons grouped together from those left out of that group and the differentia, if any, must be held to be having no rational relation to the object of legislation. It is also urged that discrimination is inherent in such a provision and there being no rule of guidance as to the selection of a spouse as an assessee arbitrary power is given to the executive or taxing authority to select any spouse as assessee which is bad in law. Attack also has been made in relation to amendment of Section 4 (ii) more or less on similar lines.

13. Mr. Kondayya, the learned Counsel for the respondent argued that the powers of the Parliament are wide enough to take within their range this legislation, that the two essential conditions are satisfied inasmuch as there is a reasonable classification of the assessee into two classes, individual and Hindu undivided family and that this differentia has a rational relation to the object sought to be achieved by the statute. The amendments introduced by the Finance Act, 1959 suffer from no constitutional inhibition and they advance the purpose and objects of legislation.

14. This argument leads us to the question as to the object of the legislation, the

purpose for introducing amendment in Sections 4 (ii) and 2 (g) (1); the exact meaning of those provisions and whether the classification introduced has a rational and intelligible basis and whether it has a reasonable nexus with the object sought to be achieved by the Statute.

15. We may state at the outset that taxation laws cannot claim any immunity from equality clause of the Constitution. They cannot afford to be arbitrary. They cannot transcend the reasonable limits enjoined by the Constitution. They are liable to be struck down if they suffer from constitutional inhibitions. With these preliminary remarks we proceed to consider whether the attacks made by the learned counsel for the assessee on the validity and constitutionality of the amendment can be sustained. As there is dispute first and foremost with regard to the real meaning of the amended provisions, we

Before Amendment.

"2. (g) 'dependant' means—

(i) where the assessee is an individual, his or her spouse or child wholly or mainly dependent on the assessee for support and maintenance;

(ii) where the assessee is a Hindu undivided family—

(a) every coparcener other than the karta; and

(b) any other member of the family who under any law or order or decree of a Court is entitled to maintenance from the joint family property.

2. (h) 'expenditure' means any sum in money or money's worth, spent or disbursed or for the spending or disbursing of which a liability has been incurred by an assessee and includes any amount which under the provisions of this Act is required to be included in the taxable expenditure;

2. (o) 'taxable expenditure' means the total expenditure of an assessee liable to tax under this Act.

3. Charge of expenditure tax—

(i) Subject to the other provisions contained in this Act, there shall be charged for every financial year commencing on and from the first day of April, 1958, a tax (hereinafter referred to as expenditure-tax) at the rate or rates specified in the Schedule in respect of the expenditure incurred by any individual or Hindu undivided family in the previous year:

Provided that no expenditure tax shall be payable by an assessee for any assessment year if his income from all sources during the relevant previous year as reduced by the amount of taxes to which such income may be liable under

have to necessarily ascertain the same by construing the said provisions. It may also be necessary in this connection to understand the scope and object of the Act, the need for amending provision, the deficiency sought to be supplied thereby and the purpose which the amended provisions have to serve. It is also to be seen whether notwithstanding the marked difference of language deliberately employed in the amended provisions in Section 2 (g) (i) a substitution of Section 4 (ii) the law in substance remains the same as before, if not whether this innovation is hit by constitutional inhibition. As we are primarily concerned with the interpretation of Sections 2 (g) (i) and 4 (ii) on which the whole discussion revolves we have to notice these provisions together with the other relevant provisions in the Act. These provisions as they were before and after amendment are detailed hereunder in juxtaposition:

After Amendment.

"2. (g) 'dependant' means—

(i) where the assessee is an individual, his or her spouse or minor child and includes any person wholly or mainly dependent on the assessee for support and maintenance;

(ii) where the assessee is a Hindu undivided family—

(a) every coparcener other than the karta; and

(b) any other member of the family who under any law or order or decree of a Court, is entitled to maintenance from the joint family property.

2. (h) 'expenditure' means any sum in money or money's worth, spent or disbursed or for the spending or disbursing of which a liability has been incurred by an assessee and includes any amount which under the provisions of this Act is required to be included in the taxable expenditure;

2. (o) 'taxable expenditure' means the total expenditure of an assessee liable to tax under this Act.

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Before Amendment.

After Amendment.

any other law for the time being in force does not exceed rupees thirty-six thousand.

Provided that no expenditure tax shall be payable by an assessee for any assessment year if income from all sources derived by the assessee and his dependants during the previous year as reduced by the amount of taxes to which such income may be liable under any law for the time being in force does not exceed rupees thirty-six thousand.

Explanation : Income derived by an assessee or any of his dependants shall include—

(i) income which a trustee or any other person receives or is entitled to receive during the previous year on behalf of the assessee or any of his dependants, or both, as the case may be; and

(ii) in the case of an assessee being an individual who is a member of a Hindu undivided family or of any association of persons any sum in money or money's worth spent or disbursed for the benefit of the assessee or any of his dependants during the previous year from or out of the income or property of the Hindu undivided family or the association, as the case may be.

(2) For the removal of doubts, it is hereby declared that nothing contained in this Act shall require the inclusion in the taxable expenditure of an assessee for any year of expenditure for the spending or disbursing of which a liability has already been incurred and which has been included in the taxable expenditure for any earlier year.

4. Unless otherwise provided in Section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this Act, namely :—

(i) any expenditure incurred, whether directly or indirectly by any person other than the assessee in respect of any obligation or personal requirement of the assessee or any of his dependants which, but for the expenditure having been incurred by other person would have been incurred by the assessee to the extent to which the amount of all such expenditure in the aggregate exceeds Rs. 5000 in any year :

(ii) any expenditure incurred by any dependant of the assessee for the benefit of the assessee or of any of his dependants out of any gift donation or settlement on trust or out of any or other source made or created by the assessee, whether directly or indirectly.

Explanation :— For the removal of doubts, it is hereby declared that nothing contained in this section shall

(2) For the removal of doubts, it is hereby declared that nothing contained in this Act shall require the inclusion in the taxable expenditure of an assessee for any year of expenditure for the spending or disbursing of which a liability has already been incurred and which has been included in the taxable expenditure for any earlier year.

4. Unless otherwise provided in Section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this Act, namely :—

(i) any expenditure incurred, whether directly or indirectly by any person other than the assessee in respect of any obligation or personal requirement of the assessee or any of his dependants to the extent to which the amount of all such expenditure in the aggregate exceeds Rs. 5000 in any year :

(ii) where the assessee is an individual any expenditure incurred by any dependant of the assessee, and where the assessee is a Hindu undivided family, any expenditure incurred by any dependant from or out of any income or property transferred directly or indirectly to the dependant by the assessee.

Explanation :— For the removal of doubts, it is hereby declared that nothing contained in this section shall

Before Amendment.

be deemed to require the inclusion in the expenditure of the assessee of any expenditure incurred by any other person for or on behalf of the assessee by way of customary hospitality or which is of a trivial or inconsequential nature.

6. (i) The taxable expenditure of an assessee for any year shall be computed after making the following deductions and allowances, namely :—

(h) a basic allowance—

(i) where the assessee is an individual of Rs. 30,000; and

(ii) where the assessee is a Hindu undivided family of Rs. 30,000 in respect of the karta and his wife and children and a further allowance of Rs. 3,000 for every additional coparcener, provided that the basic allowance for the Hindu undivided family as a whole shall not exceed Rs. 60,000 in any case”.

The Expenditure Tax is a legislation hitherto unknown to this country and in fact not experimented anywhere else in the world. Although in the United States of America a bill was introduced in the Federal Legislature in July, 1921 for levy of what was styled as “Spending Tax”, it was summarily rejected by the Congress as it was considered unworkable and too complicated. In the words of one of the Senators, the bill was a “most complicated monstrosity”. The idea of expenditure tax in India seems to have had its origin in the recommendations of Dr. Nicholas Kaldor, reader in Economics University of Cambridge who gave a report on Indian Tax Reform. It is essentially a tax on spending or consumption, i. e., expenditure. It is not entire expenditure but only the taxable expenditure for any year as defined in the Act that is liable to tax. The assessee is liable to such tax only if his income exceeds certain limit. In computing this taxable expenditure certain deductions are permissible. Sections 5 and 6 exclude certain types of expenditure from being taxed. The object of this legislation, according to the statement of objects and reasons, is to levy annually tax on expenditure above the prescribed level of an individual and a Hindu undivided family. This tax on expenditure is expected to serve as a deterrent on extravagant or unnecessary personal expenditure, promote thrift and act as an incentive to save and promote economy. While introducing the amendment, the Finance Minister in his budget speech for 1959-60 (See 35 ITR 57, para 66) observed :—

“I propose, therefore, to withdraw some

After Amendment.

be deemed to require the inclusion in the expenditure of the assessee of any expenditure incurred by any other person for or on behalf of the assessee by way of customary hospitality or which is of a trivial or inconsequential nature.

6. (i) The taxable expenditure of an assessee for any year shall be computed after making the following deductions and allowances, namely :—

(h) a basic allowance—

(i) where the assessee is an individual of Rs. 30,000 for himself and all his dependants; and

(ii) where the assessee is a Hindu undivided family of Rs. 30,000 in respect of the karta and his wife and children and a further allowance of Rs. 3,000 for every additional coparcener, provided that the basic allowance for the Hindu undivided family as a whole shall not exceed Rs. 60,000 in any case.

Provided further that the allowance of Rs. 3,000 for any additional coparcener shall not be allowed where the coparcener is separately assessed under this Act and is entitled to the allowance of Rs. 30,000 under sub-clause (i)”.

of the exemptions now available, and in particular to provide that the husband, wife and minor children should be regarded as one unit for the exemption limit of Rupees 30,000 in the matter of non-taxable expenditure and not as separate assesseees if they have incomes in their individual rights”.

In the memorandum explaining the provisions of the Finance Bill in so far as it relates to the definition of dependant it is stated; “at present the wife and children are dependants, if they are wholly or mainly dependent on him for support and maintenance. It is now proposed to dispense with this requirement. Any other person who is actually dependent on the assessee for support and maintenance will also be regarded as dependant”. In the memorandum explaining the provisions of the Finance Bill also which brought about the impugned amendment, there is a note to Clause 24 which reads: “Even at present expenditure incurred by a dependant is included in the assessee’s expenditure if it has been met out of any gift, donation or settlement or trust made or created by the assessee whether directly or indirectly. Since the basic allowance of Rs. 30,000 is meant for the assessee’s family as a whole consisting of himself and his wife and minor children; it is only proper to take into account their aggregate expenditure without looking into the sources from where it has been met, in the case of a Hindu undivided family, the expenditure incurred by a member will be treated as the family’s expenditure only if it has been met from the resources of the family.

fore unable to agree with the arguments of Mr. Narasaraju that a different construction ought to be placed on the language of the provision which so clearly shows the obvious intention of the legislature.

22. We then advert to S. 4(ii). Before doing so we may notice the definition of "expenditure" and "taxable expenditure". We may note that no change has been made in the definitions of these two expressions. "Expenditure" means any sum in money or money's worth, spent or disbursed or for the spending or disbursing of which liability has been incurred by an assessee and includes any amount which under the provisions of this Act is required to be included in the taxable expenditure. Section 2(o) defines "taxable expenditure" as the total expenditure of an assessee liable to tax under this Act. The charging section is Section 3 and this section has undergone changes. In the proviso to the amended section the following words are inserted "derived by the assessee and his dependants", while the proviso before amendment showed that no expenditure tax shall be payable by an assessee for any assessment year if his income from all sources during the relevant previous year as reduced by the amount of taxes to which such income may be liable under any other law for the time being in force, does not exceed rupees thirtysix thousand. The words "and his dependants during" are added after the word "assessee" as to bring the income derived by the assessee's dependants also within the exemption limit of Rs. 36,000. Further an explanation is added to the section so as to bring in the income of any dependant of an assessee or the income which he is entitled to receive.

23. Then there is Section 4 which relates to the computation of the expenditure of an assessee liable to tax under the Act. The changes brought about in the first part of this section, viz., Section 4(i) are the following: By the amendment the following words are deleted "which, but for the expenditure having been incurred by other person, would have been incurred by the assessee" and the words "or any of his dependants" are substituted instead. It follows that amounts expended for the dependants even though there may be no obligation on the assessee to meet such expenditure are included in assessee's taxable expenditure. In the result the amended S. 4(i) reads: "Unless otherwise provided in Section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this Act, namely: (i) any expenditure incurred, whether directly or indirectly by any person other than the assessee in respect of any obligation or personal requirement of the assessee or any of his dependants to the extent to which the amount of all such expenditure in the aggregate exceeds Rs. 5,000 in any year". The omission of the words referred to and the insertion of "or any of his dependants" is necessitated

obviously by the change in the definition of "dependant" in Section 2(g)(i).

24. The impugned section 4(ii) may now be noticed. Prior to amendment, Section 4(ii) read:

"Unless otherwise provided in Section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this Act, namely,

(i) xx xx xx

(ii) any expenditure incurred by any dependant of the assessee for the benefit of the assessee or of any of his dependants out of any gift donation or settlement on trust or out of any other source made or created by the assessee; whether directly or indirectly."

After amendment Section 4(ii) reads:

"Unless otherwise provided in Section 5, the following amounts shall be included in computing the expenditure of the assessee liable to tax under this Act, namely:

(i) xx xx xx

(ii) where the assessee is an individual any expenditure incurred by any dependant of the assessee, and where the assessee is a Hindu undivided family any expenditure incurred by any dependant from or out of any income or property transferred directly or indirectly to the dependant by the assessee."

It is thus plain that after the amendment a distinction is made between the assessee where he is an individual and where he is not an individual but is a Hindu undivided family. Where the assessee is an individual any expenditure incurred by any dependant of the assessee is included in computing the expenditure of the assessee. But where the assessee is a Hindu undivided family, only such expenditure incurred by any dependant as is met from or out of any income or property transferred directly or indirectly to him by the assessee is to be included in computing the expenditure of a Hindu undivided family. That can be the only interpretation that the language used is susceptible of. The opening clause of Section 4 viz., "the following amounts shall be included in computing" read with the distinction drawn between the two clauses in Section 4(ii) by using the words "where the assessee is an individual" and "where the assessee is a Hindu undivided family" leave no scope for argument that the concluding portion of Section 4(ii) viz., "any expenditure incurred by any dependant from or out of any income or property transferred directly or indirectly to the dependant by the assessee" should govern not only the case where the assessee is a Hindu undivided family but also where he is an individual. It is obvious that the said clause governs only where the assessee is a Hindu undivided family. The amended provision, which is marked by a substantial departure from the previous provision conveys to that effect the obvious intention of the legislature. It is by reason of

this amendment that the learned counsel for the assessee argued before our learned brother that there is discrimination between an assessee who is "individual" and one who is a Hindu undivided family, as the taxable expenditure of the two classes of assessee and the deductions permissible are different.

25. It was further argued by Mr. Narasaraju that if a dependant in Section 2(g)(i), a spouse or a minor child, is to be considered as one class or category and any person wholly or mainly dependant on the assessee for support and maintenance, is considered as another class of dependant, such classification not being based on an intelligible differentia and bearing no reasonable nexus with the object of the Act is unconstitutional and the provision should be struck down as discriminatory.

26. Mr. Narasaraju, further assailed the classification on the ground that the Legislature has not laid down in relation to a spouse any principles for guidance and consequently given naked authority and arbitrary power to the executive or the taxing authority to pick and choose any spouse at will and subject him or her to tax under the Act and that again is unconstitutional.

27. Mr. Kondayya, the learned counsel for the Department has contended that under the Act a spouse and a minor child within the meaning of Section 2 (g) (i) need not be dependent on the assessee for support and maintenance and yet any expenditure incurred by such a spouse and minor child, is liable to be taxed for according to the scheme of the Act not only the income derived by the assessee but also that derived by all his dependants is taken into account under S. 3 as income of the assessee and likewise the expenditure of that entire unit namely the assessee and his dependants is taken into consideration as taxable expenditure of the assessee, of course, with various statutory deductions and allowances. So long as the assessee is an individual and sought to be taxed as such, even he be a member of the Hindu undivided family is subject to the same test. That the persons similarly circumstanced are dealt with in the same or similar manner. There can be no question of discrimination. Of course if the assessee is an undivided family and not an individual a different yardstick is prescribed by the amended Act. Prior to the amendment of Section 4(ii) there was no difference in relation to treatment of income and expenditure of a dependant vis-a-vis the assessee whether an individual or a Hindu undivided family. All that was required under the old Section 4(ii) to attract the tax liability of an assessee was that, be it an individual or a Hindu undivided family, the expenditure incurred by any dependant should have been incurred from out of the sources made available by the assessee. Section 4 (ii) in the amended form makes distinction by means of classification, for the purpose of

the Act, between an assessee who is an individual and the assessee who is a Hindu undivided family. Whereas in case of the assessee, Hindu undivided family, the expenditure incurred by any dependant shall be included in the taxable expenditure of the assessee only if it was made from or out of any income or property transferred directly or indirectly to the dependant by the assessee, the said condition which was likewise applicable to the expenditure of the dependant of any assessee who is an individual is now dispensed with so far as he is concerned. In other words, the source of income from and out of which the expenditure is incurred by the dependant is the test in the case of Hindu undivided family for judging whether the expenditure incurred by such a dependant is to be included in the taxable expenditure of the assessee, but that has no relevance in case where the assessee is an individual. Thus the two limbs of Section 4(ii) refer to two separate classes of assessee and the tests applicable to them for purpose of the Act as already noticed are different. It cannot be said, for reasons to be presently recorded, that the classification for the purpose of the Act is unwarranted or unreasonable. The different tests for persons or category of persons differently circumstanced cannot attract the inhibition of equality clause. As the main attack is on Section 2(g)(i) we have to deal with that question as well. In sooth it is said that it is this provision which is the source of all trouble and dispute for if spouse and minor child like any other person were governed by the condition of dependence for maintenance and support in order to come within the definition of a dependant, no question as to constitutionality of Section 4(ii) also would have arisen in this case. Be that what it may, as the matters stand we have to necessarily address ourselves to the question of constitutionality of both the provisions.

28. Section 2 (g) (i) as Section 4 (ii) is subject to attack on the ground that it violates Art. 14 and Article 19 of the Constitution. It is but elementary that the legislatures have plenary powers controlled only by the basic concepts of written constitution and can exercise their powers as best as they can within the legislative fields assigned to them by the Constitution without trespassing on the fundamental rights of the citizens in a manner not justified by the relevant articles dealing with such rights. We have already stated that taxation laws like any other laws are equally subject to constitutional limitations. There is, however, a presumption in favour of the constitutionality of an enactment. There are also other presumptions although all of them are rebuttable, in relation to the fact that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

We may do well to refer to them presently by citing the very authorities which have laid down the same.

29. Article 14 which is the main article relied on says that the State shall not deny to any person equality before law or equal protection of laws in the territory of India. That does not preclude the legislature from making a reasonable classification for purposes of legislation.

30. Willis in his book on Constitutional Law at page 587 dealing with classification for taxation states:

"One reason for this undoubtedly is the urgent need for revenue by the various Governmental agencies."

A State does not have to tax everything in order to tax something. It is allowed to "pick and choose districts, objects, persons, methods, and even rates for taxation if it does so reasonably". In *Colgate v. Harvey*, (1935) 80 L Ed 299 it was observed.

"The boundary between what is permissible and what is forbidden by the constitutional requirement of equal protection of laws is incapable of exact delimitation.

The equal protection clause of the Fourteenth Amendment does not preclude the states from resorting to classification for the purposes of legislation, so long as the classification is founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones".

In *K. T. Moopil Nair v. State of Kerala*, AIR 1961 SC 552 Sinha, C. J. speaking for the Court stated.

"In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the Legislature imposing a tax and authorising the collection thereof and secondly, the tax must be subject to the conditions laid down in Article 13 of the Constitution.

A taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, though the courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in a way that the court might think more just and equitable. If the legislature has classified persons or properties into different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Art. 14 will not be in the way of such classification resulting in unequal burdens on different classes of properties. But if the same class of property similarly situated is subjected to an incidence of taxation which results in ine-

quality, the law may be struck down as creating an inequality amongst holders of the same kind of property".

The Supreme Court in *Ram Krishna Dalmia v. Justice S. R. Tendolkar*, AIR 1958 SC 538 has laid down the principles to be borne in mind by Court in determining the validity of a Statute, when challenged on the ground of violation of Article 14 of the Constitution. S. R. Das, Chief Justice, speaking for the Court observed:

"It is well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order however to pass the test of permissible classification two conditions must be fulfilled namely: (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases namely geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of Supreme Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The decisions further establish:

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may

reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

31. The above principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of laws.

32. We may also refer to *Swami Motor Transport (P) Ltd. v. Sri Sankaraswamigal Mutt*, 1964-1 SCJ 530 = (AIR 1963 SC 864) where these principles have been reiterated. In *Khandige Sham Bhat v. Agricultural Income-tax Officer Kasaragod*, AIR 1963 SC 591 *Subba Rao, J.* (as he then was) speaking for the court laid down the test to determine whether a law offends the equality clause of Article 14 of the Constitution:

"Though a law *ex facie* appears to treat all that fall within a class alike, if in effect it operates unevenly on persons or property similarly situated, it may be said that the law offends the equality clause. It will then be the duty of the Court to scrutinise the effect of the law carefully to ascertain its real impact on the persons or property similarly situated. Conversely, a law may treat persons who appear to be similarly situated differently; but on investigation they may be found not be similarly situated. To state it differently it is not the phraseology of a statute that governs the situation but the effect of the law that is decisive. If there is equality and uniformity within each group, the law will not be condemned as discriminatory though due to some fortuitous circumstances arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine. But in the application of the principles, the Courts in view of the inherent complexity of fiscal adjustment of diverse elements permit a larger discretion to the Legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways.....

It is true taxation law cannot claim immunity from the equality clause of the Constitution. The taxation statute shall not also be arbitrary and oppressive, but at the same time the Court cannot, for obvious reasons, meticulously scrutinise the impact of its burden on different persons of interests. Where there is more than one method of assessing tax and the legislature selects one out of them, the Court will not be justified to strike down the law on the ground that the Legislature should have adopted ano-

ther method which, in the opinion of the Court, is more reasonable unless it is convinced that the method adopted is capricious, fanciful, arbitrary or clearly unjust".

33. The same learned Judge speaking for the Court in *Gopal Narain v. State of Uttar Pradesh*, AIR 1964 SC 370 at p. 375 stated:

"But in the application of the principles, the Courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable way".

34. It follows from the above that presumptions as to constitutionality of the enactments of the legislatures are well settled, that the power of the legislature to classify for legislation is of necessity of wide range and flexibility; that in view of the inherent complexity of fiscal adjustment of diverse elements the courts permit a larger discretion to the legislature in the matter of classification in a fiscal enactment, that a fiscal enactment is, like other laws, subject to equality clause, that it shall not be patently or in effect arbitrary and oppressive but all the same, the court cannot for obvious reasons meticulously scrutinise the impact of its burden on different persons or interests, that the classification should be founded on an intelligible differentia and that the classification or differentia should have a rational relation to the object sought to be achieved by the legislation and that if there be equality and uniformity within each group notwithstanding that owing to some fortuitous circumstances arising out of a peculiar situation some inequality of some advantage over the other might result except that it be plain that such persons are singled out, the law will not be unconstitutional as discriminatory.

35. In the light of the above authorities, it is now to be seen whether the impugned provisions contravene Article 14. The impugned legislation is an enactment levying tax on expenditure. It is a charge on spending, i.e., on the activity of the person in spending the amount. It is not the expenditure of every person that is brought to tax. It is only persons or class of persons who come under certain income group are liable to this charge. A person having no income of his own is not assessable to expenditure tax whatsoever be the extent of capital that he is possessed of and howsoever high his expenditure might soar in any year. It is only when he gets income and it is not less than Rs. 36,000 after the statutory deductions or allowances his expenditure is brought under levy. In other words, expenditure above Rs. 36,000 as leviable to tax provided the income level of the person satisfies

the condition. Once the level is reached, the legislature intends that the assessee should take care that he does not spend more than Rs. 36,000 a year except on pain of being liable to tax and that at a rate progressively increasing to such a deterrent extent that at a certain level soon the rate of levy becomes equal to the very amount expended. It is plain from the above broad outlines of the scheme of the Act that the Legislature by this piece of Legislation has sought to check extravagance and waste and promote thrift and economy. The Legislation, which has for its object installing of saving habits, promotion of thrift and economy by discouraging extravagance and waste must necessarily contribute to the growth of the national wealth. Of course, as a taxing statute, augmenting the Government revenue is also a necessary consideration. The Legislature, in order to achieve its object, has not only to see that there is equitable levy on all assesseees but also the devices of evading legitimate tax are discouraged and all loopholes in that behalf are plugged. While judging the constitutionality of the various provisions these objects of Legislation cannot be lost sight of.

36. Now, as we have already noticed, the attack is on S. 2(g)(i) and S. 4(ii) of the Act. The former relates to the definition of "dependant" of an individual assessee and the latter to the inclusion of the expenditure incurred by dependants in the taxable expenditure of the assessee. It may be noted that the legislature has brought assessee for purposes of the Act under two broad heads (1) individual and (2) a Hindu undivided family. For purposes of computing the taxable expenditure, it chose to take into account the expenditure of the dependants and made provision therefor. It had therefore to necessarily determine in each case who should be treated as dependants. Section 2(g)(i) and (ii) respectively define the term "dependant" in relation to the assessee who is an individual and also one which is a Hindu undivided family. The contentions that whereas dependence for maintenance and support should alone be the test of a dependant, the legislature in the definition in Section 2(g)(i) has in relation to an assessee who is an individual regarded his or her spouse and minor child as a dependant merely by reason of that relationship even though for any other person it laid down the test that he or she should wholly or mainly depend for maintenance and support on the assessee. It is urged that by reason of this difference, the spouse or minor child are discriminated against and the vice of Art. 14 of the Constitution is thus attracted. It is not easy to see how, by reason of the classification of persons to be included in the definition "dependant" for furtherance of the general scheme of the Act, the question of banned discrimination would arise. Also it is not easy to understand why technical terms in a statute should necessarily be employed.

only in their literal sense. If such an obligation on the legislature be accepted, there would be no need nor occasion for the legislature to define various expressions used in the Act. But the legislature in every statute does define certain terms and some times even refers to other Acts for the meaning and import of certain other terms which have not been defined. Sometimes need to refer to General Clauses Act would arise to warrant the legal import and the meaning of general expressions used where no definition is given in an enactment. All this would have been wholly unnecessary if the dictionary or the literal meaning alone had to prevail.

It is significant that even in Section 2(g)(i) (a) which is in relation to a coparcener the legislature did not lay down any pre-requisite condition of dependence whether legal or factual for maintenance and support. It is not unoften that a coparcener has independent means of support and maintenance and may even become an individual assessee for the purpose of the Act. It may also be noticed that clause (b) of S. 2(g)(i) which bears specific reference to legal obligation unlike any provision in Section 2(g)(i) is silent, on the question of support. All this must necessarily demonstrate that the legislature having regard to the scheme of the Act sought to include in the definition various classes of persons as dependants in each category of assesseees the main division of assessee being that of an individual and a Hindu undivided family. While doing so it had in mind the objects of legislation as warranted by the needs of the people and the times and also the effective way in which they could be fulfilled. Indeed while the Act originally levied the condition of dependence for maintenance and support in relation to spouse and minor children, experience warranted the need for amendment of the said provision, with the result that Section 2(g)(i) has been amended whereby a wider scope is given to that provision by taking in other persons and confining the condition of actual dependence for maintenance and support only to persons other than the spouse and minor child. We have discussed this aspect while interpreting the amended provision.

It may also be noticed that this amendment was but one of the several amendments effected for carrying out the main scheme of the Act in an effective manner. In Section 3 while the proviso formerly referred to the income from all sources of the assessee alone, the amendment included the income derived by the dependants also in the income of the assessee if he was an individual. But in the case of a dependant in a Hindu undivided family, the income of that dependant could be included in the income of the assessee only if it was derived from or out of the property of the undivided family. Further as to the expenditure whereas in

the unamended provision dependant's expenditure could have been taken into account only if it were a liability of the assessee. Section 4(i) in the amended form provided that the amounts expended by the dependant, even if they be in relation to his personal requirements or obligation, sought to be taken into consideration for computing the taxable expenditure of the assessee. As regards the basic allowance provided for under S. 6, the amended provision specifies that it is the allowance not only for the assessee himself but also for all his dependants. Thus it is plain that all the said amendments were effected to give effect to one integrated plan. The legislature in order to effectively carry out the purposes of the Act thought thus of including necessarily the spouse and minor child of an individual assessee in the unit of dependants and made other persons dependants only on their satisfying the test of dependance and sought to include the income of all dependants in the income of the assessee and so also their expenditure irrespective of the source from which it was made. Whether this classification in Section 2(g)(i) and the distinction created in Section 4(ii) between the individual assessee and Hindu undivided family is permissible in law having regard to the scheme and does not smack of alleged vice of Article 14 is the question. Article 14 which forbids class legislation does not forbid reasonable classification for purposes of legislation. In order that the classification is reasonable or permissible it must be founded on intelligible differentia and that differentia must have a reasonable relation to the object sought to be achieved. There should be nexus between the basis of classification and the object sought to be achieved.

We have detailed above the objects which the Act is intended to achieve and also the classification and how intimately is the classification connected with the said objective. It must be borne in mind that in fiscal enactments a large discretion is allowed in the matter of classification having regard to the inherent complexity of the fiscal adjustments of diverse elements. The Act, it may be seen, has classified the various assessees into two broad heads: (1) an individual and (2) a Hindu undivided family. By no stretch of imagination could it be said that these classifications are not reasonable or have no nexus to the object to be achieved indeed these are the well known classifications in the taxation laws. Further under each head it has categorised dependants who should go with them, because the income of the dependants also has to be included having regard to the avowed purpose of the Act. It must be held that the classification of dependants also is reasonable. In the case of an individual assessee his dependants are necessarily the spouse and minor child and the other persons may also be dependants by reason of their being dependent on him for support

and maintenance. That is how the classification is made. The Legislature while making laws always take into account the social and economic set up of the country, the condition of the people and their requirements and the devices usually adopted in the matter of evasion. If the devices of evasion so warrant, it is always competent to them to prescribe a fiction so that any scope for devices of evasion may successfully be averted and the purposes of the Act be achieved. While enacting the present piece of legislation the Parliament had all these basic facts in mind. It is on that ground that they have carefully categorised the various types of dependants. Further experience of the Parliament has taught them that unless the spouse and minor child are necessarily brought into the unit, the purpose of the Act would not be effectively carried out on account of inter alia the various possible devices that may thwart the purpose.

As observed by Subba Rao, J. (as he then was) while delivering the opinion of the Court in *Balaji v. Income Tax Officer Special Investigation Circle, Akola* (1961), 43 ITR 393 = (AIR 1962 SC 123).

"A wife in India, particularly if she is illiterate, a large majority of them are illiterate, would ordinarily be in economic matters a tool in the hands of her husband. Many things are done in her name without her knowledge of the same. When the Legislature of this country, which is assumed to know the conditions of the people and their requirements with the awareness of this particular widespread fraudulent device in the matter of evasion of taxes, made a law to prevent the said fraud, it is difficult for this Court in the absence of any counterbalancing circumstances to hold, on the analogy drawn from American decisions, that the need for such a law is not in existence. On the other hand there is a direct decision of the Madras High Court in *Amina Umma v. Income-tax Officer, Kozhikode*, (1954) 26 ITR 137 = (AIR 1954 Mad 1120) sustaining the said provision on the ground of reasonable classification. Rajagopalan J., speaking for the Division Bench, after considering the relevant decisions on the subject, observed at page 150 thus:

"The reasonableness or otherwise of a classification has to be decided with reference to all the circumstances of the case including the social and economic structure prevalent in the area where the taxing statute is in operation. An attempt to prevent by legislation an evasion of just tax liability and the necessary classification to give effect to that object cannot, in our view, be termed unreasonable'.

"With respect we give our full assent to the said observations."

37. We may also notice the following opinion of Justice Holmes in *Hooper v. Tax Commission of Wisconsin*, (1931) 76 L. Ed.

248 at p. 253 who dissented from the majority:

"That this case cannot be disposed of as an attempt to take one person's property to pay another's debts. The statutes are the outcome of a thousand years of history. They must be viewed against the background of the earlier rules that husband and wife are one, and that, as the husband took the wife as chattels he was liable for her debts. They form a system with echoes of different moments none of which is entitled to prevail over the other. The emphasis in other sections on separation of interests cannot make us deaf to the assumption in the sections quoted of community when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the source. So far as the Constitution of the United States is concerned the legislature has power to determine what the consequences of marriage shall be, and as it may provide that the husband shall or shall not have certain rights in his wife's property and shall or shall not be liable for his wife's debts it may enact that he shall be liable for taxes on an income that in every probability will make his life easier and help to pay his bills. Taxation may consider not only command over but actual enjoyment of the property taxed .. and when the Legislature clearly indicates that it means to accomplish a certain result within its power to accomplish it is our business to supply any formula that the *elegantia juris* may seem to require. The statute is justified also by its tendency to prevent tax evasion".

Of course these remarks relate to a country where prevail somewhat different social and economic conditions from those of our country. But the principle laid down affords much guidance for our purposes also. We are inclined to the view that if the Legislature has in the light of past experience included unconditionally the spouse and minor child in the definition of dependants under Section 2(g)(i) for carrying out effectively the purposes of the Act, this classification can in no sense be unreasonable but only just and legitimate and based on intelligible *differentia* and further that *differentia* has, a reasonable nexus with the object to be achieved.

38. An argument has been raised on the basis of a comparison between the wife of an individual assessee and the wife of a karta of a Hindu undivided family that the law has not treated the dependants alike. It must be borne in mind that the vice of discrimination has to be judged having regard to the position in which the persons similarly circumstanced are placed. There can be no question of discrimination if the persons in two different categories are not treated alike. It is plain that under the Act wherever the assessee is an individual his dependants will be treated in the same way as any other dependant of an individual assessee. Amongst

the individual assessee the dependants of each would be entitled to similar treatment under the Act. Thus all equals are treated alike. There can therefore be no question of discrimination. It is well settled that for ascertaining the vice of discrimination comparison of persons in different categories is of no avail. We may also state that for similar reasons the discrimination complained of as having been created among dependants under Section 4 (ii) in relation to expenditure incurred by any dependant of the assessee where he is an individual and that incurred by any dependant of a Hindu undivided family does not offend Article 14. The Parliament in its wisdom has thought that in the case of dependant of an individual assessee the source of income from out of which the expenditure is met by the dependant should not be a point for consideration whereas in the case of a dependant of a Hindu undivided family it should be material. The two categories are different. It cannot be said that both the dependants are similarly circumstanced. There can thus be no basis for comparison between the two for purposes of Article 14.

39. The other point raised in this case is that as the Legislature has not laid down any rules for guidance in the matter of choice of spouse as an assessee for purposes of expenditure tax, Section 2(g)(i) should be struck down on the ground of arbitrariness. It should be remembered that having regard to the incidence of taxation, whether the husband is chosen as the assessee or the wife, in either event, the tax to be paid will be the same. Unless the limit of Rs. 36,000 is crossed no tax is leviable. It is the income from all sources, whether of the assessee or of the dependant and the expenditure made directly or indirectly by the assessee and by his dependants that is to be taken into account with the result that the total expenditure shall have to be taxed as one unit. It becomes therefore immaterial whether the assessee is the husband or the wife. It cannot therefore be said that an arbitrary power has been given to the expenditure tax authority or that the legislature has abdicated the function of legislating by not providing for such contingency.

40. Mr. Narasa Raju has argued that the spouse, in this case, the Princess, lives separately and maintains herself from her own sources of income and she could not therefore be categorised as dependant. Apart from the fact that there is nothing to show from the returns filed by the assessee that his wife, the Princess, was maintaining herself from her own source of income and not from or out of any income or property transferred directly or indirectly by him to her, the very fact that she is the spouse of the assessee brings her within the meaning of dependant under Section 2(g)(i) and her expenditure irrespective of the fact from which source the income has come has to be included in the taxable expenditure of her hus-

band. We have already said that the Parliament after some experience of the working of the Act has come to the conclusion that the wife and minor child are necessarily to be included in the definition of dependants of an assessee who is an individual. Indeed the Parliament has considered them as constituting the integral unit of the family and this for good reasons, viz., having regard to the social conditions of the country for effective working of the legislative enactment and avoiding devices of evading tax. We have also said that the Parliament was concerned with the object of promoting thrift in the family expenditure. It was therefore necessary to include the income and expenditure of these dependants in the income and expenditure of the assessee and that is what the Parliament has done. When the Parliament after taking into account the historical background, the family relationship, the social and economic conditions of the family has made such classification to effectuate the purposes for which the Act was brought we are unable to accept the contention that the classification suffers from the vice of discrimination and hit by Art. 14. It is clear to our minds the amendments introduced are not unconstitutional. They were intended to check the evasion, to augment the revenue, to promote thrift and economy the result of which will ultimately benefit the community or society at large. Again if the Parliament has not prescribed any rules in relation to the choice of the assessee in case of spouses, the law does not become bad on that account. The taxing authority may select the assessee from one of the spouses as only one of the spouses can be made an assessee and not both. The incidence of tax would be the same whether one is selected as the assessee or the other. We therefore reject the contention based on discrimination in relation to Sections 2(g)(i) and 4(ii) of the Act.

41. It is then contended that the levy on the expenditure of the petitioner's wife on whom the petitioner has no control amounts to expropriation of the property of the assessee. We have already noticed that the tax is levied on the activity of spending and for this purpose according to the scheme of the Act the expenditure of the assessee and the dependant as defined in the Act have to be taken into account. Once we hold that the wife and minor child, by reason of their relationship, can reasonably and justifiably be included in the definition of dependant, for their being included in the family unit for purposes of taxation, the question of expropriation does not arise at all. Having regard to the economic and social conditions of this country, the wife is always supposed to be a dependant on her husband. It is on that basis that the Legislature has proceeded. When the Legislature which has the right to pick and choose persons and methods and rates of taxation has exercised its powers within the permissible limits and the classification has been founded on intel-

ligible differentia and that has a rational relation to the object sought to be achieved by the legislature and there is equality and uniformity within each group, merely because owing to fortuitous circumstances arising out of peculiar situation some inequality has resulted, unless it be claimed that such persons are singled out, the law will not be unconstitutional as discriminatory. It has been so held by the Supreme Court in the case to which we have already referred.

We do not think that there is any unreasonable restriction on the right of the assessee to hold property for he is called upon to pay the tax due under the provisions of the Expenditure Tax Act. The legislation cannot be impugned as confiscatory in nature merely for the reason that the spouse has been treated as dependant and the expenditure incurred by her not from or out of the income of the property transferred to her by the assessee, has been taxed. As already noticed the concept of family includes the spouse and the minor child. That being necessarily the unit of the family the assessee is made liable for the expenditure of his dependants even though it may not be from or out of the source of income traceable to the assessee. The wife by reason of her marriage necessarily gets connected with the family. One cannot legitimately complain of the statutory and legal incidence flowing from such relationship. It is clear that the law for purposes of levying expenditure tax, has taken the total expenditure of the assessee and the dependants as a whole as they are presumed to constitute one unit and allowed deductions and allowances as permissible under Sections 5 and 6 of the Act. So long as the statute is held valid it is not open to attack on the ground of some hardship or unequal burden cast on the assessee merely on the basis that the expenditure for which he is being taxed was not from or out of the source of his income and was made by a person who is no other than his wife. We are of the view that the arguments founded on Articles 14, 19 and 31 of the Constitution of India against the constitutionality of the Act are not tenable.

42. At the stage of arguments, it was brought to our notice that subsequent to the disposal of the writ petitions, the Expenditure tax Officer finalised the assessments and assessed the assessee to tax by including the expenditure incurred by the Princess in computing the expenditure of the assessee liable to tax under the Act and that the appeals preferred against the assessment orders of the Expenditure Tax Officer are pending. In other words the need for which the writs of prohibition were filed does no longer exist. They were writs filed at the stage when notice under Section 16 of the Act was issued and it was prayed that the Expenditure Tax Officer should be directed to forbear from taking or continuing any action under that notice. That stage has already

passed. The writs of prohibition thus become infructuous. It is, however, still open to the assessee to raise before the Appellate Assistant Commissioner such pleas as may be available to him and claim such deductions and allowances as may be permissible under Sections 5 and 6 of the Act with reference to the expenditure incurred by the assessee's wife. It will also be open to the Assistant Commissioner to go into all relevant pleas which the assessee may legitimately take before him.

43. So far as these appeals are concerned for the reasons recorded by us, we are unable to find any merits therein. The appeals are therefore dismissed with costs with the above remarks. Advocate's fee Rs. two hundred in each appeal.

44. KRISHNA RAO, J.: I have had the advantage of going through the judgment of my learned brother, Obul Reddi, J., and it is needless for me to set out the facts once again as they are stated fully in the said judgment.

45. The first question for determination is whether the taxing authority has jurisdiction to issue notice under Section 16 of the Expenditure Tax Act as amended in 1959 (hereinafter referred to as the Act) which is analogous to Section 34 of the Indian Income-tax Act, 1922, proposing to reopen the previous assessments. The ground for reopening the prior assessments is that the assessee omitted or failed to disclose the expenditure of his wife who was his dependant. The attention of the assessee was pointedly drawn in the printed form of the return, annexure V of which requires the assessee to disclose the names of the individual dependants, setting forth their relationship, age, etc., but the assessee did not mention the name of his wife as a dependant. It is now argued on behalf of the assessee that the said omission by him does not really affect the position because his wife had already submitted returns of her individual expenditure separately before the same officer. In other words, the contention of the assessee is that the fact was already disclosed by him and that there was no omission on his part which justifies the reopening of the assessments. On a perusal of the returns submitted by the wife, we have not been able to find any information on record that she is described as the wife of the assessee. Hence, there is nothing before the assessing officer inviting his attention to the fact that the present assessee had a wife. It is further argued on behalf of the assessee that he was justified in not disclosing the name of his wife as a dependant because, according to him, she was living on her own resources and that she was not a dependant under law. This contention cannot be accepted because it is a matter of inference to be drawn by the officer. It was therefore the duty of the assessee to have mentioned the name of his wife in his return and it was open to the

assessee to have made a further qualifying statement that though she was his wife, she was living apart from him and met her expenditure solely out of her own separate incomes and that she was not being wholly or partly maintained by him as required by law. If this statement had been made by assessee, it was thereafter the duty of the taxing authority to draw the legitimate inference from the facts disclosed. The fact that the assessee had a wife is a primary fact which it was the duty of the assessee to have disclosed, while the question whether she would be a dependant as contemplated by the Act is a matter of inference to be drawn by the officer. Hence, applying the principle stated by the Supreme Court in *Calcutta Dicom Co. Ltd. v. Income Tax Officer*, AIR 1961 SC 372, I hold, agreeing with my learned brother Obul Reddy, J. that the notice issued under Section 16 of the Act is valid. The order of our learned brother Jaganmohan Reddy, J. (as he then was) dismissing the writ petitions (which are now under appeal) on this ground is therefore correct and does not call for any interference. This conclusion would have been sufficient for the disposal of the writ petitions. But our learned brother Jaganmohan Reddy, J. (as he was then) gave findings on other questions also to the effect that the assessee's wife is a dependant under law and that her expenditure also should be included in the taxable expenditure of the assessee even if she was not being maintained by the assessee. It has therefore, become necessary in these appeals to go into the said questions. On these questions my learned brother Obul Reddy, J. agreed with the views expressed by our learned brother Jaganmohan Reddy, J. (as he then was), but with great respect I am unable to agree with the said conclusions on this part of the case and I would, therefore, give my own reasons.

46. Section 2(g) of the Act which defines a "dependant" reads as follows:

"2(g) 'dependant' means:

(i) where the assessee is an individual, his or her spouse or minor child, and includes any person wholly or mainly dependent on the assessee for support and maintenance". Prior to the amendment introduced in 1959, this definition read as follows:

"2(g) 'dependant' means:—

(i) where the assessee is an individual, his or her spouse or child wholly or mainly dependent on the assessee for support and maintenance."

The interpretation placed by Sri Narasaraaju on behalf of the assessee is that both before and after the amendment, the qualifying expression "wholly or mainly dependent on the assessee for support and maintenance" qualifies in all the preceding classes of persons mentioned therein, namely, spouse, child or any person. The other construction sought to be placed by Sri Kondaiah on behalf of the revenue is that though the said

words "wholly or mainly dependent, etc.", qualified the words 'spouse' or 'child' before the amendment, they were no longer intended to qualify spouse or child after the amendment but that they refer only to the third class which has been introduced, namely, any person, that is, other than spouse or minor child.

The contention on behalf of the revenue has been accepted by my learned brother Obul Reddi, J. But I am inclined to accept the construction suggested on behalf of the assessee. If, so much is conceded, namely, that the qualifying words "wholly or mainly dependent on the assessee for support and maintenance" apply to his or her spouse or child, as the definition stood before 1959, I do not find any ostensible reason for coming to a different conclusion after the amendment merely because the definition of the word "dependent" is widened by the inclusion of the words "any person" other than a spouse or a child. The main ground on which the learned counsel for the revenue bases his argument is that there are certain observations made in the speech of the Union Finance Minister and in the Memorandum of notes relating to the respective amendments which go to show that in the case of a spouse or a child the qualification that they should be dependent for their support and maintenance on the assessee has been dispensed with. I do not think it is permissible for the learned counsel to rely upon these notes or speeches as an aid to the construction of the plain language of the definition. It was further contended by the learned counsel for the revenue that the object of this amendment is to increase the revenues and that the legislature therefore wanted to include the expenditure of the spouse irrespective of the fact whether the said spouse was being maintained by the assessee or not. If the object was to augment the revenues, it was certainly achieved by including persons other than the spouse or the child who are maintained by the assessee and there is really no need to go further and hold that the expenditure of a spouse or a minor child has to be included in the assessee's expenditure irrespective of the fact whether the assessee maintained the spouse or child or not. It was further contended by the learned counsel that the amendment was introduced to prevent evasion of tax. But there is no whisper in the objects and reasons of the amending Act that any evasion of the tax was sought to be remedied by the amending Act. If the above material, namely, the speech of the Finance Minister and the notes pertaining to the proposed amendment are ignored, I do not find any difficulty in coming to the conclusion which I did. The scope and object of the Expenditure Tax Act is to tax the expenditure of an individual assessee and that expenditure may be incurred on his own behalf or on behalf of his near relatives like spouse or a minor child or

any other member or non-member of the family. In all these cases the crucial test is whether it is expenditure incurred by the assessee. Section 2(h) of the Act which defines "expenditure" also indicates that the expenditure should be incurred by the assessee. Section 3 which is the charging section also emphasises the fact that the expenditure is one incurred by the individual.

The word "dependent" may involve various elements, such as dependency in the matter of merely taking advice or mere protection. But the test laid down by the Act is that the assessee should maintain the dependant. Hence the essential test is that the expenditure in relation to the maintenance of the particular dependant must be incurred by the assessee. It, therefore, excludes all expenditure which has been incurred by the members of the family out of their own resources and separate property. For instance, the spouse of a husband assessee, as in this case, who is living apart from her husband is maintaining herself out of her own separate property. Similarly, a minor child who is not living with the assessee may be maintained out of his own separate estate if he is possessed of such an estate. There may be a discarded spouse who is not being maintained by her husband but who is being maintained on her own resources. The legislature would never have intended to include the expenditure of a person who is not really dependent upon the assessee. The very word "dependent" carries with it the inherent quality of being dependent upon the assessee. On the other hand, if there is no connection or nexus between the assessee and the expenditure, it would mean that a person is a dependant of an assessee while in fact, he is not a dependant. It would, therefore, be a contradiction in terms to describe a person as dependant when he is really not a dependant. The contention of Sri Kondaiah on behalf of the revenue is that by virtue of the very personal relationship and the personal law, the wife or the child is presumed to be a dependant of the assessee and it is no longer necessary to find out whether the said dependant is actually being maintained by the assessee. If this test is to be employed in the case of an assessee who is the wife, her spouse, namely her husband cannot be said under any personal law to be her dependant and it has got to be shown that the husband who is the spouse of the assessee is indeed wholly or mainly being maintained by the assessee wife. On the other hand, the contention on behalf of the assessee does not lead to any such anomaly. Even as a matter of construction, the word "include" indicates that the scope of the existing definition is merely enlarged.

In the leading case of *Dilworth v. Commissioner of Stamps*, 1899 AC 99 it was held by the Privy Council at pages 105 and 106 that "the word 'include' is very general-

ly used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include..... It may be equivalent to "mean and include". Hence the amending Act merely included any person other than a spouse or a child who is also maintained by the assessee, that is, in addition to a spouse or a minor child who are also being maintained by the assessee. It cannot, therefore, be interpreted as a matter of grammatical construction that the qualifying clause refers only to the last class immediately preceding "any person" but not to the previous classes of persons. If the context requires that the qualifying clause should refer to all the previous classes of persons, it should be so interpreted. Reference may be made in this connection to the case of the Supreme Court in *Regional P. F. Commissioner, Bombay v. Shree Krishna Metal Manufacturing Co. Bhandara*, AIR 1962 SC 1536 in which it is held that the ordinary rule of grammar on which a construction is based cannot be treated as a rule which must always and in every case be accepted without regard to the context and that when the context definitely suggests that the relevant rule of grammar is inapplicable, then the requirement of the context must prevail over the rule of grammar. Applying the said rule, the Supreme Court, disregarding the rule of grammar, interpreted a qualifying clause with reference to the context in construing certain words of the Employees' Provident Funds Act.

47. Again, In the matter of Reference under Art. 143 of the Constitution of India, AIR 1965 SC 745 at p. 760 in interpreting Article 19(1) of the Constitution which reads as follows: "Subject to the provisions of this Constitution and to the Rules and Standing Orders regulating the procedure of the legislature, there shall be freedom of speech in the legislature of every State", it was held that the adjectival clause "regulating the procedure of the legislature" governs both the preceding clauses relating to "the provisions of the Constitution" and "rules and standing orders". Applying these rules of construction, the adjectival clause "wholly or mainly dependent on the assessee for support and maintenance" occurring in Section 2(g)(i) of the Act must be held, in the context, to govern each of the preceding classes of persons mentioned in the section, namely, his or her spouse, and minor child also, and not merely the word "person" immediately preceding the said clause. Out of the two constructions placed before the Court, it is the settled law that in interpreting a fiscal statute that construction which is most beneficial to the assessee should be adopted by the Court.

It is also contended by the learned counsel for the assessee that if his contention is accepted, it would not violate the provisions of Article 14 or 19 of the Constitution of India and that it is equally settled that in interpreting a statute that construction which does not make the provisions of a statute unconstitutional should be accepted in preference to any other construction which would tend to make it unconstitutional. For these reasons, I agree with the learned counsel for the assessee that on a proper construction of Section 2 (g) (i) of the Act, the qualifying clause "wholly or mainly dependent on the assessee for support or maintenance" not only qualifies the word "person" which immediately precedes the said clause but also the earlier words "his or her spouse or minor child." In this view of the matter, the question whether the assessee's spouse is wholly or mainly being maintained by the assessee has got to be determined by the assessing authority during the course of his investigation.

48. The other provision of the Act which falls for consideration is Section 4 (ii) which reads as follows:

"4. Unless otherwise provided in Section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this Act namely

(i) Omitted.

(ii) where the assessee is an individual any expenditure incurred by any dependant of the assessee, and where the assessee is a Hindu undivided family, any expenditure incurred by any dependant from or out of any income or property transferred directly or indirectly to the dependant by the assessee."

Section 3(1) provides that the expenditure incurred by any individual or Hindu undivided family shall be charged at the rates specified for the relevant year. Section 4 mentions what other amounts should be included in computing the expenditure of an assessee. Sub-section (ii) of Section 4, with which we are concerned, seeks to include the expenditure of a dependant either when the assessee is an individual or when the assessee is an undivided family. The contention of Sri Kondiah on behalf of the revenue is that the expression "from or out of any income or property transferred directly or indirectly to the dependant by the assessee" qualifies only a dependant in a Hindu undivided family but not the earlier clause referring to a dependant of an individual, while the learned counsel Sri Narasaraaju for assessee contends that the said qualifying clause refers to both the classes, namely, dependant of an individual as well as dependant of a Hindu undivided family.

In the light of the interpretation given by me of the word 'dependant' that is, as a person who is wholly or partly maintained by the assessee, the above section 4(ii) has necessarily to be interpreted in the manner con-

tended for on behalf of the assessee, namely, that the expression "from or out of any income or property transferred directly or indirectly to the dependant by the assessee" applies equally to the dependant of an individual assessee as well as to the dependant of a Hindu undivided family which is the assessee. There would have been no difficulty in the interpretation of sub-clause (ii) of Section 4 if there had been a comma between the word 'dependant' and the qualifying expression "from or out of any income or property transferred directly or indirectly to the dependant by the assessee". But it has been repeatedly held that the guiding factor in the interpretation of a statute is really the context and not the presence or absence of the punctuation marks. In *Aswini Kumar v. Arabinda Bose*, AIR 1952 SC 369 it was held that "punctuation is after all a minor element in the construction of a statute and very little attention is paid to it by English Courts. Punctuation may have its uses in some cases but it cannot certainly be regarded as a controlling element and cannot be allowed to control the plain meaning of a text". I therefore hold, disagreeing with my learned brother Obul Reddi J. that the qualifying clause, namely "from or out of any income or property transferred directly or indirectly to the dependant by the assessee" refers to each of the cases, namely (i) where the assessee is an individual, any expenditure incurred by any dependant of the assessee; and (ii) where the assessee is a Hindu undivided family, any expenditure incurred by any dependant.

49. The third point argued by Sri Narasaru is that if the above two sections are interpreted in the manner suggested on behalf of the revenue, the provisions would offend Articles 14 and 19 of the Constitution of India. But in the view I have taken of the construction of the above provisions, this question does not arise and hence I do not wish to express any opinion on the said question.

50. In view of my finding on the first question, I agree with my learned brother Obul Reddi, J. that the appeals have to be dismissed with costs.

Appeals dismissed.

AIR 1970 ANDHRA PRADESH 109
(V 57 C 12)

P. JAGANMOHAN REDDY, C. J. AND
SAMBASIVA RAO, J.

Vrandavanla Goverdhanlal Pitti and another, Petitioners v. Smt. Kamala Bai Goverdhanlal and others, Respondents.

S. R. No. 34717 of 1967, D/- 1-4-1969.

Succession Act (1925), Ss. 222 and 255 —
Application for probate of will — Must be
of entire estate — Probate in respect of por-

tion of property may be granted in special
circumstances.

There is no section in the Succession Act dealing specifically with grants in respect of a portion of the estate of a particular item of property. It is, therefore, clear that where a probate of a will is applied for, it must be of the entire estate which, under the will, vests in the executor, unless of course the Court grants it subject to an exception. Case law discussed. (Paras 2, 4, 5)

The general rule is that a probate should be granted in respect of the entire estate of the deceased because under Section 211, the entire estate of the deceased vests in the executor appointed by the will. It is only in special circumstances that a probate in respect of a portion of the property can be justified. (Para 2)

A prima facie reading of Section 57 and the consideration of the application of provisions of Sections 59 to 190 would show that they have nothing to do with the obtaining or a probate in respect of a part or the whole of property. This matter is dealt with in Sections 211 and 213; and the provisions in Chapter II of part IX viz. Sections 237 to 260 would apply. Section 255 provides that whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception. Under Section 213, where an executor has to establish his right as an executor or legatee in a Court, he cannot do so without obtaining a probate. But there is nothing to prevent an executor from dealing with the property of the deceased without obtaining probate because under Section 211, the executor is the legal representative of the deceased for all purposes, and all the property vests in him as such, so that the grant of probate is not a condition precedent to such acts. But these provisions however do not indicate that when an executor intends to obtain a probate of a will, he could only obtain probate of a part of a will at his choice. (Para 2)

Cases Referred: Chronological Paras
(1955) AIR 1955 Mad 411 (V 42) =
ILR (1956) Mad 36, In re, T. K. Parthasarathy Naidu 2, 3
(1954) AIR 1954 Cal 444 (V 41), In the goods of Sew Prasad Saraf 3
(1946) AIR 1946 Lah 277 (V 33) = 48
Pun LR 13, Sardar Singh v. Teja Singh 4
(1931) AIR 1931 Lah 310 (V 18) =
ILR 12 Lah 584, Satpal Ram v. Collector, Multan 3
(1930) AIR 1930 Mad 956 (V 17) = 59
Mad LJ 596, Namburumal v. Veeraperumal 3
(1929) AIR 1929 Bom 456 (V 16) = 31
Bom LR 1093, Abdul Gafur v. Jayarabi 3
(1927) AIR 1927 Cal 654 (V 14) =
31 Cal WN 874, Mt. Girija Bala v. Manindra Lal 3

(1925) AIR 1925 Lah 493 (V 12) =

26 Pun LR 608, Gurbachan v.

Satwant Kaur

(1911) ILR 34 Mad 211 = 20 Mad

LJ 687, Muniswami Chetti v.

Maruthammal

(1911) ILR 34 Mad 257 = 38 Ind App

129 (PC), Srinivasa Moorthy v.

Venkata Varada Aiyangar

(1911) ILR 34 Mad 395 = 20 Mad LJ

984, Antony Cruz Gonzolves v.

Makis Boopalarayan

(1881) ILR 6 Bom 460, In re Thaker

Madhavji Dharamsi

(1881) ILR 6 Cal 483 = 7 Cal LR

593, In the Goods of Grish

Chunder Mittar

G. Balaparameswari Rao and E. S. Ramachandra Murthy, for Petitioners; Third Govt. Pleader, for the State.

P. JAGANMOHAN REDDY, C. J.: The Office note in S. R. No. 34717 of 1967 had initially sought orders on the questions (1) whether the O-P. was maintainable in view of the fact that the petitioners seek probate for a part of the property left by the deceased and not for the entire estate? (2) Whether the Advocates for the petitioners may be directed to file an English translation of the will by a competent authority duly verified as laid down by S. 277 of the Indian Succession Act, (3) Whether the advocate may be directed to file a valuation of the estate of the deceased in duplicate as per Section 52 of the Court Fees Act and mention the Court Fee payable thereon. Our learned brother, Narasimham, J., directed that the probate fee should be levied under the proviso to Section 53(2) of the Andhra Pradesh Court Fees and Suits Valuation Act, 1956 in respect of immoveable properties situated at Bombay for which probate is compulsory under Section 57(b) of the Indian Succession Act and that a translation of the will be obtained in compliance with Section 277 of the Indian Succession Act as the Government Pleader had stated that this is necessary to know which are the immoveable properties in Bombay.

Thereafter the Office resubmitted a further note regarding the maintainability of the petition about which there were no orders. In the note, the view of the office was that there was no provision in the Indian Succession Act for the grant of a limited probate when the entire estate vested in the executor, that a limited probate is not contemplated by the Act except where the will itself reserves the interests of the executors and that Sections 254 to 257 which deal with limited probate in special circumstances were clearly inapplicable to the instant case. In support of this, the office note also cited several decisions. Our learned brother, after, hearing the arguments of the counsel, thought that as this matter was of sufficient importance and that there is as yet no ruling of the Court, it may be decided by a Bench as to whether probate

duty is payable on a part of the estate of the testator Sri Goverdhanlal Bansilal, even if the case does not fall under the exceptions to sections 254 to 257 of the Indian Succession Act.

2. Before us, Shri G. Balaparameswari Rao, the learned advocate for the executors, contends that no probate need be obtained of a will except in cases mentioned in Section 57 of the Indian Succession Act; and at any rate only a limited court-fee of Rs. 25 is payable under the Court-fees Act and if a caveat is entered that O. P. will be registered as a suit and the Court-fee payable is on half of the value of the estate devised under the will less the Court-fee already paid. In so far as probate duty is concerned, that is a matter which has to be decided after probate is granted depending on the value of the estate either on the date of the death of the testator if the petition is within one year; or on the date of the application if it is after a year. The learned Government Pleader has supported the office note and relied on the cases cited by it for the proposition that no probate of a part of a will can be obtained unless the Court, in cases which provide for exceptions, grants in respect of a part of the property bequeathed under the will. It appears to us that the provisions of Chapter II of Part IX Sections 237 to 260 which deal with grants limited in duration are only applicable to limited grants and exceptions. Of these, Section 255 allows a limited probate in special circumstances of which the following are some examples.

(i) When the testator makes a grant for a limited purpose.

(ii) When the testator appoints several executors for different purposes.

(iii) when a part of the will is invalid on the ground of fraud; and

(iv) when the will is damaged or mutilated.

From this it is sought to be contended that the grant of a general probate is the rule and a limited probate an exception. Shri G. Balaparameswari Rao's contention, as already noticed, is that the cases cited in the Office note are all cases which deal with probate proceedings within the territories which on the first day of September, 1870 were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay and which are subject to the provisions of Section 57 (a) and (b) of the Indian Succession Act. It is his submission that in these territories the obtaining of a probate is compulsory. As such, a probate of a will situated outside those territories has to be obtained in respect of immoveable properties situated within those territories. Otherwise there is no necessity for an executor or executors to obtain probate of the will at all. If so, in respect of properties not

situated within the territories specified in Section 57(a), partial probate also can be taken.

At any rate, in so far as immoveable properties situated within the territories which were subject to Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay are concerned obtaining probate of a will is compulsory. For an appreciation of these contentions, it is necessary to read the provisions of Sections 57, 211 and 213 of the Indian Succession Act which are in the following terms:

"57. The provisions of this part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits so far as relate to immoveable property situate within those territories or limits; and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh and Jain on or after the first day of January 1927 to which those provisions are not applied by clauses (a) and (b):

Provided that marriage shall not revoke any such will or codicil."

211. (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Mohammedan, Buddhist, Sikh, Jain or Parsi or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person."

213 (1) "No right as executor or legatee can establish in any court of justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

(2) This section shall not apply in the case of wills made by Muhammadans, and shall only apply—

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jain where such wills are of the classes specified in clauses (a) and (b) of Section 57; and

(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local limits of the ordinary original civil jurisdiction of

the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits, in so far as they relate to immoveable property situate within those limits".

A reading of these provisions would show that Sections 59 to 190 with the modifications specified in Schedule III will be applicable to all wills specified in Section 57 Clauses (a) to (c). It may be noted that the provisions of Section 57 and the application of Sections 55 to 190 with modifications has nothing to do with the obtaining of a probate of a part or of the whole of the will or codicil of a Hindu testator. It would appear that originally the classification in clauses (a) and (b) of Section 57 was taken from the Hindu Wills Act XXI of 1865 (now repealed). To those classes of wills and codicils that Act applied. Certain sections of the Indian Succession Act, 1865 (as amended by Act XXI of 1870) corresponding to the sections set out in Schedule III of the Indian Succession Act 1925 were made applicable to all wills and codicils specified in clauses (a) and (b) of Section 57 wherever executed. The sections specified in Schedule III of the Indian Succession Act as modified therein are applicable to the execution, attestation, revocation, alteration, revival, construction of wills, making of bequests and of legacies, their nature and validity, payment of liabilities in respect of specific and general bequests.

A prima facie reading of Section 57 and the consideration of the application of the provisions of Sections 59 to 190 would show that they have nothing to do with the obtaining of a probate in respect of a part or the whole of property. This matter is dealt with in Sections 211 and 213; and as we have noted earlier, the provisions in Chapter II of Part IX viz., Sections 237 to 260 would apply. Under Section 211, the property of a testator vests in an executor immediately upon the testator's death unlike in the case of an administrator who derives his title wholly from the Court from the date of the grant of the Letters of Administration from which time alone the property vests in him. See *Antony Cruz Gonzolves v. Makis Boopalarayan*, (1911) ILR 34 Mad 395. An executor, therefore, is competent to deal with the property and to demand and obtain amounts in respect of debts or recover his property without obtaining a probate. We are assuming for this purpose that the executor has accepted the office or has dealt with the property of the deceased in such a way as would imply his acceptance.

Under Section 213, where an executor has to establish his right as an executor or legatee in a Court, he cannot do so without obtaining a probate. But there is nothing to prevent an executor from dealing with the property of the deceased (e.g., collecting assets, selling any property to pay debts, etc.) without obtaining probate because, as we said earlier, under Section 211, the executor is

get consideration. But in this case he (Shri Upendra Nath Khempri) being a tribal is entitled to some concession. His appeal petition is therefore, allowed. The Mahal should be settled with him at the highest bid provided he clears up his Sales Tax arrear within 30th October, 1968. The order will be absolute only when the Sales Tax arrear is completely cleared up by 30th October 1968. Otherwise the settlement order passed by the Conservator of Forests, Upper Assam Circle will prevail."

8. It will be seen from the above, that the only ground on which the petitioner was deprived of the Mahal was the fact that opposite party No. 5 belonged to a Scheduled tribe. I may quote below the relevant portion of Article 15 of the Constitution of India which reads as follows:

"15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) * * * * *

(3) * * * * *

(4) Nothing in this article or in cl. (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

9. There is no doubt that there has been discrimination against the petitioner and in favour of opposite party No. 5 on racial ground. But this is permissible in case the discrimination is in favour of a member of the Scheduled tribe. So, it is vitally important to find out whether a person in whose favour a discrimination is made actually belongs to a Scheduled caste or Scheduled tribe or a backward class. That is why Rule 6 (4) (iv) has been made providing for the certificate to be produced to establish a claim by any person to have belonged to a Scheduled caste or Scheduled tribe or Backward class. I think that if such a certificate is not produced, but there are materials enough to show that the person belongs to a Scheduled caste, Scheduled tribe or Backward class, non-submission of a certificate will not vitiate a settlement. But if a person is regarded as belonging to a Scheduled caste, Scheduled tribe or Backward class without any material whatsoever, such an action will be arbitrary and capricious and must be struck down.

10. Under Article 342 of the Constitution, the President, after consultation with the Governor, may specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall, for the purpose of the

Constitution, be deemed to be Scheduled tribe. Under this Article the President has made the Constitution of the Scheduled Tribes Order 1950. It appears from Part II of the Schedule of the said Order that Dimasa (Kachari) is a Scheduled tribe so far as regards members thereof are residents in an autonomous district. Kachari including Sonowals is a Scheduled tribe so far as regards the members thereof are residents in the State of Assam excluding the tribal areas. It appears from the affidavit filed by opposite party No. 5 himself that he is a resident in the district of Nowgong which is not a Tribal area. Therefore, he can claim to have belonged to a Scheduled tribe only if he is a Kachari or Sonowal. Nowhere opposite party No. 5 discloses to what type of tribal community he belongs. In his tender he simply said "I am belonging to the Scheduled tribe community. The certificate will be submitted later on." This certificate was never submitted. In his affidavit he says that he is a "Kachari Hindu". On the other hand, his contention is that he is not to submit an income-tax clearance certificate as the tribals do not pay any income-tax. But S. 10 (26) of the Indian Income Tax Act 1961 exempts a Tribal from income-tax provided he is a resident of a Tribal area. But if opposite party No. 5 is a resident of a Tribal area, he can claim to have belonged to a Scheduled tribe only if he is a Dimasa Kachari and not a mere Kachari or Sonowal. Thus from the contentions of the opposite party No. 5, it cannot be ascertained to what tribal community he claims to have belonged. The appellate authority had no material whatsoever to hold that he belonged to a Scheduled tribe. When the petitioner has been discriminated against, his fundamental right has been involved and in such a case scrupulous care should be taken to find out whether such discrimination can be sustained under the law. Any arbitrary discrimination must be struck down. Here discrimination against the petitioner and in favour of opposite party No. 5 has been arbitrary and capricious. In this view of the matter, the order of the appellate authority disturbing the settlement cannot be sustained and it is set aside. The settlement made by the Conservator of Forests with the petitioner will stand. The petition is allowed and the rule is made absolute. We make no order as to costs.

11. K. C. SEN, J.: I agree.

Petition allowed.

AIR 1970 ASSAM & NAGALAND 35
(V 57 C 6)

S. K. DUTTA, C. J.
AND P. K. GOSWAMI, J.

R. D. Gupta, Petitioner v. The Union of India, Opposite Party.

Civil Revn. No. 2 (H) of 1968, D/- 13-5-1969, against judgment of Addl. Dy. Commr., United Khasi Jaintia Hills, Shillong, D/- 4-5-1968.

(A) Civil P. C. (1908), S. 115 — Powers of High Court under — Limitations.

The powers of the High Court under this section are limited. The High Court while exercising its jurisdiction under the section cannot correct errors of fact, however gross they may be, or even errors of law. It can only do so when such errors have relation to the jurisdiction of the Court. (Para 3)

(B) Civil P. C. (1908), O. 27, R. 2 and O. 3, R. 1 — Arbitration Act (1940), Section 14 — Reference of dispute to arbitrator — Notifications by Government authorising Executive Engineers to act for Government in judicial proceedings — Proceedings in Court under Arbitration Act are proceedings under the Civil P. C. — Held, that the Executive Engineer became a "recognised agent" within O. 27, R. 2 and could make appearance under O. 3, R. 1. (Para 4)

(C) Arbitration Act (1940), S. 14 (2) — Formal notice under section is not necessary and a verbal notice may be enough under certain circumstances — However, knowledge of lawyer cannot be deemed to be notice under S. 14 (2) unless such lawyer has been authorised by party to receive such notice—Court by order deciding to issue notice—Order shown to lawyers of both parties present there—Court subsequently issuing formal notice—Held, limitation for filing objections begins to run from the date of formal notice and not the date on which the order of the Court was shown to lawyers. (Para 7)

(D) Civil P. C. (1908), S. 115 — Arbitration Act (1940), S. 20 — High Court in revision cannot examine correctness of finding that certain claims were outside purview and scope of agreement — It is enough for the High Court to say that the lower Court had jurisdiction to decide the matter and that the appellate Court upheld the decision. (Para 10)

S. S. Ray and D. Pathak, for Opp. Party.

DUTTA, C. J.: This petition is against the orders of the Additional Deputy Commissioner, United Khasi & Jaintia Hills setting aside an award. The relevant facts are as follows. The petitioner (hereinafter called the contractor) entered into an agreement with the opposite party—Union of India (hereinafter called the

Government)—for the construction of the Sadiya-Denning Road in the North East Frontier Agency (hereinafter called N. E. F. A.). There was a provision in the said agreement for reference of any dispute arising out of it between the parties, to the Superintending Engineer, N. E. F. A. or his nominee for arbitration. Disputes having arisen, the said Superintending Engineer appointed one Sri O. P. Mittal a Superintending Engineer of the Central P. W. D., New Delhi as an arbitrator. Sri Mittal entered into the reference but resigned after some days on 3-2-60. Thereafter the petitioner applied to the Assistant to the Deputy Commissioner, United Khasi and Jaintia Hills, Shillong for appointment of an arbitrator.

It may be pointed out here that the parties entered into the agreement within the jurisdiction of the Courts of the United Khasi and Jaintia Hills where the Munsiff is also an Assistant to the Deputy Commissioner and the position of the Deputy Commissioner or the Additional Deputy Commissioner is that of a District Judge. After Sri Mittal resigned, the Superintending Engineer, N. E. F. A. appointed on 19-3-60 one Sri M. N. Malkani to act as an arbitrator. The Assistant to the Deputy Commissioner, however, held that the Superintending Engineer had no power to appoint Sri Malkani and therefore he appointed one Sri R. M. Nath as the arbitrator. It was ordered that if Sri Nath refused to act, the appointment should go to one Sri G. N. Dutta. Sri Nath entered into the reference on 4-10-61. The Government filed an appeal before the Additional Deputy Commissioner against the order of the Assistant to the Deputy Commissioner appointing Sri Nath as the arbitrator and the Additional Deputy Commissioner by an order dated 12-11-62 set aside the appointment of Sri Nath and restored the appointment of Sri Malkani. The contractor filed a revision petition before this Court which by its order dated 17-3-64 set aside the order of the Additional Deputy Commissioner on the ground that no appeal lay to him as the order of appointment made by the Assistant to the Deputy Commissioner was under S. 8 of the Indian Arbitration Act (hereinafter called the Act). On 21-1-62 a petition was filed by the Government under sections 5, 11 and 12 of the Act before the Assistant to the Deputy Commissioner for revoking the authority of Sri Nath. But this petition was dismissed by an order dated 12-3-62. The Government filed a revision petition before this Court and this Court by an order dated 12-7-62 remanded the case. But on 6-12-62 the petition was withdrawn.

2. On 9-7-64 the Government filed another petition under Sections 5, 11 and

12 of the Act before the Assistant to the Deputy Commissioner for revoking the authority of Sri Nath. This petition was dismissed by the Assistant to the Deputy Commissioner on 16-9-64. Thereafter the Government filed a revision petition before this Court against the said order. This petition was, however, not pressed as in the meantime Sri Nath died. The Government also filed an appeal before the Supreme Court from the order of this Court dated 17-3-64 by which the order of the Additional Deputy Commissioner restoring the appointment of Sri Malkani was set aside. The Supreme Court by an order dated 24-3-65 held that the appointment of Sri Nath made by the Assistant to the Deputy Commissioner was under Section 8 of the Act and as such, no appeal lay to the Additional Deputy Commissioner. On the death of Sri Nath, Sri G. N. Dutta was appointed as the sole arbitrator under Section 8 of the Act. A revision petition filed by the Government against this order was rejected by this Court by an order dated 1-9-65. An appeal to the Supreme Court against the said order was also dismissed. Sri G. N. Dutta made his award on 23-3-66 and filed the same in the Court of the Assistant to the Deputy Commissioner at Shillong on 26-5-66. The Assistant to the Deputy Commissioner ordered on 26-5-66 for issue of notices on parties. The Government received the written notice on 30-5-66 and filed a petition on 27-6-66 for setting aside the award. The learned Assistant to the Deputy Commissioner allowed the petition and set aside the award. An appeal before the Additional Deputy Commissioner by the contractor was dismissed and hence this petition.

3. The petition before us is purported to be under Rule 36 of the Rules for the Administration of Justice in the Khasi and Jaintia Hills and under sections 115 and 151 of the Civil Procedure Code. It is, however, not disputed that the proceedings in the case are under the Indian Arbitration Act. Under Section 41 of the said Act the provisions of the Civil Procedure Code are applicable to all proceedings before the Court including appeals. Under Section 39 (2) of the Act, no second appeal lies from an order passed in appeal regarding setting aside of an award. In this view of the matter, this petition must be treated as a revision petition under Section 115 of the Civil Procedure Code. The powers of this Court under this section are limited. The High Court while exercising its jurisdiction under the said section cannot correct errors of fact, however gross they may be, or even errors of law. It can only do

so when the said errors have relation to the jurisdiction of the Court.

4. The first point raised by the contractor is that the objection petition filed by the Union of India was not valid as it was signed by Mr. Seshasar who had no authority either to sign the petition or to engage lawyer on behalf of the Government. In reply to this contention it may be pointed out that by a notification dated the 11th February, 1958 issued under Or. 27 R. 2 of the First Schedule to the Civil Procedure Code, the Central Government authorised the Superintending Engineers and the Executive Engineers among others, to act for the Government in respect of any judicial proceeding. By another notification dated the 25th January 1958, issued in exercise of powers conferred by Or. 27 R. 1 of the First Schedule to the Code, the said officers were appointed as persons by whom plaints and written statements in suits in any Court of civil jurisdiction by or against the Government, could be signed and verified. Sri Seshasar was an Executive Engineer and therefore, had the authority to sign the objection petition and engage a lawyer for the Government. Sri Seshasar being authorised to act on behalf of the Government, became a "recognised agent" within the meaning of Or. 27 R. 2 of the Civil Procedure Code. Under Or. 3 R. 1 of the Civil Procedure Code, as a recognised agent of the Government, Sri Seshasar could make any appearance, application or act in or to any Court required or authorised by law (including the Arbitration Act) to be made or done, by the Government in such Court.

5. The argument that proceedings in court under the Arbitration Act are not proceedings under the Civil Procedure Code has no force. The Arbitration Act creates a substantive right, but it does not lay down the details of the procedure to be followed for the enforcement of the same. By Section 41 (a) of the Act itself, the provisions of the Civil Procedure Code are specifically applied to all proceedings before the Court under the Act. It may be noted that the contractor filed the petition before us in person and also argued his case in person. This could be done by him only under Or. 3 R. 1 of the Civil Procedure Code. If this provision of law was not attracted, there was no law under which he could enjoy these privileges. In these circumstances, it must be held that Sri Seshasar had the authority to sign the objection petition and to engage lawyers on behalf of the Government.

6. The second point raised before us is that the objection petition was barred by limitation and therefore the Court had no jurisdiction to entertain the same.

The award was filed on 26-5-66 and on that day the Court passed the following order:

"Arbitrator filed the award along with the record of the proceeding and his bill amounting to Rs. 7163/-. Issue notices on the parties fixing 14-7-66."

The said order was shown to the lawyers for both the parties and Sri L. P. Changkakoti, Government Advocate wrote the word "Seen" and signed. Under S. 14 (2) of the Act, the Court has to give notice of filing of the award and then objection must be filed within thirty days of the service of the said notice, vide Article 158 of the old Limitation Act and Article 119 of the new Act. Sri Changkakoti signed as aforesaid on the 26th May, 1966. If that day is taken as the day of service of notice of filing of the award, the objection petition should have been filed within the 25th June, 1966. But it was actually filed on the 27th June, 1966. If however, the service of the written notice on the Government is taken as the date of service of notice, the objection petition is well within time.

7. It is true that a formal notice under section 14 (2) of the Act is not necessary and a verbal notice may be enough under certain circumstances. But what happened in this case was that the Court decided to issue a notice when it said—"Issue notice on the parties fixing 14-7-66". What Sri Changkakoti took note of was the fact that notice would be issued. The intention of the Court was clear that formal notice would go. As a matter of fact a copy of the award was received for the first time by the Government on the 30th May, 1966, when it received the notice under Section 14 (2) served on it by the Court. If showing of the order of the Court to Sri Changkakoti amounted to the service of notice of the filing of the award, there was no point in serving a written formal notice on the Government again. The very fact that formal notice was issued, shows that mere showing of the order of the Court about issuing of notice to Sri Changkakoti was not taken by the Court as notice of filing of the award. Moreover, knowledge of a lawyer cannot be deemed to be notice under Section 14 (2) of the Act unless it can be shown that the party authorised the lawyer to receive such a notice. There is nothing in the Vakalatnama of Sri Changkakoti to show that he was empowered to act in any way on behalf of the Government after the award was made. In the above view of the matter, I am of the opinion that the objection petition was not barred by limitation.

8. The third point is in respect of res judicata. It may be noted that one of the grounds on which the award has been

set aside, is that the arbitrator entertained claims which were not before the first arbitrator Sri Mittal. The claims filed before Sri Mittal by the contractor amounted to Rs. 2,81,871.67 P whereas before Sri Nath they became Rupees 27,92,674.80 P. and before Sri Dutta they amounted to Rs. 48,65,295.24 P. It is submitted on behalf of the Government that as the appointments of Sri Nath and Sri Dutta were under Section 8 of the Act, they had only "like power" as that of the first arbitrator Sri Mittal and could not entertain claims which were not before them. But the learned Assistant to the Deputy Commissioner while dismissing the petition under sections 5, 11 and 12 by an order dated 16-9-64, held that the appointment of Sri Nath was under S. 20 of the Act. Therefore, it is argued by the contractor that this operates as a res judicata and it cannot now be contended that Sri Nath was not appointed under Section 20 of the Act. If the appointments of Sri Nath and Sri Dutta were under section 20 of the Act, there could be no dispute that they could entertain any claim referred to them by the Court. It is submitted that the Courts below exceeded their jurisdiction in going into the question whether the arbitrators after Sri Mittal were appointed under S. 8 or Section 20. According to the contractor the decision of the Assistant to the Deputy Commissioner dated 16-9-64, by which it was held that the appointment of Sri Nath was under Section 20 of the Act, operated as res judicata.

9. It may, however, be noted that by the order dated 24-3-65 mentioned above, the Supreme Court held that the appointment of Sri Nath was under S. 8 of the Act. So, if there is any res judicata, it is the decision of the Supreme Court which operates as such. On the death of Sri Nath, the contractor made an application under section 8 of the Act for the appointment of an arbitrator and Sri G. N. Dutta was appointed accordingly. Therefore, the finding of the Courts below, that the appointment of Sri Nath as well as of Sri Dutta was under S. 8 of the Act is not hit by res judicata. In this view of the matter, it is not necessary to examine whether the order of the learned Assistant to the Deputy Commissioner dated 16-9-64 is only an interlocutory order which does not operate as res judicata.

10. Moreover, the learned Assistant to the Deputy Commissioner found some of the claims to be outside the agreement. Any dispute arising out of such claim could not be a dispute arising out of the agreement. The learned Assistant to the Deputy Commissioner had jurisdiction to decide this matter and if the arbitrator

entertained any claim outside the scope of the agreement, the award must be set aside. This court in revision cannot examine the correctness of the finding that certain claims were outside the purview and scope of the agreement. It is enough for this Court to say that the learned Assistant to the Deputy Commissioner had jurisdiction to decide this matter and the appellate Court upheld the decision.

11. In the result, therefore, there is no scope for interference by this Court with the order of setting aside of the award. The petition is, therefore, rejected. There will be no order as to costs.

12. P. K. GOSWAMI, J.: I agree.

Petition dismissed.

AIR 1970 ASSAM & NAGALAND 38 (V 57 C 7)

M. G. PATHAK, J.

Prem Chand Jain, Petitioner v. State, Respondent.

Criminal Ref. No. 5 of 1968, D/- 3-6-1969, from order of S. J. Dhubri, D/- 9-1-1968.

Essential Commodities Act (1955), S. 3 — Assam Foodgrains (Licensing and Control) Order, 1961, Cl. 3 — Violation of — Requirements — Cri. Rev. No. 4 of 1967 (Assam) held not good law.

Before a conviction can be reached under the Order, it must be established (i) that the person convicted was engaging himself in any business; (ii) that his business involved the purchase, sale or storage for sale of any foodgrains; (iii) that the quantities of the foodgrains, involved should be of wholesale quantities, namely, in excess of ten maunds in one transaction of purchase or fifteen maunds of the storage of the foodgrains; and (iv) that this should have been done without a license. Cri. Rev. 147 of 1964 (Assam) and AIR 1964 SC 1533 Foll. Cri Rev. No. 4 of 1967 (Assam) held not good law. (Para 9)

In the absence of any proof that the accused engaged himself in some business involving purchase, sale or storage for sale of paddy the conviction is not sustainable. (Para 8)

Cases Referred: Chronological Paras
(1967) Criminal Revn. No. 4 of 1967 (Assam) 10
(1964) AIR 1964 SC 1533 (V 51), Manipur Administration v. M. Nila Chandra Singh 7, 10
(1964) Criminal Revn. No. 147 of 1964 (Assam) 9
P. C. Katak, for Petitioner; S. N. Choudhury as Public Prosecutor, for Respondent.

ORDER: This is a reference under S. 438, Cr. P. C. made by the learned Sessions Judge, Goalpara with recommendation for setting aside the impugned order and for return of paddy or the sale price thereof to the accused-petitioner.

2. The petitioner's shop at Sukchar was searched by the Supply Inspector on 12-11-65 and found a stock of 58 bags of Ahu paddy weighing 34.80 quintals and the paddy was seized. The accused-petitioner could not produce any license for dealing in paddy as required under Clause 3 of the Assam Foodgrains (Licensing & Control) Order, 1961 (hereinafter called the 'Assam Order 1961'). The Supply Inspector submitted an offence report against the petitioner with necessary sanction for prosecution under S. 7 of the Essential Commodities Act for violation of the provisions of the said Clause of the Assam Order 1961. The case was tried summarily by the learned Magistrate as provided in Section 12-A of the Essential Commodities Act, 1955.

3. The prosecution examined three witnesses in the case including the Supply Inspector. The defence did not deny the fact that 58 bags of paddy were found in his possession by the Supply Inspector. The contention of the accused-petitioner was that prior to the seizure of paddy, on a bazar day, some persons numbering about 22 who brought paddy to Sukchar bazar for sale were unable to dispose of the same and so they left the paddy at his godown to be lifted later on and that the paddy did not belong to the petitioner. In support of his contention the petitioner examined one witness.

4. On a consideration of the evidence adduced by the parties, the learned Magistrate found that the accused stored the paddy for sale in his shop in violation of the provisions of Clause 3 of the Assam Order 1961 and accordingly he convicted the accused under Section 7 of the Essential Commodities Act and sentenced him to rigorous imprisonment for one month and to pay a fine of Rupees 500/- in default to rigorous imprisonment for another month. The seized paddy was also confiscated. As the order of the learned Magistrate was not appealable as provided under sub-section (3) of section 12-A of the aforesaid Act, the accused petitioner moved a revision petition under section 435, Cr. P. C. before the Sessions Judge, who has referred the case as stated above.

5. The learned Courts below have found that the evidence of the prosecution witnesses in the case proved beyond reasonable doubt that on 12-11-65 the shop of the accused was searched by the Supply Inspector P. W. 3 and on such search 58 bags of paddy weighing 38.80 quintals of paddy were found in his pos-

session. As stated hereinbefore the accused also admitted possession of the seized paddy.

6. The point that falls for determination in this case is whether mere possession of paddy in question was sufficient to bring home the offence under S. 7 of the Essential Commodities Act to the accused. The learned Sessions Judge found that there was no evidence that the accused was ever seen dealing in paddy in his shop. On the other hand, the Supply Inspector P. W. 3 stated that he had no information if the accused dealt in rice or paddy. The accused was charged for violation of Clause 3 of the Assam Order 1961 which runs as follows:

"3. Dealings to be licensed: No person shall engage in any business which involves the purchase, sale or storage for sale of any foodgrains in wholesale quantities, except under and in accordance with the terms and conditions of a license issued under this Order:

Provided that nothing in this clause in so far as sale or storage for sale of foodgrains is concerned, shall apply to a producer.

Explanation:— The expression "purchase or sale in wholesale quantities" means the purchase or sale in quantities exceeding ten maunds or 3.73 quintals in any one transaction, and the expression "storage for sale in wholesale quantities" means storage in quantities exceeding fifteen maunds or 5.60 quintals."

Admittedly the petitioner is not a producer and the quantity of paddy found in his possession exceeds 5.60 quintals. The petitioner also had no license for dealing in paddy under the said Order. The only point to be considered is whether the petitioner can be said to have engaged in a business which involves the purchase, sale or storage for sale of paddy, as contemplated under Clause 3 of the Assam Order 1961. As observed earlier, there is no evidence in the case to the effect that the petitioner was even seen dealing in paddy in his shop and P. W. 3 stated that he had no information whether the accused dealt in rice or paddy. In order to establish a case under Clause 3 of the said Order, the prosecution must show that the accused engaged in business of storage for sale of paddy in wholesale quantities.

7. For the interpretation of Clause 3 of the Order, the learned counsel for the petitioner has referred to the case of *Manipur Administration v. M. Nila Chandra Singh*, reported in AIR 1964 SC 1533. In that case, the Supreme Court considered the question whether mere possession without any evidence to the effect that the accused engaged in business of storage for sale would be an offence under section 7 of the Essential Commodities

Act. In that case, the Supreme Court observed as follows:

"In dealing with the question as to whether the respondent is guilty under S. 7 of the Essential Commodities Act, it is necessary to decide whether he can be said to be a dealer within the meaning of cl. 3 of the Order. A dealer has been defined by cl. 2 (a) and that definition we have already noted. The said definition shows that before a person can be said to be a dealer it must be shown that he carries on business of purchase or sale or storage for sale of any of the commodities specified in the Schedule, and that the sale must be in quantity of 100 mds. or more at any one time. It would be noticed that the requirement is not that the person should merely sell, purchase or store the foodgrains in question, but that he must be carrying on the business of such purchase, sale or storage; and the concept of business in the context must necessarily postulate continuity of transactions. It is not a single casual or solitary transaction of sale, purchase or storage that would make a person a dealer. It is only where it is shown that there is a sort of continuity of one or the other of the said transactions that the requirements as to business postulated by the definition would be satisfied. If this element of the definition is ignored, it would be rendering the use of the word "business" redundant and meaningless."

At another place in the same judgment, the Supreme Court observed as follows:

"At this stage it would be convenient to refer to the relevant provisions of the Order. Clause 2 (a) defines a dealer as meaning a person engaged in the business of purchase, sale or storage for sale, of any one or more of the foodgrains in quantity of one hundred maunds or more at any one time. Clause 2 (b) defines foodgrains as any one or more of the foodgrains specified in the Order including products of such foodgrains other than husk and bran. It is common ground that paddy is one of the foodgrains specified in Schedule I. Clause 3 with which we are directly concerned in this appeal reads thus:

"(1) No person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority;

(2) For the purpose of this clause, any person who stores any foodgrains in quantity of one hundred maunds or more at any one time shall, unless the contrary is proved, be deemed to store the foodgrains for the purpose of sale." In the said case, the Supreme Court was dealing with *Manipur Foodgrains Licens-*

ing Order, 1958. The provisions of Cl. 3 of Assam Order 1961 are similar to those of Clause 3 of the Manipur Foodgrains Control Order, except for the deeming provision in the Manipur Order, which is not to be found in the Assam Order 1961.

8. Since in the instant case there is no evidence that the petitioner engaged in any business involving the purchase, sale or storage for sale of paddy, the charge against the petitioner cannot be said to have been proved in the case in view of the Supreme Court's decision referred to above. Even if the defence case that some villagers coming to the bazar kept the paddy in question with the petitioner is disbelieved as has been done by the learned Magistrate, yet the only thing that may be said to be proved against the petitioner by the prosecution is that the petitioner had been found in possession of the paddy in question. In order to bring home the offence under section 7 of the Essential Commodities Act to the petitioner, the prosecution should have established that the petitioner engaged in some business involving purchase, sale or storage for sale of paddy. The prosecution having failed therein, the conviction and sentence of the petitioner cannot be sustained in law.

9. In this connection, the learned counsel for the petitioner also referred to an unreported judgment of this Court in Criminal Revn. No. 147 of 1964 (Assam). In that case Nayudu, C. J., following the aforesaid Supreme Court's decision, held that before a conviction could be reached under the Assam Order 1961, it must be established (1) that the person convicted was engaging himself in any business; (2) that this business involved the purchase, sale or storage for sale of any foodgrains; (3) that the quantities of the foodgrains, involved should be of wholesale quantities, namely, in excess of ten maunds in one transaction of purchase or fifteen maunds of the storage of the foodgrains; and (4) that this should have been done without a license. I am in respectful agreement with this observation. I hold that the prosecution has not been able to prove the case against the petitioner.

10. The learned counsel for the State referred to another unreported judgment of this Court in Criminal Revn. No. 4 of 1967 (Assam). On a perusal of the judgment, I find that the Supreme Court's decision reported in AIR 1964 SC 1533 was not brought to the notice of the Court in that case and as such that decision does not help the prosecution in the instant case.

11. In the result, the conviction and sentence of the petitioner are quashed.

The seized paddy or the sale price thereof should be made over to the accused-petitioner. The reference is accepted.
Reference accepted.

AIR 1970 ASSAM & NAGALAND 40 (V 57 C 8)

S. K. DUTTA, C. J., AND K. C. SEN, J.
Assam Co. Ltd., Petitioner v. State of Assam and others, Opposite Parties.

Civil Rule No. 183 of 1965, D/- 28-3-1969.

(A) Assam General Clauses Act (2 of 1915), S. 26 — Issue of notification under S. 4 (1) (b) and (c) of Assam Municipal Act (1 of 1923) — Act (1 of 1923) repealed by Assam Municipal Act (15 of 1957) — Nothing expressly mentioned in Act (15 of 1957) that notifications issued under Act (1 of 1923) will come to an end — Such Notifications are saved by S. 26 and action could validly be taken under them. (Paras 8 and 9)

(B) Municipalities — Assam Municipal Act (15 of 1957), Ss. 336 (1) (d), 4 (1) (a) and (b) — Provisions of Section 4 (1) (b) can be validly applied under Section 336 (1) (d) to a town committee — No necessity to take action under S. 4 (1) (a) before applying S. 4 (1) (b). (Para 10)

(C) Municipalities — Assam Municipal Act (15 of 1957), Ss. 334 and 4 (1) — Developed area — Inclusion of, in town committee jurisdiction — Notification is invalid.

It is quite obvious from a reading of Section 334 that the provision for the constitution of a town committee does not envisage inclusion within a town committee jurisdiction of any developed area. If, therefore, S. 4 (1) is applied by a notification in order to include an area already having arrangements better than what can be provided, the notification will certainly amount to a colourable legislation and has to be struck down.

(Paras 11, 12)

(D) Constitution of India Art. 246 — Colourable legislation — Meaning of — Law pretended to be in exercise of undoubted power but which in fact is on a prohibited field is colourable legislation. (Para 11)

S. K. Ghose, S. R. Khound, S. N. Chetia, Prasanta Kumar Goswami, for Petitioner; A. M. Mazumdar, Jr. Govt. Advocate, Dr. J. C. Medhi, P. C. Kataki, for Opp. Parties.

DUTTA, C. J.: The case of the petitioner company in this writ petition is as follows. The petitioner company owns several tea gardens within the State of Assam and has been engaged in the cultivation and manufacture of tea for over a

century. In fact it is the first private tea concern in this State and in 1859 it had under cultivation nearly 4,000 acres of land. They obtained from the Government about 100 acres of land which was covered by dense forest on the south bank of Dikhow river at Nazira in 1839 for the purpose of establishing its headquarters in Assam. The company has been gradually developing this area by spending huge sums of money year after year and the area has been provided with all kinds of modern amenities such as roads, electric supply, water supply, sewerage and conservancy etc. This area (hereinafter called the Headquarters area) is now one of the most modern towns in the State or even outside. The service facilities and amenities provided in this area by the petitioner are of far superior standard to those obtained in the adjoining small town areas. After the establishment of its headquarters the petitioner company voluntarily assisted in providing educational facilities to the boys and girls of the locality. Recurring financial grants are made for scholarships to deserving students. In the year 1909 the Town Committee of Nazira was established and formed into a Union, and the limits of the Union were defined in the relevant notification. The Assam Municipal Act 1923 (hereinafter called the Act of 1923) came into force on the 1st of March 1924. Thereafter the Government of Assam in exercise of the powers conferred by sections 329 and 330 of the Act of 1923 extended the various provisions of the said Act from time to time by notifications in the official gazette to the Nazira Town Committee.

The Act of 1923 was replaced by the Assam Municipal Act 1956 (hereinafter called the Act of 1956). The provisions of the new Act are almost the same as those of the old Act and they are in force now. On the 8th September 1961 the General Manager of the petitioner company came to know from a newspaper report that the Nazira Town Committee had approached the Government of Assam for inclusion of the headquarters area of the petitioner within the jurisdiction of the said Town Committee. Nothing further was known about it till May 1966 when the Sub-Divisional Officer, Sibsagar wrote to the General Manager asking for information about the number of buildings within the said area and whether the company had its arrangements for electric and water supply, conservancy and other amenities. Thereafter the General Manager addressed a letter to the Deputy Commissioner, Sibsagar on the 9th July, 1963 objecting to the proposal to include the headquarters area within the Town Committee. Subsequently, it was learnt that the Nazira Town

Committee had passed a resolution on 21-9-62 for extension of the boundaries of the Town Committee and the Sub-Divisional Officer of Sibsagar forwarded the same to the Government. Thereafter the State Government published in the Assam Gazette dated the 15th January, 1964 a notification purported to be under Section 4 (1) (b) of the Assam Municipal Act 1956 proposing to revise the boundaries of the Nazira Town Committee by including the headquarters area of the petitioner.

The General Manager sent a representation on 18-2-64 to the State Government through the Deputy Commissioner, Sibsagar setting forth his objection to its inclusion. The petitioner company is a member of the Indian Tea Association and the representative of the said Association who was designated as Adviser and posted at Shillong, wrote to the Government by a letter dated 22-2-64 against the proposal to include the headquarters area of the company within the boundaries of the Town Committee. Previously also the said Adviser wrote a letter dated 20-5-63 raising objection to the proposed move. A few months later the following notification appeared in the Assam Gazette:

"The 30th September 1964.

No. LML. 247/62/103. — Whereas sixty days from the date of publication of the Notification No. LML. 247/62/47, dated the 6th January 1964 issued under Clause (b) of sub-section (1) of Section 4 of the Assam Municipal Act, 1956 (Assam Act XV. of 1957) have expired:

And whereas the Governor of Assam, after having considered the objections received pursuant thereto, is satisfied that the areas specified in the aforesaid Notification should be included within the jurisdiction of the Nazira Town Committee.

Now, therefore, the Governor of Assam, in exercise of the powers conferred by clause (b) of sub-section (2) of Section 5 of the said Act, is pleased to include the specified areas within the Nazira Town Committee in the District of Sibsagar.

Sd. G. C. Phukan,
Secy. to the Govt. of Assam
Municipal Administration Department."

2. The Chairman of the Town Committee wrote to the General Manager on 6-11-64 seeking his co-operation to include the headquarters area within the boundaries of Nazira Town Committee. Thereafter the Company came before this Court to challenge the said inclusion.

3. At this stage it will be convenient to refer to the relevant sections of the Assam Municipal Act of 1923 and the Assam Municipal Act of 1956 (hereinafter called the Act of 1923 and the Act of

1956 respectively). Section 328 of the Act of 1923 ran as follows:

"328. (1) The Provincial Government may, by notification, signify its intention to declare that with respect to some or all of the matters upon which a municipal fund may be expended under S. 52, improved arrangements are required within a specified area, which, nevertheless, it is not expedient to constitute as a municipality.

(2) A copy of the notification under sub-section (1) shall be published in such places as the Provincial Government may by general or special order direct.

(3) Should any inhabitant of the specified area aforesaid desire to object to the notification issued under sub-section (1), he may within six weeks from the date of its publication, submit his objection in writing to the Provincial Government through the Deputy Commissioner, and the Provincial Government shall take his objection into consideration.

(4) When six weeks from the date of publication have expired, and the Provincial Government has considered and passed orders on such objections as may have been submitted to it, the Provincial Government may, by notification, declare the specified area aforesaid or any portion thereof to be a notified area:

Provided that in any area where a Union has been established under the Bengal Municipal Consolidation Act, V of 1876, such Union shall be deemed to be a notified area until such area has been declared a Municipality as provided by the Act."

4. Section 330 (1) (d) and (3) ran as follows:

"330. (1) The Provincial Government may—

- (a) ** **
- (b) ** **
- (c) ** **

(d) extend to any notified area the provisions of any section of this Act subject to such restrictions and modifications, if any, as the Provincial Government may think fit.

(2) ** **

(3) For the purposes of any section of this Act which may be extended to a notified area, the town committee constituted for such area, under section 329 shall be deemed to be a Municipal Board under this Act and the area to be a municipality."

5. Section 4 of the Act ran as follows:

"4. (1) The Provincial Government may, by notification and by such other means as it may determine, signify its intention—

(a) to declare any town together with or exclusive of any railway station, village, building, or land in the vicinity of any such town a municipality under this Act;

(b) to include within a municipality any local area in the vicinity of the same;

(c) to exclude from a municipality any local area comprised therein; or

(d) to withdraw the whole area comprised in any municipality from the operation of this Act;

Provided that no municipality under this Act shall include any military cantonment or part of a military cantonment:

Provided also that no action shall be taken by the Provincial Government under sub-clauses (b), (c) and (d) of this sub-section, except on the recommendation of the Board at a meeting.

(2) Every notification published under sub-section (1) shall define the limits of the local area to which it relates."

6. Section 5 of the Act is as follows:

"5. (1) Any inhabitant of any part of local area defined in a notification published under section 4 may, if he objects to anything therein contained, submit his objection in writing through the Deputy Commissioner to the Provincial Government within forty-two days from the date of the publication and the Provincial Government shall take his objection into consideration.

(2) When sixty days from the date of the publication of a notification have expired, the Provincial Government may by notification,

(a) ** **

(b) include the local area or any part thereof in the municipality or exclude it therefrom."

7. The Act of 1923 was repealed and re-enacted as the Assam Municipal Act of 1956. The provisions of sections 4 and 5 of the Act of 1923 are same as those of the Act of 1956. The provisions in Ss. 328 and 323 of the Act of 1923 are almost same as the provisions in Ss. 334 and 336 respectively of the Act of 1956.

8. By a notification dated the 21st October, 1951 and in exercise of powers conferred by section 330 (1) (d) of the Act of 1923 the provisions of section 4

(1) (b) and (c) of the said Act were applied to the town committee of Nazira among others. But ultimately action was taken in 1964 under S. 4 (1) (b) of the Act of 1956 although the provisions that were applied were provisions of the Act of 1923. It is contended that the notification of 1951 came to an end when the Act of 1923 was repealed in 1956 and no action could be taken in 1964 under the said notification. It is pointed out that by section 2 of the Act of 1956, certain acts done and taxes imposed are saved. But there is no mention in this section about the saving of any notification. The Assam Municipal (Amendment) Act of 1958 was passed to provide for saving of notifications.

9. Mr. Medhi however, points out that under section 26 of the Assam General Clauses Act where any enactment is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or by-law, made or issued under the repealed enactment, is saved. It is true, that there was a saving provision in the Act of 1956. But this was inserted only by way of an abundant caution. There is nothing in the Act of 1956 which expressly says that the notifications issued under the Act of 1923 would come to an end. I think that there is force in this argument and I accept the same. The notification issued in 1951 under the Act of 1923 was saved under section 26 of the Assam General Clauses Act when the Act of 1923 was replaced by the Act of 1956.

10. The second argument is that although the provisions of the Municipal Act can be applied to a town committee, it is not possible to apply all the sections. For example, section 1 of the Act of 1956 says "This Act may be called the Assam Municipal Act of 1956". It will be meaningless to apply this section to a town committee although under S. 336 (1) (d) of the said Act, any section of the Act can be applied to a town committee. It is argued that section 4 (b) cannot be applied unless action is taken under section 4 (a). I am, however, not prepared to accept this argument. Any provision of the Municipal Act can be applied to a town committee and I find section 4 (b) is not inapplicable. If it is applied, the town committee will be treated as a Municipal Board by legal fiction and any local area can be included within the town committee as if it was a municipality.

11. But there is another aspect of the matter. If Section 4 (1) (b) is applied to frustrate the purpose of Section 334 of the Act of 1956, the notification applying Section 4 (1) (b) will amount to colourable legislation. Colourable legislation means a law which is pretended to be in exercise of undoubted power and which in fact is a law on a prohibited field. Under Section 334, a town committee is constituted when "improved arrangements are required within a specified area." If Section 4 (1) is applied by a notification in order to include an area already having arrangements, better than what can be provided, the notification will certainly amount to a colourable legislation. In the present case in the affidavit of the petitioner, it is said in Paragraph 3, that the amenities and facilities provided in the headquarters area are superior in standard to those available in any modern town in this State or outside. In the

affidavit filed by the Chairman of the town committee, it is not stated what kind of amenities and facilities the town committee can provide which the petitioner has not been able to provide itself. It is quite obvious from a reading of section 334 of the Act of 1956, that the provision for the constitution of a town committee does not envisage inclusion within a town committee jurisdiction of any developed area.

12. It is, therefore, held that the Government notification No. LML. 247/62/103 dated 30-9-64 including the headquarters area of the petitioner is a piece of colourable legislation and as such it is struck down, so far as the headquarters area is concerned. The petition is allowed. There will be no order as to costs.

13. K. C. SEN, J.: I agree.

Petition allowed.

AIR 1970 ASSAM & NAGALAND 43 (V 57 C 9)

S. K. DUTTA, C. J.
AND K. C. SEN, J.

Lt. Col. G. K. Apte and others, Petitioners v. Union of India and others, Respondents.

Criminal Revn. Nos. 63, 87, 112 and 143 of 1968, D/- 22-5-1969, against order of Spl. J., Gauhati, D/- 29-4-1968.

(A) Criminal Law Amendment Act (1966), S. 5 (1) (a) — Accused charged and tried with person not amenable to military, naval or air force law — Charge-sheet submitted and trial commenced long before 30-6-66 — Proceedings can be continued by Special Judge even if charges had been framed after 30-6-66 — Word 'charged' in section means only the submission of a charge sheet before that date and not the framing of a charge by the court. (Para 4)

(B) Criminal Law Amendment Act (1966), S. 5 (1) (a) — Applicability — Accused appearing in court before 30-6-66 in obedience to summons — Section applies to the case even though some of the documents referred to in S. 173, Criminal P. C. were not given to accused even long after 30-6-66 — In view of the fact that 'trial' under S. 251-A (1), Criminal P. C. begins as soon as the accused appears or is brought before court trial in the case must be taken to have commenced long before 30-6-66 when the accused appeared in court — Criminal P. C. (1898) S. 251-A (1). (Para 5)

(C) Criminal P. C. (1898), Ss. 196-A (2), 4 (n) and 221 — Prosecution for conspiracy to commit offence under S. 5 (2), Prevention of Corruption Act and also for offence under that section — Sanction not

obtained in respect of conspiracy — Prosecution must fail in respect of both offences — Prevention of Corruption Act (1947), S. 5 (2).

Where the accused is charged for two offences, namely (1) conspiracy to commit an offence under S. 5 (2), Prevention of Corruption Act and (2) the offence under that section committed in pursuance of that conspiracy both the charges must fail if there is no sanction under S. 196-A (2) in respect of the offence of conspiracy which is a non-cognizable one. (Para 17)

A man who commits an offence under sections 161 or 165 or 165A of the Indian Penal Code can be punished either under section 5 (2) of the Prevention of Corruption Act or under the said sections of the Indian Penal Code. If the offence is investigated under section 156, Criminal Procedure Code as a cognizable offence, the court can punish only under those sections of the Penal Code and the prescribed punishment is imprisonment of either description for a term which may extend to three years or with fine or with both. But if the offence under those sections is to be punished under section 5 (2) of the Prevention of Corruption Act, the investigation must be under the Act and in that case no police officer below the rank of a Deputy Superintendent of Police can investigate it without the order of a Presidency Magistrate or Magistrate of the first class, as the case may be. An offence punishable under section 5 (2) of the Act is non-cognizable as section 156, Criminal Procedure Code which authorises an officer in charge of a Police Station to investigate a cognizable offence without the order of a magistrate, will not apply to investigation of an offence made under the Act.

(Paras 14, 15)

The offence of 'misconduct' as defined in section 5 of the Act has a very wide meaning. It includes the offences under sections 161, 165, and 165A, Indian Penal Code and some more offences. The Prevention of Corruption Act creates two new rules of evidence, one under S. 4 and the other under section 5 (3), of an exceptional nature and contrary to the accepted canons of criminal jurisprudence. These sections introduce an exception to the general rule as to the burden of proof in criminal cases and shift the onus on to the accused. Section 5 (2) prescribes a very severe punishment. In view of all these, the investigation into an offence of misconduct which is punishable under section 5 (2) has been left to police officers of high rank and consequently such an offence is non-cognizable. AIR 1955 SC 196, Rel. on. (Para 16)

No question of remitting the case for reframing of charges can arise in the case

as the charge of conspiracy refers to a non-cognizable offence only and not to cognizable as well as non-cognizable offence. Such a charge cannot exist in the eye of law as the court could take no cognizance of such a conspiracy without sanction under section 196A (2) of the Criminal Procedure Code. Hence the charges must be quashed. AIR 1961 SC 1241, Distinguished. (Para 18)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 1241 (V 48) =

1961 (2) Cri LJ 302, State of A. P.

v. Kandimalla Subbiah

18

(1955) AIR 1955 SC 196 (V 42) =

1955 Cri LJ 526, H. N. Rishbud

v. State of Delhi

10, 11, 14, 16

N. C. Malkani, S. K. Sen, A. R. Banerjee (In No. 63), P. Chaudhuri, B. K. Goswami, M. S. Pathak (In No. 87); D. Pathak, P. P. (in No. 112) and J. Choudhuri, P. C. Kataki (in No. 143), for Petitioners; B. C. Barua, Advocate General, A. Singh P. P., D. Pathak, P. P. (in Nos. 63, 87 and 143), G. Bhattacharjee, B. K. Goswami, P. C. Deka, B. C. Barua (in No. 112); for Opposite Parties.

DUTTA, C. J.: This is a revision petition. The petitioner's case is that he had been serving in the Indian Army as a Commissioned Officer for 23 years and pensioned off since 1st December, 1967. In the year 1960 the Central Government decided to construct roads on the northern corners of India with one of the headquarters at Tezpur under the command of Brigadier O. M. Mani, Chief Engineer and with such headquarters at Dibrugarh, Along and other places in North East Frontier Agency under Engineer Commanders. The petitioner was one of such Engineer Commanders and posted at Dibrugarh from November 1960 to 2nd April 1962 under the said Chief Engineer, as a Division Commander, local purchases of stores required for the construction of roads, bashes, bridges and culverts, materials like bricks, broken bricks, bamboos thatch, timbers and sand etc. These materials had to be removed from Dibrugarh to Lekhabali, Sonarighat, Deorighat and other places beyond the river Brahmaputra and to be air-lifted to Along and other places in North East Frontier Agency from Mohanbari. The petitioner was authorised to direct local purchases of the said materials up to the extent of Rs. 10,000/- per each supply order to be issued by the petitioner under his signature only and he was also authorised to enter into a contract to the extent of Rs. 5,00,000/-. The construction of the roads was treated as an emergency work and hence acceptance of the supply quotations and purchases on negotiations from suppliers were permitted and quotations from the suppliers were not insisted upon.

On the 5th July, 1963 that is more than one year after the petitioner was transferred to Roorki as Commander of the G. R. E. F. Centre, the Superintendent of Police of the Special Police Establishment, C. I. A., New Delhi filed a first information report alleging that the petitioner and one Israil Khan had by manipulation of quotations caused supply orders to be issued in the name of Israil Khan and Sons in which they were interested, giving exorbitant rates. It was alleged that the petitioner abused his position as a public servant in the matter of purchase of materials and also in carriage of stores by boats across the Brahmaputra and thereby committed misconduct in the discharge of his duties. On these allegations a Special Judge by order dated the 29th April, 1968, framed charges against the petitioner and this revision petition has been filed for quashing the same.

2. It is necessary to mention certain dates to show how the case progressed during the course of nearly six years. The first information report was submitted on 5-7-63, and the accused was put under suspension in October of that year. The statements of witnesses were recorded from the 10th July up to the 13th October, 1964. Sanction for prosecution under Section 6 of the Prevention of Corruption Act 1947 (hereinafter called the Act) was granted by the Government on 3-9-64 and on 21-10-64 chargesheet was filed in Court. The accused was summoned to appear in Court in June, 1965 and some documents under Section 173, Criminal Procedure Code were filed on the 18th November, 1966. As the accused was not given copies of the said documents, in April 1967, he filed an application for supply of relevant documents and the Court passed an order on 15-5-67 for the supply of such documents to the accused.

The prosecution moved this Court against the order of the Judge dated 15-5-67 and this Court dismissed the petition on 12-9-67. The accused also moved this Court for quashing the proceedings and this Court dismissed the petition on 12-4-68. The charges were framed on 29-4-68 and against this order framing the charges, this Court was moved on 1-5-68 by a petition which is before us now. The accused has first been charged of conspiracy to commit an offence punishable under Section 5 (2) of the Act. Secondly he has been charged for committing that offence in pursuance of the conspiracy.

3. The first point raised by Mr. Malkani is that under Section 549 of the Criminal Procedure Code the Central Government may make rules as to the cases in which persons subject to military,

naval or air force law shall be tried by a Court to which the Code applies or by court-martial. The Central Government framed rules under the said section called the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1952. It is not necessary to quote all the rules. It will suffice to say that under rule 3 of the said rules, when a person subject to military, naval or air force law, is brought before a Magistrate on accusation of an offence for which he is liable to be tried by court martial the Magistrate is not to proceed with the case unless he is moved to do so by the relevant military authority. He can, however, proceed with the case when he is of the opinion, for reasons to be recorded, that he should so proceed without being moved in that behalf by a competent authority.

Even in such a case, the Magistrate has to give notice of his opinion to the Commanding Officer and he is not to pass any order of conviction or acquittal or frame charge or commit the accused until the expiry of seven days from the service of the notice. The Commanding Officer can inform the Magistrate that in his opinion the accused should be tried by court-martial. Subsequent rules prescribe the steps to be taken thereafter. It is an admitted fact that in the instant case, these rules were not followed.

It is conceded that section 549, Criminal Procedure Code did not formerly apply to proceedings before a Special Judge. However, by the Criminal Law Amendment Act of 1966 (hereinafter called the Act of 1966), it is declared that for the purposes of the Criminal Law Amendment Act of 1952, by which the appointment of Special Judges is provided, the Court of a Special Judge shall be deemed to be a Court of ordinary criminal justice. Then sub-section (1) of Section 5 of the Act of 1966 reads as follows:

"5. (1) Notwithstanding anything contained in this Act or in the principal Act as amended by this Act,—

(a) cases pending immediately before the 30th day of June, 1966, before a special Judge in which one or more persons subject to military, naval or air force law is or are charged with and tried for an offence under the principal Act together with any other person or persons not so subject, and

(b) cases pending immediately before the said date before a special Judge in which one or more persons subject to military, naval or air force law is or are alone charged with and tried for an offence under the principal Act and charges have already been framed against such person or persons, shall be tried and disposed of by the special Judge."

4. In the case before us the charge-sheet was submitted on 21-10-64 and the charge was framed on 29-4-68. The petitioner is charged and being tried together with a person who is not subject to military, naval or air force law. The learned Advocate-General therefore submits that as the accused was charge-sheeted and his trial commenced before 30-6-66, clause (a) of the above section 5 (1) applies in this case and the proceedings can be continued before the Special Judge. Mr. Malkani's first contention is that the word "charged" means framing of charge and therefore the above provision does not save the present proceedings as admittedly the charge was framed after the 30th June, 1966. There is no force in this argument. The word "charged" can only mean the submission of the charge-sheet.

It is obvious from sub-section (2) that where the accused is subject to military, naval or air force law, and is alone charged and tried for an offence and charges have already been framed against such person before 30-6-66, the case shall be disposed of by the special Judge. This shows that a distinction is made between "charged" and "framing of charge."

5. Mr. Malkani next argues that "trial" begins only after the magistrate satisfies himself under Section 251-A (1) that all the documents referred to in Section 173, Criminal Procedure Code have been furnished to the accused. He points out that even long after the 30th June, 1966, some of the documents were not so furnished and the magistrate had to order the prosecution to furnish the same. Therefore, he contends that the trial did not begin before the 30th June, 1966. There is no force in this argument either. The word "trial" was defined in the Criminal Procedure Code of 1872 to mean proceedings after the framing of charge. This definition was dropped and now there is no fixed or universal meaning of the said word. It must be construed according to the particular context and intendment of each individual section. Under Section 251-A (1), the documents are to be given at the commencement of the trial when the accused appears or is brought before a magistrate. Therefore, obviously the trial under the section begins as soon as the accused appears or is brought before a magistrate. In this view of the matter the trial of the accused in the present case began long before the 30th June, 1966 and clause (a) of Section 5 (1) of the Act of 1966 applies to it.

6. The second contention of Mr. Malkani is that under Section 196A (2) of the Criminal Procedure Code, sanction of the State Government or a Chief Presidency Magistrate or District Magistrate

specially empowered is necessary for a Court to take cognizance of an offence of conspiracy where the object of the conspiracy is to commit any non-cognizable offence. In the present case charges have been framed on the allegation that the accused entered into a conspiracy to commit an offence under Ss. 5 (2)/5 (1) (d) of the Prevention of Corruption Act (hereinafter called the Act). A second charge has been framed on the allegation that the accused in pursuance of the said conspiracy committed offences under the said sections.

7. It is pointed out that Section 5A of the Act lays down that notwithstanding anything contained in the Code of Criminal Procedure, no police officer below the rank (a) in the Presidency towns of Madras and Calcutta, of an Assistant Commissioner of Police (b) in the Presidency town of Bombay, of a Superintendent of Police, and (c) elsewhere, of a Deputy Superintendent of Police shall investigate any offence punishable under S. 161, Section 165, or Section 165-A of the Indian Penal Code or under sub-section (2) of Section 5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the first class as the case may be, or make any arrest therefore without a warrant.

8. In Section 4 (n) of the Criminal Procedure Code, non-cognizable offence is defined as an offence for which a Police officer may not arrest without a warrant. It is submitted that an offence under Section 5 of the Act is non-cognizable as a police officer, which means any police officer, cannot make an arrest for it without a warrant.

9. Civil Revn. No. 53 of 1968 was heard by this Bench and it was submitted in that case on behalf of the petitioner that when the offence under Section 5 of the Act was investigated by an Inspector of Police, it would be non-cognizable, as the Inspector could not make an arrest without a warrant. But when it was investigated by a Deputy Superintendent of Police, who could arrest without a warrant, it would be cognizable. This argument was accepted. Now the contention is that an offence under Section 5 of the Act is always non-cognizable. It may be noted that in Civil Rule No. 53 of 1968 the offence was investigated by an Inspector of Police and in the present case it was investigated by a Deputy Superintendent of Police. The new contention is now for our consideration.

10. At this stage we may deal with the history of the offence of bribery by public officers. Under the Criminal Procedure Code, most of the offences relating to public servants as such were non-cognizable. As pointed out by the Supreme

Court in *H. N. Rishbud v. State of Delhi*, AIR 1955 SC 196, the underlying policy was that public servants who had to discharge their functions often under difficult circumstances, should not be exposed to the harassment of investigation against them on informations levelled, possibly by persons affected by their official acts, unless a magistrate was satisfied that an investigation was called for and on such satisfaction authorised the same.

There was wide-spread corruption among the public servants in the wake of the second World War due to various controls, licences etc. introduced for regulating trade and commerce. So, the Act was passed in 1947 and it was laid down in Section 3, that offences under Sections 161, 165 and 165-A of the Indian Penal Code would be deemed to be cognizable offences for the purposes of the Criminal Procedure Code notwithstanding anything to the contrary contained therein. It was also provided that a police officer below the rank of a Deputy Superintendent of Police would not investigate such an offence without the order of a Magistrate or make any arrest without warrant. This proviso was omitted when Section 5-A of the Act was inserted.

Then by the Code of Criminal Procedure (Amendment) Act 1955, Ss. 161 and 165 were made cognizable and these sections were therefore omitted from Section 3 of the Act by an amendment of 1955. The result is that the offences under Sections 161, 165 and 165-A of the Indian Penal Code have become cognizable for the purposes of the Criminal Procedure Code. But it is laid down in Section 5-A of the Act that no police officer below the rank of a Deputy Superintendent of Police can investigate any offence punishable under the above sections or Section 5 (2) of the Act without the order of a Presidency Magistrate or Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant.

11. In the *Rishbud* case, AIR 1955 SC 196 mentioned above, the Supreme Court observed as follows:

"When, therefore, the Legislature thought fit to remove the protection of the public servants, in so far as it relates to investigation of the offences of corruption comprised in the Act, by making them cognizable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a designated high rank."

12. The learned Advocate-General contends that the above observation means

that an offence punishable under S. 161 or 165 or 165A, Indian Penal Code is cognizable and Section 5A of the Act only provides a safeguard to public officers. He further contends that an offence punishable under Section 5 (2) of the Act is also cognizable under the Criminal Procedure Code as the punishment prescribed by it may extend to imprisonment for seven years and Section 5A only provides a safeguard.

13. We do not think that the interpretation given by the learned Advocate-General to the observation in question is correct. The offences of bribery and corruption on the part of public officers, have been made cognizable for the purposes of the Criminal Procedure Code. But when investigation is made into such an offence under the Act, a safeguard is provided in Section 5A of the said Act. The Supreme Court does not say that such an investigation will be an investigation into a cognizable offence.

14. The Criminal Law Amendment Act of 1952 provides for appointment of Special Judges for the trial of offences punishable under sections 161 or 165 or 165A, Indian Penal Code or section 5 (2) of the Act. As said above, the question is whether an offence punishable under S. 5 (2) of the Act is cognizable or non-cognizable. In the *Rishbud* case, AIR 1955 SC 196 the Supreme Court observed that offences were divided into two categories, cognizable and non-cognizable "for the purposes of investigation". Section 155 (2) of the Criminal Procedure Code lays down that no police-officer shall investigate a non-cognizable case without the order of a magistrate. Section 156 of the said Code confers powers on any officer in charge of a police-station to investigate a cognizable case without any order of a magistrate. Hence if an offence punishable under section 161 or 165 or 165A, Indian Penal Code is investigated under S. 156, Criminal Procedure Code as a cognizable offence, the court can punish only under those sections and the prescribed punishment is imprisonment of either description for a term which may extend to three years or with fine or with both.

15. The offence of "misconduct" punishable under Section 5 (2) of the Act is defined in Section 5. "Misconduct" as defined there includes not only the offences under Ss. 161, 165 and 165A of the Indian Penal Code, but also some new offences. Hence a man who commits an offence under Section 161 or 165 or 165A of the Indian Penal Code can be punished either under Section 5 (2) of the Act or under the said section of the Indian Penal Code. The punishment prescribed by Section 5 (2) of the Act is imprisonment for a term which shall not be less than one year and may extend to

seven years and also fine. The Court may, however, for special reasons to be recorded in writing impose a sentence of imprisonment of less than one year.

If an offence under Section 161 or 165 or 165A, Indian Penal Code is to be punished under Section 5 (2) of the Act, the investigation must be under the Act and in that case no police-officer below the rank of a Deputy Superintendent of Police can investigate it without the order of a Presidency Magistrate or magistrate of the first class, as the case may be. An offence punishable under Section 5 (2) of the Act is non-cognizable as section 156, Criminal Procedure Code which authorises an officer in charge of a police-station to investigate a cognizable offence without the order of a magistrate, will not apply to investigation of an offence made under the Act. Thus, if a public servant is accused of accepting bribe, an investigation can be made under S. 156 of the Cr. P. C. followed by a trial in which he can be convicted under S. 161, Indian Penal Code. But investigation may also be made under Section 5A of the Act followed by a trial in which Sections 4 and 5 (3) of the Act may be applied and the accused convicted under Section 5 (2) of the Act. The investigation under Section 156 Cr. P. C. will be an investigation into a cognizable offence whereas investigation under Section 5A of the Act will be an investigation into a non-cognizable offence punishable under Section 5 (2) of the Act.

16. The above interpretation appears to be in conformity with the policy of the legislature to give protection to the public officers. As explained above, the offence of "misconduct" as defined in Section 5 of the Act has a very wide meaning. It includes the offences under Sections 161, 165 and 165A, Indian Penal Code and some more offences. As pointed out by the Supreme Court in the Rishbud case, AIR 1955 SC 196 the Act creates two new rules of evidence, one under Section 4 and the other Section 5 (3) of an exceptional nature and contrary to the accepted canons of criminal jurisprudence. These sections introduce an exception to the general rule as to the burden of proof in criminal cases and shift the onus on to the accused. Section 5 (2) prescribes a very severe punishment. In view of all these, the investigation into an offence of "misconduct" which is punishable under section 5 (2) has been left to police-officers of high rank and consequently such an offence is non-cognizable.

17. In the instant case, two charges were framed against the petitioner. The first charge is for conspiracy to commit an offence punishable under Section 5 (2) of the Act. As such an offence is non-cognizable, sanction under Section 196A (2)

of the Criminal Procedure Code was necessary. No such sanction was obtained. Hence the charge for conspiracy cannot stand. The second charge was for commission of offence punishable under Section 5 (2) of the Act "pursuant to the conspiracy." As no cognizance of any case of conspiracy could be taken for want of sanction, the second charge must also fail.

18. The learned Advocate-General submits that if the charges are found to be invalid, the case should be sent back for reframing the charges. In this connection he cites the judgment of the Supreme Court in *The State of Andhra Pradesh v. Kandimalla Subbiah*, AIR 1961 SC 1241 in which the case was sent back for reframing of charges. In that case the charge of conspiracy referred to certain cognizable as well as to non-cognizable offences. Hence the question of reframing of the charge could arise. But in the case before us the charge of conspiracy refers to a non-cognizable offence only viz. an offence punishable under Section 5 (2) of the Act. Such a charge cannot exist in the eye of law as the Court could take no cognizance of such a conspiracy without sanction under Section 196-A (2) of the Criminal Procedure Code. Hence the charges must be quashed.

19. Mr. Malkani has strenuously argued that the materials before the Special Judge disclosed no offence for which any charge could be framed and that the charges are so vague that the accused could not defend himself properly. He submits that several distinct offences, arising out of different transactions have been amalgamated in one charge. He further submits that the trial has been conducted in a most dilatory and vexatious manner and hence the entire proceedings are liable to be quashed.

20. We need not go into the above questions as we are quashing the charges on the ground already stated.

21. The petition is allowed and the charges are quashed. The rule is made absolute.

22. Criminal Revisions Nos. 87, 112 & 143 of 1968—Criminal Revisions Nos. 87, 112 and 143 of 1968 are also heard with this petition as they all arise out of the same case. The Delhi Special Police Establishment submitted charge sheet against Lt. Col. G. K. Apte (petitioner in Criminal Revision No. 63 of 1968), Major Sappa Hamid, K. K. Banerjee, who was the Ordnance Officer, Contractor Israil Khan and three employees of the said contractor. The learned magistrate discharged K. K. Banerjee and the employees of the contractor but framed charges of conspiracy against Lt. Col. G. K. Apte, Major Sappa Hamid and Israil Khan. Major Sappa Hamid and Israil Khan have

They are to be found in paragraph 31 and we make no apology for producing them in extenso:

"It is not difficult to appreciate how and why the Legislature must have thought that it would be inexpedient either to define or describe in detail all the relevant factors which have to be considered in fixing the fair price of an essential commodity from time to time. In prescribing a schedule of maximum prices the Controller has to take into account the position in respect of production of the commodities in question, the demand for the said commodities, the availability of the said commodities from foreign sources and the anticipated increase or decrease in the said supply or demand. Foreign prices for the said commodities may also be not irrelevant. Having regard to the fact that the decision about the maximum prices in respect of iron and steel would depend on a rational evaluation from time to time of all these varied factors, the Legislature may well have thought that this problem should be left to be tackled by the delegate with enough freedom, the policy of the Legislature having been clearly indicated by S. 3 in that behalf.

x x x x x x

In deciding the nature and extent of the guidance which should be given to the delegate Legislature must inevitably take into account the special features of the object which it intends to achieve by a particular statute..... Having regard to the nature of the problem which the Legislature wanted to attack it may have come to the conclusion that it would be inexpedient to limit the discretion of the delegate in fixing the maximum prices by reference to any basic price."

17. It will now be useful at this stage to compare the provisions of Section 548 of the Calcutta Municipal Act with the provisions of Section 114 of the Corporation Act, with which we are concerned in this case. If sufficient guide-lines are found indicating the policy of the Legislature and the limits within which the tax should be imposed under Section 548 of the Calcutta Municipal Act, we do not see why sufficient guide-lines cannot be said to exist in the provisions of Section 114 of the Corporation Act as well. It is necessary to point out that the power to impose taxes, whether compulsory or optional, has been granted to the Corporation for the purposes of the Act which itself is a sufficient guideline according to the decision of the Supreme Court. The Corporation is charged with multifarious duties. It has to find funds, finances and revenues for discharging its functions effectively and efficiently. It knows as a representative body what are the needs of its people, residents and citizens and how they should be met. The proposals

for imposing the tax in the first instance are subject to objections which are required to be considered. They are further subject to scrutiny by the State Government at a responsible level. The rules to be made are again the responsibility of the State Government. All these safeguards in our opinion, therefore, are sufficiently defensive to protect the provision from challenge as a piece of excessive delegation of legislative power. There is a provision for budget. The budget is to be scrutinised by the Government. There is overriding power in the State Government under Section 144 of the Corporation Act to order exemption from payment of any tax in whole or in part in proper cases and in case of particular class of persons, and Government is also empowered to require the Corporation to reconsider its proposal of impost if it results in an unfair incidence or is injurious to the interests of the general public as provided under sub-section (2) of Section 144. The guide-lines that are to be sought in the legislation are to be found in such and similar provisions of the Corporation Act and we are satisfied that on the test laid down in the case of *Liberty Cinema*, AIR 1965 SC 1107, by the Supreme Court, it cannot be said that Section 114 suffers from the vice of excessive delegation of legislative power.

18. The learned counsel for the State has also relied upon some decisions taking a similar line. There are two decisions of this Court by which we are bound on similar provisions of the Act. The case of *Kisan v. Bhusawal B. Municipality*, AIR 1966 Bom. 15 was concerned with a challenge to the power of the municipal authorities to impose a tax on professions, trades, callings and employments. S. 73 of the Bombay Municipal Boroughs Act, 1925, which empowered the municipal borough to levy a profession tax was challenged on the ground of excessive delegation. The learned Chief Justice, delivering the judgment on behalf of the Court, observed:

"Since, however, the power to levy taxes is conferred on a Municipality for carrying on the local government it seems to us doubtful whether merely because the Legislature has left to each municipality to determine the rate at which it should levy the tax, it can be said that the Legislature has made excessive delegation of powers vested in it. Moreover, the power given to the Municipality to levy this tax on professions, trades, callings and employments is not absolute or uncontrolled, as has been argued. The maximum rate at which the tax can be levied is determined by Article 276 of the Constitution and it cannot exceed Rs. 250/- per annum. The tax can be levied only for purposes of the Act, that is, in order to enable the Municipality to discharge

the obligations imposed upon it by the Act. It must therefore have some relation to the needs and requirements of the Municipalities. The circumstances and conditions of Municipalities vary. In fixing the rate of tax the capacity of those on whom the liability will fall to bear the burden has to be taken into consideration. A rate of tax which residents of a large and prosperous city may be able to bear may be too heavy for people residing in a small town. Every town and city is also growing and as the duties and responsibilities of a municipality increase the need for additional taxation will arise. It is probably on account of these and other similar considerations that it has been left to each municipality to decide the rate at which it should levy the tax. Since, however, the rate of tax is to be determined having regard to the resources required by a municipality for performing its statutory duties, it cannot be said that the power given to a municipality to fix the rate is entirely unfettered or uncontrolled."

19. The other case is *Hirabhai Ashabhai v. State of Bombay*, AIR 1955 Bom. 185. In that case, Section 169 of the Bombay Municipal Corporation Act, 1888, which empowers the Commissioner to charge for water supplied by measurement was under challenge. With regard to this challenge, the Court observed:

"A delegation of certain functions is bad only if it amounts to an abdication by the Legislature. In other words, if the Legislature, instead of legislating itself, which is its own function, permits legislation by some other authority or again, to put it in different language, if the Legislature, without laying down the policy, permits the carrying out of a particular activity or a particular function by some authority, then it might be said that the Legislature has abdicated its own functions.

The contention that Section 169 constitutes a delegation of legislative function by the Legislature is therefore untenable."

20. The learned counsel for the respondent has made available to us a copy of the recent judgment of the Supreme Court in Civil Appeals Nos. 1857 and 1858 of 1967 in the case of *Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi*. A short note also appears with regard to this decision in 1968 S. C. N. 116=(AIR 1968 SC 1232). In that case the provisions of the Delhi Municipal Corporation Act, 1957, passed by Parliament and in particular the provisions in Section 113(2)(d) and (3) and Section 150 were under challenge as suffering from the vice of excessive delegation. Section 150 is more or less analogous to Section 114 of the Nagpur Corporation Act. Under Section 150 of the

Delhi Municipal Corporation Act, the Corporation has been empowered to levy any of the taxes specified in sub-sec. (2) of Section 113 by passing a resolution for the same and defining the maximum rate of the tax to be levied, the class or classes of persons or the description or descriptions of articles and properties to be taxed, the system of assessment to be adopted and the exemptions, if any, to be granted. Almost similar powers are given to the Nagpur Corporation under Sections 114 and 115 of the Corporation Act. Under the Delhi Act, as in the case of the Nagpur Act, a proposal to levy a tax is subject to sanction of the Central Government (under the Nagpur Act, it is subject to sanction of the State Government) and the actual rates can be determined under the Delhi Act by passing a second resolution. The learned Chief Justice pointed out the various provisions in the Delhi Act regarding the Corporation's functions and duties and the necessity of raising funds for the same and found that there was guidance and policy as to the ambit and incidence of taxes and the provision was within the bounds of permissible delegation. In a concurring opinion, Hidayatullah J. (as he then was) pointed out that the proper test to apply was whether the legislative will to impose the tax is adequately expressed so as to bind those who have to pay the tax. It was observed that the principle now advocated that the legislature must itself impose the tax by laying down the rate, the persons to be affected and the manner of levy and collection when it concedes power to Municipal Corporation appears to be a novel doctrine which has not been accepted even in the land where the doctrine about delegated legislation took its birth. It was further pointed out:

"Local bodies are subordinate branches of governmental activity. They are democratic institutions managed by the representatives of the people. They function for public purposes and take away a part of the government affairs in local areas. They are political sub-divisions and agencies which exercise a part of State functions. As they are intended to carry on local self-government the power of taxation is a necessary adjunct to their other powers. They function under the supervision of the Government. This supervision is considered necessary, because Municipal Councillors as a rule are unwilling to tax in a manner likely to affect themselves. House-holders seek to transfer burdens to tradesmen and vice versa. To insist that the legislature should provide for every matter connected with municipal taxation would make municipalities mere tax collecting departments of Government and not self-governing bodies which they are intended to be. Government might as well collect the

taxes and make them available to the municipalities. That is not a correct reading of the history of Municipal Corporations and other self-governing institutions in our country."

It was also observed:

"The learned Chief Justice has upheld Section 150 by pointing out certain in-built safeguards in the Act which, in his view, save it from being characterised as a piece of excessive delegation. With all due respects we think this is not the only approach to the problem. We do not wish to be understood as saying that the conferral of a power of taxation on Municipalities must always be accompanied by a detailed enumeration in the constituent Act of the rate of the tax, the persons to be taxed, the manner of the levy and collection, before it can be said that there are sufficient safeguards. Nor do we think that these matters cannot be left to the determination of the Municipal Corporation subject, of course, to such controls as the legislature may think necessary to effectuate its own will. While the provisions which have been characterised as safeguards (where found necessary) are desirable the proper test to apply is not the existence of safeguards but whether the legislative will to impose the tax is adequately expressed so as to bind those who have to pay the tax."

21. We have thus no doubt that the decision in *Liberty Cinema's case*, AIR 1965 S.C. 1107 and the latest decision in the case of the Municipal Corporation of Delhi, Civil Appeals Nos. 1857 and 1858 of 1967=1968 S.C.N. 116=(AIR 1968 SC 1232) are ample authority in support of the contention of the respondent that the provisions in the Nagpur Corporation Act are adequate to indicate the legislative policy and the reasonable limits within which the power to tax can be exercised, and therefore the sections under which the power is exercised cannot be considered as void or invalid on account of excessive delegation.

22. The only ground on which the levy was challenged having failed, it is apparent that the petition must fail and is accordingly dismissed with costs.

23. Leave to appeal to the Supreme Court asked for orally is rejected.

Petition dismissed;

Leave to appeal refused.

AIR 1970 BOMBAY 67 (V 57 C 9)

CHITALE AND NAIN, JJ.

Motilal Hirachand Marwadi, Appellant v. Sadabai w/o. Manikchand Bora and others, Respondents.

A. F. A. D. No. 352 of 1960, D/- 30-1-1968 against decision of Extra Assistant J., at Ahmednagar in Reg. App. No. 201 of 1957.

Civil P. C. (1908), O. 21, Rr. 92, 89 and 90 — Sale held during judgment-debtor's lifetime — Confirmed after death of judgment debtor — Omission to bring legal representatives on record — Sale is not vitiated. AIR 1952 Mad. 871 Diss.

Where in an execution proceeding certain property belonging to judgment debtor is sold when the judgment debtor was alive and party to the proceeding but the sale is confirmed subsequently after the death of the judgment debtor without bringing his legal representatives on record, then if the judgment debtor's estate was properly represented at the date of the sale, even if the sale was confirmed after the judgment debtor's death without bringing his legal representatives on record, such omission or failure to bring legal representatives on record does not affect the validity of the sale. This is because after sale is validly held, it is for the judgment debtor or his legal representatives to decide whether the provisions of Rule 89 or 90 of Order 21 Civil Procedure Code should be availed of or not, and if they are not availed of and if the Court confirms the sale, the validity thereof will not be affected even though the legal representatives of the judgment debtor, who died after the sale but before confirmation thereof, are not brought on record before confirmation of sale, as the jurisdiction of the Court is not affected thereby. AIR 1952 Mad. 871 Dissented. AIR 1955 Trav. Co. 92 & (1890) ILR 12 All. 440 (FB); (1895) ILR 17 All. 162, Ref.; AIR 1921 Bom. 385 & AIR 1936 Mad. 205 (FB); AIR 1961 Cal. 336 (FB) & AIR 1958 Mad. 317 & AIR 1958 Mad. 396 & AIR 1929 Oudh. 235. Ref. (Paras 20, 22)

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M. L. Pendse, for Appellant; G. N. Vaidya with G. S. Gupte, for Respondents (Nos. 1, 2 and 3); S. M. Mhamane for Miss Mina Bal, for Respondent (No. 1).

CHITALE, J.— The facts giving rise to this appeal, briefly stated, are as follows:

2. In Civil Suit No. 131 of 1923 money decree was obtained against Ratanchand Walchand and Hirachand Gambhirmal. It is not disputed that the decree was a joint and several decree against both these judgment-debtors. In execution of that decree, auction sale in respect of the property involved in the present suit was held on 23rd March 1944. The sale was confirmed on 14th October 1944. For some reasons which are not clear on record, the sale certificate was issued as late as 18th March 1953. It is not disputed that judgment-debtor Ratanchand Walchand died on 6th March 1935 i.e., long before the auction-sale in question was held. Judgment-debtor Hirachand Gambhirmal died on 21st April 1944 i.e. after the auction-sale in question, but within 30 days thereof. The plaintiff Manikchand Daulatram Bora filed the present suit on 10th August 1956 to recover possession of the three houses which are the subject-matter of the present suit on the basis of the sale certificate issued to him.

3. Defendant Motilal Hirachand Marwadi, who is the son of above-mentioned judgment-debtor Hirachand, by his written statement, Exhibit 10, contends that the suit is bad for want of necessary parties, it is barred by limitation, the debt for which the property was sold was avyavaharik, i.e. illegal and immoral, hence not binding on him, the decree in execution of which the sale was held is not binding on him as he was not a party to the suit, since he was not brought on record as Hirachand's heir in the execution proceedings, the auction sale is not

binding on him, and the present suit for possession is, therefore, not tenable.

4. The learned trial Judge held that the auction-sale in question was not binding on the defendant, inasmuch as he was not brought on record on the date of confirmation of the sale. In view of this finding, he dismissed the plaintiff's suit with costs. It may be mentioned here that the defendant's contentions that the debt for which the decree was passed was avyavaharik, that the suit was not tenable for want of necessary parties, were not pressed in the trial Court. Although the plea of limitation was taken in the written statement, no specific issue on that point was asked for in the trial Court.

5. The plaintiff preferred an appeal to the District Court, Ahmednagar. The learned Assistant Judge, who heard the appeal, held that the auction-sale in question was legal and valid inasmuch as judgment-debtor Hirachand was alive on the date of the sale, the fact that the heirs of the other judgment-debtor Ratanchand were not brought on record did not matter as the decree in execution of which the auction-sale was held was a joint and several money decree, and the fact that on the date of the confirmation of the auction-sale the present defendant was not brought on record as the legal representative of deceased judgment-debtor Hirachand did not vitiate the auction-sale. In view of these findings, he allowed the appeal, set aside the decree of the trial Court and decreed the plaintiff's claim.

6. In this second appeal, Mr. Pendse for the defendant contends that the view taken by the trial Court is correct and that of the lower appellate Court is wrong. Mr. Pendse invites our attention to Sir Dinshah Mulla's Commentary on Civil Procedure Code, Vol. I, 13th Edition, page 262. The learned author mentions that under the present Code of 1908 the words "fully satisfied" have been substituted for the words "fully executed". Mr. Pendse further relies on the learned author's observations at page 263 which are to the effect that the expression 'fully executed' gave rise to the question as to when a decree could be said to be "fully-executed". The learned author then refers to the conflicting decisions and observes:— "It was to remove this conflict of decisions that the word 'satisfied' has been substituted in the present section for the word 'executed'. The effect of this alteration in the language is to supersede the Allahabad decisions in so far as they hold that after attachment it was not necessary to bring the legal representatives on the record, for a decree cannot be said to be fully 'satisfied' merely because the property was attached".

7. Sub-section (1) of Section 50 of Civil Procedure Code 1908, reads thus:—

"50. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased".

8. In our opinion, Section 50 (1) merely enables the decree-holder to apply to the Court which passed the decree to bring the judgment-debtor's heirs on record, if he dies before the decree is fully satisfied, and may also pray for execution against the legal representatives. The decree-holder may continue the same execution application or may get it dismissed and file another execution application against the legal representatives of the deceased judgment-debtor. It is, however, important to note that it is only the Court that passed the decree under execution that can bring the judgment-debtor's legal representatives on record and can initially order execution against them, and then if necessary transfer the decree to another Court for execution. The observations of the learned author relied upon by Mr. Pendse do not touch the point which we are required to decide. The material point that arises for our consideration is: If in execution proceedings certain property belonging to a judgment-debtor was sold when he i.e. judgment-debtor was alive and was a party to the execution proceedings, but if that sale was subsequently confirmed after the judgment-debtor's death, without bringing his legal representatives on record, is such sale invalid and not binding on the judgment-debtor's legal representatives? Order 21, Rule 92 of Civil Procedure Code provides that where no application is made under Rule 89, Rule 90 or Rule 91 of Order 21 or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute. On the wording of this rule, it is quite clear that a statutory duty is cast on the Court to confirm a sale held in execution proceedings, if no application to set aside that sale is submitted under Rule 89, 90 or 91 of Order 21, and also if such an application is made and disallowed. Sir Dinshah Mulla in his commentary under Order 21, Rule 92 at page 1193, Civil Procedure Code, Vol. II, observes:—

"Confirmation of sale under this rule does not require an application by the auction-purchaser. It is a statutory duty cast on the Court, and if an application is filed, it is not subject to any limitation."

9. In the relevant foot-note, two Madras decisions are referred to. They are *Veda Goundar v. Arunachallam*, AIR 1958, Mad. 317 and *Lakshmi Ammal v. Thangaraju Padayachi*, AIR 1958 Mad.

396. Mr. Pendse for the defendant does not challenge the correctness of this proposition. He, however, points out that there is difference of opinion as to the legality of an auction-sale confirmed without bringing legal representatives of the judgment-debtor on record. Our attention is invited to *Kamakhyia Dutt Ram v. Shyam Lal*, AIR 1929 Oudh 235, particularly to the observations at page 237. The facts in this decision were similar to those in the present case. The relevant observations are at page 237, and they are as follows:—

"The sale had taken place in the lifetime of the judgment-debtor and there are no provisions in the Civil Procedure Code which require legal representatives of a judgment-debtor, who has died after the sale, to be brought on the record for the purposes of confirmation. The case may be different if a judgment-debtor dies before the date of the sale and the sale taken place behind the back of his representatives, but we express no opinion on that point. It may be mentioned that the Deputy Commissioner had directed the issue of notice to the representatives of the deceased judgment-debtor under his order dated 11th November 1925 (Exhibit 6). Unfortunately notice was not served. This fact, however, does not affect the validity of the confirmation."

In addition to the reasoning given in the above quotation, we may state that an auction-purchaser gets his title because of the auction-sale itself, and not because of the confirmation. It is true that the title which an auction-purchaser at a Court-sale gets is in a sense contingent, because it is subject to confirmation of the sale, but it cannot be said that he gets title because of the confirmation. Considering the provisions of Order 21 of Civil Procedure Code, it is clear that once an auction-sale is validly held, the auction-purchaser is not required to submit an application to the Court praying for confirmation of the sale. In other words, no legal duty is cast on the auction-purchaser to apply for confirmation. Rules 89 and 90 of Order 21 Civil Procedure Code merely give a judgment-debtor an opportunity to have the sale set aside on depositing in the executing Court the amount mentioned in rule 89 or to challenge the validity of the sale, if he desires to challenge it, on the ground mentioned in Rule 90. As already pointed out, a statutory duty is cast on the Court to confirm a sale, if the same is not set aside by an application under Rule 89 or 90 or 91 of Order 21 of Civil Procedure Code. In view of this legal position, no representation for the judgment-debtor's property is necessary at the stage of confirmation of a court sale. It is a well-established prin-

ciple, that where execution proceeds against the property of a judgment-debtor and any substantive step affecting the interest of the judgment-debtor in such property is taken in execution proceedings, there must be proper representation for the property of the judgment-debtor, but once the sale has taken place, there seems to be no principle on which it can be said that such representation is necessary at the stage of confirmation of the sale, which must follow as a matter of course, if the judgment-debtor does not challenge the sale by taking suitable steps or the sale is not otherwise set aside under Rule 89 or 91 of Order 21, Civil Procedure Code. It cannot, therefore, be said that a court-sale, which is properly held while the judgment-debtor himself was on record, but died after the sale and his legal representatives were not brought on record at the time of the confirmation of the sale, is not valid.

10. Mr. Pendse for the defendant relies on *Arunachala Chettiar v. Vadla Koundan*, AIR 1952 Mad. 871. In this case also, the facts are similar to the facts of the present case. The learned Judge observes:—

"The position of purchaser after the sale and before the confirmation is that he has only a sort of inchoate interest which might become a vested interest in the property after confirmation".

11. Mr. Pendse relies on these observations to contend that the auction-purchaser gets no title until the sale is confirmed. We are unable to accept this contention. In our opinion, it would be more accurate to say that an auction-purchaser gets title by the auction-sale, but it remains contingent until the sale is confirmed. In the above-mentioned Madras decision, the learned Judge relies on Order 21, Rule 92(3), Civil Procedure Code to hold that an auction-sale cannot be confirmed in the absence of the legal representatives of the judgment-debtor. He observes:—

"In my opinion an answer to the question raised by the learned Advocate for the appellant that the judgment-debtor's legal representatives are not necessary parties to a confirmation of sale is met by the language of Order XXI, Rule 92(3). Under that sub-clause a suit to set aside an order made under rule 92 shall not be questioned in a suit by any person against whom such an order is made is significant as indicating that if even an order of confirmation is made under Rule 92(1), it must be an order made against a person which implies that the confirmation order is made against the judgment-debtor or in case of his death, against his legal representatives. The very object of that rule is to prevent the judgment-debtor, and in case he dies, his legal representatives, from agitating the

question of the finality of the sale in a later proceeding and to compel them to take proceedings under Rule 89 or 90 in cases in which the money is deposited or the requirements of Rule 90 are satisfied. The decision of the Oudh Court, overlooked, in my opinion, the language of clause (3) of Rule 92."

11-A. With respect, we are unable to agree with this reasoning. As already pointed out, Rules 89 and 90 of Order 21, Civil Procedure Code confer on a judgment-debtor the right to have the sale set aside either by payment of the necessary amount or by challenging the sale on the ground of material irregularities and/or fraud, but if the judgment-debtor fails to exercise the right conferred by these rules, confirmation of sale must follow as a matter of course. Neither the decree-holder, nor the auction-purchaser is required to take any step or to obtain any judicial order of the executing Court in order to have the auction-sale confirmed. It is because of the above right which is conferred on the judgment-debtor that he is precluded from challenging the validity of the sale by a substantive suit. Sub-rule (3) of rule 92 does not, in our opinion, indicate in any way that because the confirmation of an auction-sale precludes the judgment-debtor from subsequently challenging the sale by a suit, it necessarily follows that the order confirming the sale cannot be passed unless the legal representatives of the judgment-debtor, who was alive at the date of the sale, are brought on record before the order confirming the sale is passed. As already pointed out, while confirming a court-sale the executing court does not pass any further judicial order adversely affecting the judgment-debtor's interest but it merely discharges a statutory duty and records a legal consequence that must follow. Sub-rule (3) of Rule 92 also merely mentions the legal position arising on confirmation of a court-sale. It is urged that the legal representatives of the deceased judgment-debtor may not be aware of the auction-sale held against the judgment-debtor. That may or may not be so, but that would not confer any additional right on the legal representatives of the judgment-debtor — any higher rights than those of the judgment-debtor himself.

12. In the above-mentioned Madras decision, the learned Judge further proceeds to observe that there are decisions to the effect that before an auction-sale is confirmed, the interest of the judgment-debtor can be attached by other decree-holders. In view of this, the learned Judge observes:—

"The confirmation order therefore has got a double operation of divesting the judgment-debtor of his title in the property and vesting it retrospectively in

the auction purchaser to take effect from the date of the sale."

13. In our opinion, it would not be correct to say that the title of the judgment-debtor passes on to the auction-purchaser on the date of the confirmation of the auction-sale. It may be that decree-holders other than the decree-holder who has brought the property to sale may attach the judgment-debtor's interest, whatever it is, because in case the auction-sale is set aside, such attachment may be effective. That would not, however, have any bearing on the question of the validity of the sale. The validity of a Court-sale must depend upon whether at the stage of confirmation in the case of such a sale validly held representation for the judgment-debtor's estate is necessary. As pointed out above, confirmation must follow as a matter of course, if the judgment-debtor does not choose to challenge the sale or have it set aside on paying the necessary amount. It is for the judgment debtor or his legal representatives to exercise the above right to have the sale set aside within the time provided by law and on failure to exercise that right, confirmation of sale must follow as a matter of course and whether the legal representatives of the judgment-debtor were brought on record before confirmation of the sale or not would be immaterial, representation for the estate being unnecessary merely for confirmation of sale, that being in such cases a legal consequence that must follow.

14. In the above-mentioned Madras decision, at page 872 the learned Judge observes:—

"In a case where the judgment-debtor or his legal representatives are parties to the proceedings they would undoubtedly be aware of the sale and within the period of limitation provided by law, namely, thirty days, they would be in a position to take steps to have the sale set aside either by deposit of the money, or if the sale was vitiated by irregularities, by an application under Order XXI, Rule 90".

15. In our opinion, the mere fact that the legal representatives of a judgment-debtor, who was alive and a party to the execution proceedings at the date of the auction-sale, may not be aware of that sale would not affect the legal position. Legal consequences in respect of any right or property do not cease to follow because of such ignorance. The legal representatives step into the shoes of the judgment-debtor, they have to exercise their legal rights within the period of limitation and ignorance as to the rights and liabilities of their predecessor cannot be a ground to hold that the legal representatives of such a judgment-debtor would be necessary parties at the date of the confirma-

tion of the auction sale held while the judgment-debtor was a party to the execution proceedings. Once that period of limitation begins to run, it would not stop merely by the death of the judgment-debtor.

16. Mr. Pendse referred to the Full Bench decision of Calcutta High Court in *Shanti Devi v. Khandubala Dasi*, 65 Cal. W.N. 171=(AIR 1961 Cal. 336) (FB). This decision is distinguishable on facts. In that case, the judgment-debtor died after the issue of the proclamation of sale, but before the date of the sale itself. Reliance is placed on the observations at page 178, (of Cal. W.N.)=(at p. 340 of AIR) which are as follows:—

"A court sale of the property of the judgment-debtor after his death without impleading his legal representative does not bind the representative, at whatever stage of the execution proceedings the judgment-debtor might have died and irrespective of whether the sale was in execution of a money decree or a rent decree or a final decree for sale in a mortgage suit. Such a sale does not bind his representative where the death takes place after the commencement of the proceedings for execution of a money decree."

17. In our opinion, there is a good deal of difference in an auction-sale held without bringing the judgment-debtor's heirs on record and an auction-sale held with the judgment-debtor on record to represent the estate, but merely confirmed after his death without bringing his legal representatives on record. At the date of sale, which is a substantive step in execution, representation for the estate of the judgment-debtor is essential and absence of such representation will affect the validity of the sale, but such representation is not, in our opinion, necessary for mere confirmation of an auction-sale otherwise validly held.

18. The learned appellate Judge relied on *Aba Khesaji v. Dhondabai*, (1895) ILR 19 Bom. 276, *Sheo Prasad v. Hiralal*, (1890) ILR 12 All. 440, and *Abdur Rahman v. Shankar*, (1895) ILR 17 All. 162. Mr. Pendse refers to Sir Dinshah Mulla's commentary, on Civil Procedure Code, under S. 50, and points out that these decisions may not be said to lay down the correct law after the amendment to Section 50. These decisions go to the extent of holding that if the property was properly attached with notice to the judgment-debtor, subsequent proceedings in execution could not be held to be void even if the judgment-debtor dies subsequent to the attachment and his legal representatives are not brought on record. In the present case, we need not go to that length. On the facts stated above, it is clear that the judgment-debtor did represent his estate at the date of the sale.

The learned trial Judge relied upon *Shankar Daji v. Dattatraya Vinayak*, ILR 45 Bom. 1186=(AIR 1921 Bom. 385), *Kanchanmalai Pathar v. Shahaji Raja Sahib*, ILR 59 Mad. 461=(AIR 1936 Mad. 205) (FB), and *Ajablal v. Haricharan*, ILR 23 Pat. 528=(AIR 1945 Pat. 1) (FB). As the lower appellate Court points out, these cases are distinguishable on facts. During arguments, Mr. Pendse further referred to ILR 59 Mad. 461=(AIR 1936 Mad. 205) (FB), and *Anni Marie Fernandez v. Mathavan Madhavi*, AIR 1955 Trav. Co. 92. These cases also are distinguishable on facts. ILR 59 Mad. 461=(AIR 1936 Mad. 205) (FB) is no doubt a Full Bench decision, but that was a case in which sale was held after the death of the judgment-debtor without bringing judgment-debtor's heirs on record. The terms of the proclamation of sale were settled and sale was ordered while the judgment-debtor was alive and a party to the execution proceedings, but he died before the sale was actually held. At page 471 of the report, (ILR Mad.)=(at p. 206 of AIR), Cornish J. observes:—

"On the death of a judgment-debtor the decree cannot be executed against him, for there is no such thing as execution against a dead man. His property remains subject to the decree and to an attachment upon it, notwithstanding that it has passed to his heir or to a surviving coparcener or if there is an executor, has vested in his executor. But his death effects a change in the parties liable to execution. The legal representative has stepped into the place of the deceased judgment-debtor, with the liability under the decree, though his liability is limited to the extent of the deceased's assets which have come into his hands and have not been duly administered by him. In these well-known principles lies the reason for the provision in Section 50 enabling the decree-holder whose decree has not been fully satisfied prior to the death of the judgment-debtor to apply to the Court to execute the decree against the legal representative. They also explain the notice required by Order XXI, Rule 22.

"It is quite new to me",

said Cotton L. J. in *In re Shephard*, *Atkins v. Shephard*, (1889) 43 Ch. D. 131,

"to hear it alleged that there is anything in the rules to enable the Court to make an order against a person who is not a party to the action. It is against all principle to proceed against him until he has been brought before the Court or all proper steps to bring him before the Court have been taken ineffectually."

Those observations appear to me to be very pertinent to the case where the Court proceeds in execution of a decree made against A to sell property which on A's death has devolved on B without an

opportunity to B of coming before the Court to show cause why execution should not proceed against him."

19. The learned Judge then refers to the conflict of judicial opinion on the question whether application under S. 50 and notice under Order 21, R. 22 Civil Procedure Code are the foundation of Court's jurisdiction. That was the main question considered by the Full Bench. The observations quoted above indicate that the underlying principle is that there must be representation for the property to be proceeded against in execution proceedings. As pointed out above, once sale is validly held in execution proceedings, with regard to the property thus sold, there is no further execution to be ordered by the Court, hence the question of representation for the property already sold does not arise at the time of confirmation of such a sale. The judgment-debtor or his legal representatives have the rights conferred by Rules 89 and 90 of Order 21 Civil Procedure Code, but if these rights are not exercised by the judgment-debtor or his legal representatives, confirmation of sale must follow as a matter of course, unless the sale is set aside by the Court on an application under R. 91 of Order 21, Civil Procedure Code. The ratio of the decision in ILR 59 Mad. 461=(AIR 1936 Mad. 205) (FB) seems to have been summarised in the following observations by Varadachariar J. at page 494 (of ILR Mad.)=(at p. 214 of AIR):—

"Again, it is not justifiable to assume that, once the proclamation of sale has been settled after notice to the judgment-debtor, everything necessary to safeguard his interests has been done. There are provisions in the Code which secure very considerable practical advantages to the judgment-debtor right down to the moment of sale and, under some of these, it is for him to take the initiative and not merely to oppose an application by the decree-holder, e.g., Order XXI, Rules 69 and 83; and, if the sale is to take place without any legal representative on record, these advantages will be denied to him."

20. As already pointed out above, after sale is validly held, it is for the judgment-debtor or his legal representatives to decide whether provisions of Rule 89 or 90 of Order 21 Civil Procedure Code should be availed of or not, and if they are not availed of and if the Court confirms the sale, the validity thereof will not be affected even though the legal representatives of the judgment-debtor, who died after the sale but before confirmation thereof, are not brought on record before confirmation of sale, as the jurisdiction of the Court is not affected thereby. The above Madras decision does not in our opinion help the defendant in

this case; the point before Madras High Court was different.

21. In AIR 1955 Trav. Co. 92 also the sale was held after the death of the judgment-debtor. That distinguishes the decision.

22. In our opinion, if the judgment-debtor's estate was properly represented at the date of the sale, even if the sale was confirmed after the judgment-debtor's death without bringing his legal representatives on record, such omission or failure to bring legal representatives on record does not affect the validity of the sale for reasons which we have indicated above.

23. The next question for consideration is whether the plaintiff's claim for possession of the entire suit property can be decreed. Mr. Pendse for the defendant contends that at best the auction-purchaser got the right, title and interest of only Hirachand, hence the plaintiff would not be entitled to the possession of the entire suit property. It was stated in the Courts below and also before us that the other judgment-debtor Ratanchand died without leaving any known heirs or legal representatives. It is urged that even if there are no heirs, Ratanchand's interest would pass on to the State and the plaintiff would not be entitled to possession of the property that belonged to Ratanchand. Ratanchand died before the auction-sale itself was held, hence it would be correct to say that the auction-sale would not be binding on Ratanchand or his legal representatives. We are, however, required to find out whether decree for possession in respect of the entire suit property can be passed against the present defendant. The defendant in his written statement, Exhibit 10, nowhere states that he is not in possession of the entire suit property, nor does he state that Ratanchand has any interest in the suit property. If it is clear on the defendant's own written statement that he is in possession of the entire suit property and if his right, title and interest has passed on to the auction purchaser i.e. the present plaintiff, there is no reason why decree for possession of the entire suit property should not be passed in favour of the plaintiff. Ratanchand's legal representatives — if any — may, if they are so advised, dispute the plaintiff's right to possession, if they have a remedy available at law i.e., if it is within limitation. So also the State may, if it thinks proper, take the necessary steps, if it is correct to say that Ratanchand's property has escheated to the State. We are not concerned with those questions in this appeal.

24. For reasons indicated above, we confirm the decision of the lower appellate Court and dismiss the appeal with costs.

25. A copy of this judgment may be sent to the State Government.

Appeal dismissed.

AIR 1970 BOMBAY 73 (V 57 C 10)

NAIN, J.

Gotiram Nathu Mendre, Appellant v. Sonabai w/o. Savleram Kahane and others, Respondents.

A. F. A. D. No. 331 of 1960, D/- 16-7-1968 against decision of Asst. J., Ahmednagar in Appeal No. 284 of 1957.

(A) Limitation Act (1908), S. 91—Limitation Act (1963), S. 59 — Voidable sale, setting aside — Person other than a reversioner at whose instance sale is voidable must sue to set aside the sale.

Where a sale is voidable at the instance of a person interested he can only get it set aside by a suit. This will however not apply to a reversioner challenging a sale by a limited owner. A reversioner may treat such a sale as a nullity without the intervention of a Court. A person other than a reversioner must sue to set aside a voidable sale even if he is not a party to the instrument or a person claiming under a person who has executed the instrument and even if the onus of proving circumstances establishing the voidability of the instrument is not upon him, but on the person affirming the instrument. A sale by an executor in contravention of the terms of the will being voidable under S. 307 of the Succession Act the legatee has to sue to set aside the sale. AIR 1918 Bom. 188 (FB) Foll., AIR 1920 Bom. 1 (FB) & (1907) ILR 34 Cal. 329 (PC) & (1891) ILR 14 Mad. 26 & (1912) ILR 36 Mad. 575 Ref. (Paras 17 and 18)

(B) Succession Act (1925), S. 307(2) — Word restriction includes and covers a total prohibition. AIR 1954 S.C. 634 & AIR 1960 S.C. 430 Rel. on. (Para 13)

Cases Referred: Chronological Paras

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| (1960) AIR 1960 SC 430 (V 47)= | |
| (1960) 2 SCR 375, Narendra Kumar v. Union of India | 12 |
| (1954) AIR 1954 SC 634 (V 41)= | |
| Madhya Bharat Cotton Association, Ltd. v. Union of India | 12 |
| (1953) AIR 1953 Bom. 424 (V 40)= | |
| ILR (1953) Bom. 1055, Gangadhar Balkrishna v. Dattatraya Baliram | 19 |
| (1920) AIR 1920 Bom. 1 (V 7)=ILR | |
| 44 Bom. 742 (FB), Fakirappa Limanna v. Lumanna Mahatu Dhamnekar | 16 |
| (1918) AIR 1918 Bom. 180 (V 5)= | |
| ILR 42 Bom. 626, Laxmava v. Rachappa | 16 |
| (1918) AIR 1918 Bom. 188 (V 5)= | |
| ILR 42 Bom. 638 (FB), Narsa- gauda v. Chawagauda | 15, 16, 19 |

- (1912) ILR 36 Mad. 575=23 Mad.
LJ 306, Ganapati Aiyar v. Siva-
malai Goundan 15
(1907) ILR 34 Cal. 329=34 Ind.
App. 87 (P.C.), Bijoy Gopal
Mukerji v. Krishna Mahishi
Debi 14, 16, 19
(1891) ILR 14 Mad. 26, Unni v.
Kunchi Amma 15

Y. S. Chitale, for Appellant; R. B. Kotwal, for Respondent No. 1.

JUDGMENT:— This is a second appeal by the original plaintiff. Full facts leading to this appeal are set out in the judgment dated 21st December 1966 of Mr. Justice M. V. Paranjpe who framed certain issues and referred the same for trial partly to the lower appellate Court and partly to the trial court, as will appear a little later. But for the purpose of the contentions taken before me I may perhaps set out a few of the facts which may be relevant for the purpose of those contentions.

2. The plaintiff instituted the suit from which the present appeal arises against four defendants in the court of the learned Civil Judge, Junior Division, Ahmednagar at Sangamner for possession of a house mentioned in para 1 of the plaint. It was alleged that the house originally belonged to one Bhika Hari. Bhika Hari married six wives but had no son. On 7th December 1934 he made a will bequeathing this house to his daughter's son Shivnath. The will provided that his last wife Sakhubai should take the income during her lifetime as guardian of Shivnath for maintenance. Shivnath was the son of Kondabai, the daughter of Bhika Hari from his third wife, and not from Sakhubai. Bhika Hari died on 8th January 1936 and on 16th June 1937 Sakhubai executed a sale deed in respect of the property left by Bhika Hari in favour of the defendant No. 1 Sonabai. Sonabai was the daughter of Sakhubai by her first husband. Bhika Hari was her second husband. The sale was in the sum of Rs. 4,000/-. On 11th June 1941, the defendant No. 1 Sonabai executed a possessory mortgage in respect of the property in favour of Kankuchand Maganlal. The said possessory mortgage was later satisfied. On 20th May 1943 Sakhubai and Sonabai executed a second mortgage in favour of the plaintiff. On 1st June 1945 Shivnath, the ultimate legatee under the will of Bhika Hari, attained majority and on 18th March 1947 he executed a conveyance of the property bequeathed to him by Bhika Hari in favour of the plaintiff. On 28th March 1951 the plaintiff filed the suit for possession claiming to be the owner under the sale deed executed by Shivnath. The suit was against the defendant No. 1 and the tenants of the property defendants Nos. 2, 3 and 4. The plaintiff alleged that Sakhubai, the widow of the

testator Bhika Hari, had no authority to sell the suit property to the defendant No. 1 and that the transaction of sale in favour of the defendant No. 1 was illegal and void and the defendant No. 1 derived no title thereunder. The plaintiff also alleged that Sakhubai the widow of Bhika Hari had been the guardian of Shivnath, the plaintiff's vendor.

3. The defendant No. 1 contended that Sakhubai had sold the suit property to her for legal necessity, that is to defray the expenses incurred in the litigation in respect of Bhika's property. She contended that she had been in possession in her own right since the sale in her favour of 16th June 1937. In the alternative, the defendant No. 1 contended that Sakhubai, being the widow, was a legal heir of Bhika and the sale was valid. The defendant No. 1 also set up title by adverse possession and took up the contention that the suit was barred by the law of limitation.

4. The trial Court decreed the suit. The defendants appealed to the District Court at Ahmednagar. The learned Assistant Judge, however, disposed of the appeal only on one point holding that the suit was barred by Art. 44 of the Indian Limitation Act. He did not deal with the other points. He allowed the appeal and dismissed the suit. Against the said decision the plaintiff has filed the present second appeal.

5. When the second appeal came up for hearing before Mr. Justice M. V. Paranjpe, he found that the trial Court had not dealt with the question of adverse possession and he also found that the lower appellate Court had not dealt with the contentions of the parties other than that of limitation. He therefore, framed certain issues under the provisions of Order 41, Rule 25, C. P. C. and referred the issue as to adverse possession for trial to the trial Court. He also framed other issues on points which the lower appellate Court had not dealt with in the first appeal and directed the lower appellate Court to return the papers with the evidence on the issue as to adverse possession, the finding of the trial court on that issue, and the findings of the lower appellate Court on all the issues referred. The reference has since been returned, and this second appeal was thereafter placed before me for hearing.

6. The findings of the lower appellate Court on the issues referred to it by Mr. Justice M. V. Paranjpe are that the defendant No. 1 had not proved that she had acquired title to the suit property by adverse possession. It appears that both the trial Court as well as the lower appellate Court came to the conclusion that Sakhubai had been in physical possession of the property and not the defendant No. 1 Sonabai. This was a finding of fact. It was also found that the sale deed of

1937 was not hollow or bogus, and that it was also not for legal necessity. With regard to defendants Nos. 2 to 4 it was found that they were not entitled to the protection of the Bombay Rent Act, 1947, as against the plaintiff.

7. Before me Mr. Kotwal appearing for the respondents-defendants has taken only two contentions. The first contention is that the sale deed dated 16th June 1937 executed by Sakhubai in favour of defendant No. 1 is at best voidable and not ab initio void. Unless the sale deed was set aside by a suit under the provisions of Art. 91 of the Indian Limitation Act, 1908, it was good against the plaintiff. In any event, the plaintiff attained majority on 1st June 1945 and ought to have filed a suit for setting aside the sale deed on or before 1st June 1948. In absence of setting aside of the sale deed, the present suit by the plaintiff would not be maintainable. His second contention was that even if the sale deed was void, it ought to be held that the defendant No. 1 was in possession adverse to the plaintiff and his predecessor-in-title Shivnath for a period exceeding 12 years and had thus perfected her title.

8. I shall first deal with the contention that the suit is not maintainable, on the ground that the sale deed dated 16th June 1937 is voidable and has not been set aside. An agreed translation of the will has been produced before me. The will is Ex. 57. The testator Bhika Hari states in the will that a thought came to his mind that after his death his immovable property should go to Shivnath and that his last wife Sakhubai who was living with him should take the income during her lifetime as guardian of Shivnath for maintenance. After his death, the estate should not be wasted and the relations should not trouble Sakhubai. He states that the property disposed of by the will was self-acquired property. In the will he describes Sakhubai as

‘माझी व्यवस्था ठेवणारी वायको सख्खाई’ (Sakhubai,

my wife in-charge of management). The will provides that Sakhubai should incur expenses of obsequies out of the property of Bhika, and after Sakhubai's death, Shivnath should get the property. If at the time of Sakhubai's death Shivnath was a minor his mother Kondabai should take possession of the estate as guardian and should preserve the estate till Shivnath attained majority. The will also provides that the testator's sixth wife Sakhubai had no right to mortgage or sell the suit property and only the income should be enjoyed. It will thus be observed that the will absolutely prohibits a sale or mortgage by Sakhubai. Mr. Kotwal for the defendant No. 1 contended that Sakhubai was constituted an executor

within the meaning of Section 2(c) of the Indian Succession Act, 1925, which defines an executor as meaning a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. In the present case, the management of the property is confided to Sakhubai. She is to apply the income during her lifetime to her maintenance and to that of Shivnath. She is asked to perform the obsequies of the testator. She is called the guardian of the property of Shivnath and is referred to as ‘व्यवस्था ठेवणारी’ (manager). In my opinion Sakhubai would be “executor” within the meaning of that word in Section 2(c) of the Indian Succession Act, 1925.

9. Section 307 (1) and (2) of the Indian Succession Act reads as under:—

“307 (1) Subject to the provisions of sub-section (2), an executor or administrator has power to dispose of the property of the deceased, vested in him under Section 211, either wholly or in part, in such manner as he may think fit.

(2) If the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions namely:—

(i) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

(ii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted

“(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property for the time being vested in him under Section 211, or (b) lease any such property for a term exceeding five years.

(iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii), as the case may be, is voidable at the instance of any other person interested in the property.”

10. Section 307 (1) of the Indian Succession Act, provides that subject to the provisions of sub-section (2) an executor or administrator has power to dispose of property of the deceased, vested in him under Section 211, either wholly or in part in such manner as he may think fit. Section 211 provides that the executor is the legal representative of the deceased person for all purposes, and all the property of the deceased person vests in him as such. It would, therefore, appear

that Section 307(1) of the Indian Succession Act confers on an executor or administrator a general power to dispose of the property of the deceased subject, however, to the provisions of sub-section (2). Sub-section (2) provides that if the deceased was a Hindu, as he was in this case, the general power to dispose of the property conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely, that the power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order. The general power of disposal over property conferred by Section 307(1) is therefore, subject to restrictions and conditions imposed in the will. In this case the will totally prohibits sale and mortgage. Section 307 (2) (iii) provides that a disposal of the property by an executor in contravention of the restrictions and conditions contained in the will is voidable at the instance of any other person interested in the property. The contention of Mr. Kotwal is that as in this case the will had imposed a prohibition on disposal of the property, the prohibition amounted to a restriction within the meaning of Section 307 (2) and the disposal of the property by Sakhubai to defendant No. 1 was, therefore, voidable and not void. He further contended that a voidable instrument must be set aside at the suit of the person affected by it and but for such setting aside a suit by him for possession would not be maintainable. I shall, however, deal with that aspect of the matter a little later.

11. The contention of Mr. Kotwal that at best the sale deed dated 16th June 1937 was voidable at the instance of Shivnath was objected to by Mr. Chitale appearing for the plaintiff on two grounds. He firstly contended that Section 307 (2) talks of restriction, and not absolute prohibition. Restriction merely confines the power of disposal within certain limits, whereas prohibition altogether forbids the disposal. He, therefore, contended that S. 307 (2) (iii) of the Indian Succession Act was not applicable to the facts of the case and the sale was void. His second contention was that the power to dispose of property referred to in sub-section (1) of Sec. 307 is the power contained in the will, and no power was conferred by Sec. 307 (1) as such. This second contention of Mr. Chitale has no validity because on the face of it sub-section (1) itself confers the general power of disposal and sub-section (2) also talks of the general power

conferred by sub-section (1) and provides that it shall be subject to the restrictions and conditions therein referred to. I, therefore, reject this contention straightway.

12. With regard to the first contention of Mr. Chitale that a prohibition is not a restriction, Mr. Kotwal has drawn my attention to two judgments of the Supreme Court interpreting Articles 13 and 19 of the Constitution of India which provide that reasonable "restrictions" may be put by the Legislature on the fundamental rights guaranteed by the Constitution. The first judgment is in the case of Narendrakumar v. Union of India, AIR 1960 S.C. 430. It has been held in that case that it is reasonable to think that the makers of the Constitution considered the word "restriction" to be sufficiently wide to save laws inconsistent with Art. 19 (1) of the Constitution of India or taking away rights conferred by the article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. The judgment proceeds to say that there can be no doubt that the framers of the Constitution intended the word "restriction" to include cases of prohibition also. The contention that a law prohibiting exercise of a fundamental right is in no case saved cannot therefore be accepted. It is undoubtedly correct, however, that when the restriction reaches the stage of prohibition, special care has to be taken by the Court to see that the test of reasonableness is satisfied. The other case is that of Madhya Bharat Cotton Association Ltd. v. Union of India, AIR 1954 S.C. 634. There are in this case observations in the judgment of Bose J. to the effect that cotton being a commodity essential to the life of the community, it is reasonable to have restrictions which may in certain circumstances extend to total prohibition for a time of all normal trading in the commodity, and such prohibition would not offend Art. 19(1) (g) of the Constitution, because sub-clause (5) validates it. It will, therefore, appear that in interpreting certain articles of the Constitution of India, the word "restriction" has been held to cover a total prohibition. However, words in the Constitution of India and Indian Succession Act need not receive a uniform construction. I am referring to these judgments only to show that the word "restriction" is capable of including and covering a total prohibition. Whether in section 307 of the Indian Succession Act this meaning should be given to the word "restriction" or not has to be determined independently.

13. I am afraid, unless in Sec. 307 (2) the word "restriction" is so interpreted as to cover a total prohibition of disposal

of property, the results will be iniquitous. The general power of disposal of property conferred by Section 307(1) is made subject to the restriction imposed by sub-section (2). If the word "restriction" in sub-section (2) did not cover and include total prohibition, the consequence will be that the general power of disposal over property conferred by sub-section (1) will not be subject to or affected by total prohibition, and the executor will be free to dispose of the property in spite of the prohibition. The statutory general power of disposal conferred by sub-section (1) will override the prohibition, the general power not having been made subject to the prohibition. Thus, while restrictions on power of disposal will prevail total prohibition of disposal will not prevail. It cannot be that the general power of disposal over property is made subject to restrictions that is bound and confined within limits, but is not made subject to a total prohibition. If this contention of Mr. Chitale were correct, then notwithstanding a total prohibition of disposal of property, the general power conferred by Section 307 (1) will remain. This cannot be the intention of the Legislature. I am, therefore, of the view, and I also hold, that in Section 307 (2) of the Indian Succession Act the word "restriction" includes and covers a total prohibition. The general power of disposal of property conferred by sub-section (1) is, therefore, subject to the prohibition on disposal imposed by the will, and a sale in contravention of such prohibition is voidable at the instance of a person interested as provided in clause (iii) of sub-section (2) of Section 307. Mr. Chitale's contention that under sub-section (2) a disposal of property in violation of a restriction is made voidable but a disposal of property in violation of prohibition will be totally void cannot be accepted, because neither Section 307 so provides, nor does such inference follow from it. I, therefore, hold that the sale by Sakhubai to defendant No. 1 Sonabai on 16th June 1937 was voidable within the meaning of S. 307 (2) (iii) of the Indian Succession Act.

14. There has been considerable controversy on the point whether a sale which is voidable at the instance of a person interested can only be avoided by a suit or it is open to the interested person to declare that he will not be bound by it. Mr. Chitale contended that in case of a void as well as voidable transfer, all that the person interested has to do is to declare that he will not be bound by it. He invited my attention to the judgment of the Privy Council in the case of *Bijoy Gopal Mukerji v. Krishna Mahishi Debi*, (1907) ILR 34 Cal. 329 (P.C.). That was a case of reversioner filing a suit for possession without a prayer for setting aside a transfer made by a Hindu widow. It

was held that a Hindu widow is the owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. Her alienation was not absolutely void, but it was prima facie voidable at the election of the reversionary heir, who may affirm it or treat it as a nullity. without the intervention of any Court, there being nothing to set aside or cancel as a condition precedent to his right of action. It was further held that the institution of a suit for possession showed his election to treat the alienation as a nullity, and in such a suit it was, therefore unnecessary for him to ask for a declaration that the transfer was inoperative. I might here observe that this case is a good authority where a reversioner seeks to recover possession. A transfer by a Hindu widow will operate only during her life time. If the suit is instituted while the widow is living, it will not be maintainable and if a suit for possession is filed after her death, the transfer has already become inoperative and there certainly is nothing to set aside. But that case will not apply to a case such as the one I am dealing with which is not the case of a reversioner, but it is a case of a voidable transfer effected by an executor in violation of a restriction or prohibition in the will.

15. Mr. Chitale then invited my attention to a judgment of a Full Bench of this Court in the case of *Narsagauda v. Chawagauda*, ILR 42 Bom. 638 = (AIR 1918 Bom. 188) (FB). It was decided by the Full Bench of which Mr. Justice Shah was a member that Article 91, Schedule I of the Indian Limitation Act, 1908, did not apply to a suit for possession where the plaintiff alleged and proved that a sale deed was void because it was executed by him while he was a minor, but did not claim expressly to have it cancelled or set aside. It is not disputed by Mr. Kotwal that this judgment would be applicable to cases of void instruments. A sale deed executed by a minor is undoubtedly a void instrument. On the question of voidable instruments, Mr. Justice Shah had something to say in a later case to which I shall refer later. Mr. Chitale also invited my attention to two judgments of the Madras High Court in the cases of *Unni v. Kunchi Amma*, (1891) ILR 14 Mad. 26, and *Ganapati Aiyar v. Sivamalai Goundan*, (1912) ILR 36 Mad. 575. I consider it unnecessary to deal with these cases in detail in view of the direct judgments of our own Court on the point in controversy, to which I shall refer immediately.

16. In the case of *Fakirappa Limanna v. Lumanna Mahadu Dhamnekar*, AIR 1920 Bom. 1 (FB), it was held that where

a Hindu mother, acting as the natural guardian of her minor son, transfers property during his minority, the minor, in order to recover possession of the property so transferred must sue to set aside the transfer, and such suit must be brought within three years of the minor attaining majority under Art. 44, and if he fails to bring such suit within that time, neither, he, nor the next reversioner can dispute the alienation. In this judgment earlier Division Bench decision in the case of *Laxmava v. Rachappa*, ILR 42 Bom. 626=(AIR 1918 Bom. 180) and several other previous decisions of the Bombay High Court have been considered. The judgment of the Privy Council in (1907) ILR 34 Cal. 329 (PC) has also been considered. In the judgment of Mr. Justice Macleod, it has been observed that the argument that a plaintiff need not sue to set aside a transfer to which he is not a party may well apply to a suit by a reversioner impugning a transfer by a Hindu widow, for the widow represents her husband's estate, and until her death there is no one who has a vested interest, nor is there an obligation on any one to take proceedings until the reversion falls in. After reviewing the judgment of the Privy Council and several judgments of Bombay and other High Courts, Mr. Justice Shah, who was a party to the Full Bench case in ILR 42 Bom. 638=(AIR 1918 Bom. 188), observed that in some cases it was contended as well as held that whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends upon whether the onus of proving circumstances establishing its validity lies upon the plaintiff or upon the defendant. Mr. Justice Shah also considered the argument which has been advanced before me by Mr. Chitale that where a person is not a party to the impugned instrument, nor does he claim under a person who has executed it, it is not necessary for him to have it set aside by a suit. Mr. Justice Shah held that this view was generally based upon observations made in cases relating to suits by reversioners in respect of alienations made by widows inheriting their husband's estates as such. Mr. Justice Shah was conscious of the fact that he himself had been a party to some decisions where such view had been taken in cases of reversioners. In fact in the case in hand Mr. Justice Shah was dealing with a suit of a person who was challenging a sale on his behalf effected by his mother during his minority without having got it set aside by a suit. The minor was neither a party to the sale nor did he claim under his mother. He observed as under:—

"On further consideration I am satisfied that the necessity for suing to set aside a sale does not depend so much

upon the question whether the onus lies upon the plaintiff or the defendant "in the first instance, but upon the question whether the sale is by a person wholly unauthorised or by a person who is authorised only under certain circumstances to alienate the property, or in other words whether the sale is null and void or only voidable if the person interested seeks to void it. If the latter is the case, the persons concerned should sue to have it set aside if there is any article of the Limitation Act applicable to such a suit. In the present case Art. 44 applies, and therefore the necessity of suing to set aside the sale is established under the circumstances."

17. In the final analysis, what the Full Bench held was that where a sale was voidable at the instance of a person interested and there is an article in the Limitation Act applicable to such a suit, he can only get it set aside by a suit. In the Indian Limitation Act, 1908 there was Article 91 for setting aside voidable sales to which no other specific article was applicable. In the Limitation Act, 1963 there is Article 59. The position in law now, therefore, is that where a sale is voidable at the instance of a person interested he can only get it set aside by a suit. This will however not apply to a reversioner challenging a sale by a limited owner. A reversioner may treat such a sale as a nullity without the intervention of a Court. A person other than a reversioner must sue to set aside a voidable sale even if he is not a party to the instrument or a person claiming under a person who has executed the instrument and even if the onus of proving circumstances establishing the voidability of the instrument is not upon him, but on the person affirming the instrument.

18. In the present case a suit to set aside the sale deed dated 16th June 1937 would have been governed by the residuary Article 91 of Schedule I to the Indian Limitation Act, 1908. The said transfer being both voidable in terms of Section 307 of the Indian Succession Act and being governed by Article 91 of the Indian Limitation Act, 1908, it was necessary for Shivnath to have it set aside by a suit within three years of Shivnath's attaining majority, which he did on 1st June 1954. Since Shivnath has not got the sale deed set aside, I am afraid, a suit for possession by him is not maintainable.

19. The Full Bench decision in AIR 1920 Bom. 1 was referred to in the case of *Gangadhar Balkrishna v. Dattatraya Baliram*, AIR 1953 Bom. 424 where it was held that an agreement entered into in contravention of Order 32, Rule 7(1), is not altogether void, but is voidable only at the option of the minor and if it is so voided, the parties would naturally be restored to the position which they occu-

pied before the agreement was made. But if the minor does not avoid the agreement, the other parties were bound by the agreement, and it would be fully effective against them. In the above case the judgments of Bombay High Court in ILR 42 Bom. 638=(AIR 1918 Bom. 188) (FB) and the judgment of the Privy Council in (1907) ILR 34 Cal. 329 (PC) were also discussed and thereafter their Lordships came to the conclusion that it was necessary for the plaintiff to have sued within three years of his attaining majority to set aside the impugned compromise. In view of these two judgments of the Bombay High Court, I am of the view that in this case also, it was necessary for Shivnath to file such suit within three years of Shivnath attaining majority.

20. The next contention of Mr. Kotwal was that the defendant No. 1 had established her case of adverse possession. He contended that the sale deed in favour of Sonabai was executed on 16th June 1937 and the present suit was instituted on 28th March 1951. The defendant No. 1 was in possession of the property from 16th June 1937 to 28th March 1951 adversely to Shivnath and the plaintiff. This argument of Mr. Kotwal, however, proceeds on the assumption that on the execution of the sale deed on 16th June 1937 the defendant No. 1 entered into possession of the suit property. But both the trial Court and the lower appellate Court have found it as a finding of fact that Sakhubai continued to be in possession of the suit property even after the sale deed of 16th June 1937. The defendant No. 1 was not in possession of the property at all and, therefore, cannot be in possession adverse to any one. This contention must, therefore, be rejected.

21. In the result, the appeal must be dismissed and the plaintiff's suit for possession must stand dismissed. In the circumstances of the case, there will be no order as to costs throughout.

Appeal dismissed.

AIR 1970 BOMBAY 79 (V 57 C 11)

VIMADALAL AND KAMAT, JJ.

Harbansingh Sardar Lenasingh and another, Accused, Appellants v. The State, Respondent.

Criminal Appeal No. 573 of 1967, D/- 5-12-1968.

(A) Customs Act (1962), S. 104(2) — Without unreasonable delay — Persons detained by Customs authorities for interrogation and produced before the Magistrate within 24 hours of their arrest — Provisions of section are not violated.

S. 104(2) of the Customs Act comes into operation only after a person is "arrest-

GM/HM/C830/69/GGM/P

ed" and not till then. It is analogous to the provisions of Section 60 of the Criminal P. C. Although there is no provision similar to Section 61 of the Criminal P. C. which lays down a maximum period of 24 hours within which an accused person should be put up before a Magistrate, that may have been unnecessary in view of the fact that such a maximum period is now laid down by the Constitution itself in Article 22(2) thereof. Where the accused persons had in fact been put up before the Chief Presidency Magistrate within 24 hours of their arrest, there is no violation of S. 104(2). (Paras 4 and 5).

(B) Criminal P. C. (1898), S. 46 — Applicability — Arrest and custody — Distinction — Person under surveillance making statement — Statement is not hit by S. 24, Evidence Act.

Arrest is a mode of formally taking a person in police custody, but a person may be in the custody of the police in other ways. What amounts to arrest is laid down by the legislature in express terms in S. 46 of the Code of Criminal Procedure, whereas the words "in custody" which are to be found in certain sections of the Evidence Act only denote surveillance or restriction on the movements of the person concerned, which may be complete as, for instance, in the case of an arrested person, or may be partial. The concept of being in custody cannot, therefore, be equated with the concept of a formal arrest and there is a difference between the two. Where after the statements recorded by the Customs authorities due to the night fall the accused are put up before a Magistrate only next morning, it cannot be said that accused were arrested and as such any statement made by them cannot be said to be in violation of S. 24, Evidence Act. 1885 All. W.N. 59 (FB) Dist; AIR 1960 S.C. 1125 & AIR 1965 S.C. 481 & (1900) ILR 25 Bom. 168, Ref. (Para 4)

Cases Referred: Chronological Paras.

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| (1965) AIR 1965 SC 481 (V 52)=66 Bom. LR 482=1965 (1) Cri. LJ 490, Soni Vallabhdas Liladhar v. Soni Narandas | 4 |
| (1963) AIR 1963 SC 1094 (V 50)=1963 (2) Cri. LJ 178, Pyare Lal v. State of Rajasthan | 4 |
| (1960) AIR 1960 SC 1125 (V 47)=1960 Cri. LJ 1504, State of Uttar Pradesh v. Deoman Upadhyaya | 4 |
| (1959) AIR 1959 SC 18 (V 46)=1959 Cri. LJ 108, Ratan Gond v. State of Bihar | 6 |
| (1957) AIR 1957 SC 637 (V 44)=1957 Cri. LJ 1014, Sarwan Singh Rattan Singh v. State of Punjab | 6 |
| (1954) AIR 1954 SC 462 (V 41)=1954 Cri. LJ 1313, Hem Raj Devilal v. State of Ajmer | 4 |

- (1918) AIR 1918 PC 118 (V 5)=45
Ind. App. 284 (P.C.), Banwari Lal
v. Maheshh 6
(1900) ILR 25 Bom. 168=2 Bom.
LR 761, Queen Empress v. Bas-
vanta 4
(1885) 1885 All. W.N. 59 (FB),
Empress v. Madar 4

R. Jethmalani with S. B. Keshwani, for Appellants; M. B. Kadam, Asst. Govt. Pleader, for Respondent.

VIMADALAL, J.:— This is an appeal filed by two accused persons who have been convicted by the Additional Sessions Judge, Thana, of offences relating to the illegal importation and possession of 6920 Tolas of gold, under Section 135 of the Customs Act 1962 as well as under Section 23 of the Foreign Exchange Regulation Act, 1947. It may be mentioned that the accused were also charged under R. 126-P of the Defence of India (Amendment) Rules, 1963, but were acquitted of that offence.

2. The facts of the prosecution case are that one Jokhi who was, at the material time, an Assistant Collector of Customs, at Bombay, received some information on the night of 21st March 1965 that gold was going to be smuggled into India from a place near the bridge on the Bassein Vajreshwari Road, that he, therefore, contacted witness Wagh who was then working as Deputy Superintendent under him, and the said Jokhi, accompanied by Wagh and two inspectors named Jadhav and Surti and a constable of that department, left Vadala at about 10 p.m. and reached Bassein at about 1-30 a.m., that they stopped their car near railway crossing along the Bassein-Vajreshwari Road, and stopped facing Vajreshwari side, after putting off the head-lights, somewhere near the wicket-gate of the level-crossing about 4 or 4 and half furlongs away from Bassein Station, that at about 2 a.m. they saw a car coming from the Vajreshwari side which came near the bridge and turned a little and put off its lights and went on to the kachcha road leading to the salt pans, that the said car turned again and came towards the bridge, but halted after going off the road, that the said car waited there for about 10 or 15 minutes whereupon the raiding party started their vehicle to go to see what the matter was, that in the meantime that car had come on to the main road and the raiding party, therefore, intercepted the car by placing their own car across the road, and that all the persons from the raiding party then got down and went up to that car. The prosecution story is that, apart from the driver who was at the wheel of that car, accused Nos. 1 and 2 were sitting on the rear side, that Wagh and Jokhi questioned them as to why they had come there, and in the beginning they

did not give any reply, but later on accused No. 2 stated that there was gold in the dicky of the car and that the raiding party then opened the dicky and found that there were four gunny bags which were wet and soiled and were heavy. The prosecution story further is that Jokhi then sent Wagh to get two panchas from Bassein Town which he did and the dicky was opened and the gunny bags shown to the panchas, as also the marks of the tyres on the kachcha road along which that car had proceeded, as already stated above, but Jokhi and Wagh ultimately decided that it would not be safe to open the bundles and make a panchnama in a lonely place like the one in which they were, and they, therefore, decided that they should go to their office in Bombay with the panchas where the property in question should be opened and taken charge of under a panchnama. Inspector Surti, Jadhav and Assistant Collector Jokhi sat in the car in which the accused were travelling, and the rest of the raiding party proceeded in their own car and the two cars reached Churchgate at about 9 a.m. The said bundles were then opened in the presence of the panchas and were found to contain 6920 Tolas of gold with foreign markings and the panchnama which was made was concluded at about 2 p.m. on the 22nd of March 1965. The said bundles of gold, together with the car, were then sent to Superintendent Robb who took investigation of the case, he being the officer authorized to record statements under Section 108 of the Customs Act, 1962. He first recorded the statement of the driver of the said car Bapu, and thereafter at about 4 p.m. he started recording the statement of accused No. 2 which he concluded at about 5 p.m. He then proceeded to record the statement of accused No. 1 and finished recording the same at about 6 p.m. Superintendent Robb then placed accused Nos. 1 and 2 under arrest and sent them to the Azad Maidan Police lock-up, and they were put up before the Chief Presidency Magistrate the following morning viz. on the 23rd of March 1965. The Chief Presidency Magistrate having directed that the accused should be put up before the Judicial Magistrate, First Class, at Bassein, as the offence had been committed there, they were produced before that Magistrate and remanded into magisterial custody. The formalities of sanction and other formalities having been gone through, accused Nos. 1 and 2 were thereafter prosecuted and were convicted by the trial Judge, as already stated above, and were sentenced to three years' rigorous imprisonment for the offence under Section 135 of the Customs Act, 1962, and to one year's rigorous imprisonment for the offence under Section 23 of the Foreign Exchange Regu-

lation Act, 1947. It is from the said convictions and sentences that both the accused have filed the present appeal.

3. The conviction of the accused persons is challenged by Mr. Jethmalani on three grounds: (1) that the accused persons not having been taken to a Magistrate till the 23rd of March 1965 in violation of the provisions of Section 104(2) of the Customs Act, 1962, which enjoin that they should be put up before a Magistrate "without unnecessary delay", the confessions which were obtained from them whilst they were in illegal custody must be regarded as having been obtained under compulsion and not to have been made voluntarily, with the result that they would be hit by the provisions of Section 24 of the Evidence Act; (2) that the confessions of the accused persons are, in any event, not true, there being evidence intrinsic in the confessions themselves to show the same, as well as extrinsic evidence to prove their falsity; and (3) that the extra-judicial confessions which were recorded required corroboration, and on the only point in dispute in the present case, viz., the question as to whether the possession of gold by accused Nos. 1 and 2 was conscious, there was no corroboration in the other evidence led in the case.

I will now proceed to deal with each of these contentions of Mr. Jethmalani.

4. As far as the first contention of Mr. Jethmalani, which was his main contention, is concerned, it may at the very outset be pointed out that Section 104(2) of the Customs Act comes into operation only after a person is "arrested" and not till then. It is analogous to the provisions of Section 60 of the Code of Criminal Procedure. It is true that there is no provision similar to Section 61 of the Code of Criminal Procedure which lays down a maximum period of 24 hours within which an accused person should be put up before a Magistrate, but that may have been unnecessary in view of the fact that such a maximum period is now laid down by the Constitution itself in Article 22(2) thereof. It may be mentioned that the accused persons had in fact been put up before the Chief Presidency Magistrate within 24 hours of their arrest.

Mr. Jethmalani has, however, contended that in so far as the accused persons were not free agents right from the time when the police contacted them at 2 a.m. on the night between the 21st and the 22nd of March 1965, though they may not have been formally arrested, it must be held that they were in custody and under arrest, and the confessions cannot, therefore, be said to have been obtained without the use of some sort of threat within the meaning of Section 24 of the Evidence Act. Reference must be made in that connection to Section 46 of the Code

of Criminal Procedure which lays down how an arrest is to be made. It states that in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action. It is the contention of Mr. Jethmalani that the facts of the present case show, at any rate, a submission to the custody of the excise officer by the accused persons by action and they must, therefore, be deemed to have been under arrest ever since the time when they were first apprehended at 2 a.m. somewhere near Bassein. In support of that contention Mr. Jethmalani has relied upon an old decision of a Full Bench of the Allahabad High Court in the case of *Empress v. Madar*, 1885 All. W.N. 59 (FB), but a careful perusal of that case shows that in the judgment itself the learned Judges have made a distinction between formal arrest, and what they have called "a condition of restraint which, in fact, amounted to the accused being in the custody of the police", since the accused was not "a free agent capable of going whither he chose". It is true that the learned Judges of the Allahabad High Court have excluded the retracted confession before them on the ground that a confession obtained from an accused person who, though not actually arrested, had, "to all intents and purposes..... been in their custody" for an "unexplained period of twelve days" could not be said to be a voluntary one, but, they have not in terms held that the accused persons before them must be deemed to have been under arrest as such. Mr. Jethmalani has also relied upon a decision of the Supreme Court of the United States of America in case of *Benjamin McNabb v. United States of America*, in which also the majority of Court held that the admissions of the petitioners having been improperly received in evidence, the convictions could not stand. The Court based their decision on the fact that the petitioners before them had been detained in violation of the provisions of law which required that persons arrested must be immediately taken before a committing officer, and that the confessions obtained from them were therefore not voluntary. It may be convenient at this stage to set out the precise position in regard to what happened in the present case after the accused persons were apprehended at 2 a.m. somewhere near Bassein. When it was decided that the panchnama should be made in Bombay, and not at the lonely place at which the accused persons had been apprehended, the police party, the panchas and the accused persons came to Bombay and reached Churchgate at about 9 a.m. as is clear from the evidence of Superintendent Wagh as well as the panchnama (Ex. 12). The panchnama

(Ex. 12) was then continued in Bombay and was concluded at as late an hour as 2 p.m. as is shown by what is recorded at the foot of the said panchnama itself, and it is not surprising that it should have taken so long, having regard to the fact that the quantity of gold in respect of which the panchnama was made was as large a quantity as 6920 Tolas contained in four gunny bags which, in their turn, contained seven jackets with innumerable small pockets therein, with different markings on the gold which had all to be noted. After the panchnama was concluded at 2 p.m., the investigation was handed over to Senior Superintendent Robb, and taking over charge of the investigation and the gold would itself take some time. Superintendent Robb then recorded the statement of the driver of the car Bapu. After the recording of the statement of Bapu was concluded, he started recording the statement of the 2nd accused at about 4 p.m. and followed this up by the statement of the 1st accused which he finished recording as late an hour as 6 p.m. It was after he had satisfied himself from the statements of the accused persons and come to the conclusion that there was reason to believe that they were guilty of an offence punishable under Section 135 of the Customs Act that he placed them under arrest in accordance with the provisions of S. 104(1) of that Act. It was then too late in the day to put them up before a Magistrate, and the accused persons were therefore put up before the Chief Presidency Magistrate the next day as stated in the evidence of Superintendent Robb. In view of this sequence of events, it could not possibly be said that there was "unnecessary delay" in putting up the accused persons before a Magistrate within the terms of Section 104(2) of the Customs Act, 1962. The question, however, still survives as to whether the accused persons could be said to have been in the custody of the excise officers so as to lead the court to the conclusion that the confessions obtained from them were not voluntary and were therefore hit by the provisions of Section 24 of the Evidence Act and should be excluded from consideration as was done by the Allahabad High Court in the case of 1885 All. W.N. 59 (FB) which has already been cited above. Arrest is a mode of formally taking a person in police custody, but a person may be in the custody of the police in other ways. What amounts to arrest is laid down by the legislature in express terms in Section 46 of the Code of Criminal Procedure, whereas the words "in custody" which are to be found in certain sections of the Evidence Act only denote surveillance or restriction on the movements of the person concerned, which may be complete as, for instance, in the case of an arrested person, or may

be partial. The concept of being in custody cannot, therefore, be equated with the concept of a formal arrest and, in my opinion, there is a difference between the two. Turning to the facts of the present case, the learned Assistant Government Pleader sought to rely on the statement of accused No. 2 in answer to questions put to him under Section 342 of the Criminal Procedure Code in the course of which he has said that when the police party, the panchas and the accused persons came to Bombay from somewhere near Bassein on the morning of the 22nd of March 1965, and when they were near Bhendi Bazar, accused No. 2 told the driver to allow him to get down, but the driver told him that he would go ahead and would come there again, and that later on he stopped the car near Churchgate in front of the excise office. In my opinion, that does not, however, show that the accused persons would have been allowed by the excise officer to get down from the car, if they had wanted to do so, whatever the driver may have told them. The very fact that three excise officers, including the Assistant Collector, made it a point to accompany the accused persons in their car whilst the rest of the police party and the panchas proceeded in the other car on their way back to Bombay, shows that there was some sort of surveillance or restriction on the movements of the accused persons ever since the time that they were apprehended near Bassein at 2 a.m. on the night of 21st March 1965. In view of the fact that it has been held that customs officers are persons in authority within the terms of Section 24 of the Evidence Act (66 Bom. L.R. 482 at p. 484) = (AIR 1965 SC 481 at p. 483), there can be little doubt that excise officers would also be persons in authority within the terms of that section. It has also been laid down by the Supreme Court that the expression "accused persons" in Section 24 includes a person who subsequently becomes an accused, and that he need not have been accused of an offence when he made the confession in question (AIR 1960 S.C. 1125 para 7). It must be noted that the expression "in custody" is not to be found in Section 24 of the Evidence Act, and the question as to whether an accused person was in custody at the time of making a confession arises only for the purpose of finding out whether that confession "appears to the court to have been caused by inducement, threat or promise" within the terms of that section. Confessions made during the time that an accused person was in illegal custody, or in the custody of the police, or has been under arrest and custody for a prolonged period of time have, no doubt, been excluded by courts on the ground that they did not appear to have been made voluntarily, but the custody in all those cases

was complete custody from which it appeared to the court that the confession could not be voluntary. If the Allahabad High Court intended to lay down anything more in Madar's case, 1885 All. W.N. 59 (FB), I do not agree with the same. In my opinion, however, the mere fact that there may be some restriction on the movements of the accused, or the accused person may be under some sort of surveillance at the time when he makes a confession, would not ipso facto vitiate the confession as being involuntary. To draw such a conclusion would, in my opinion, be to make no more than a conjecture. Reference may be made in this connection to an old decision of this Court in the case of *Queen Empress v. Basvanta*, (1900) ILR 25 Bom. 168 in which it has been held that the use of the word "appears" in section 25 of the Evidence Act indicates a lesser degree of probability than would be necessary if "proof" had been required, but, even so, the court observed (at p. 1172) as follows:—

"Still although we think that very probably a confession may be rejected on well-grounded conjecture, there must be something before the Court on which such conjecture can rest".

The same view now has been taken by the highest court in the case of *Pyare Lal v. State of Rajasthan*, AIR 1963 S.C. 1094, para 4, in which, after referring to the use of the word "appears" in Section 24 of the Evidence Act it has been stated as follows:—

"But under S. 24 of the Evidence Act such a stringent rule is waived but a lesser degree of assurance is laid down as the criterion. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A *prima facie* opinion based on evidence and circumstances may be adopted as the standard laid down. To put it in other words, on the evidence and the circumstances in a particular case it may appear to the court that there was a threat, inducement or promise, though the said fact is not strictly proved. This deviation from the strict standards of proof has been designedly accepted by the Legislature with a view to exclude forced or induced confessions which sometimes are extorted and put in when there is a lack of direct evidence. It is not possible or advisable to lay down an inflexible standard for guidance of courts, for in the ultimate analysis it is the court which is called upon to exclude a confession by holding in the circumstances of a particular case that the confession was not made voluntarily".

I must, therefore, proceed to consider whether there is anything in the evidence

or the circumstances in the case before us to show that the confessions of the two accused were obtained by any inducement, threat or promise within the terms of Section 24 of the Evidence Act. It may be mentioned that there is no suggestion, and indeed, that has not been argued by Mr. Jethmalani at all, that there was any inducement or promise given to the accused persons at the time of obtaining their confessions which would vitiate the same. Mr. Jethmalani has however contended that the fact that the accused persons were in custody at the time when their confessions were taken amounted to the use of some sort of threat in obtaining their confessions. In this connection, it may be mentioned that the first accused has in his statement under Section 342 of the Code of Criminal Procedure said that his signature to the statement was obtained by threat and by force saying that he would otherwise be beaten, but that is the first time that he has come out with the story of his statement having been obtained by threat. No such suggestion has been made to Superintendent Robb in the course of cross-examination. Indeed, the cross-examination of Superintendent Robb shows that the case that was sought to be made out on behalf of the 1st accused was an entirely different one viz., that two statements of his were recorded, and that what was being produced was not the original statement of the 1st accused.

That was also the case that was sought to be made out in the cross-examination of Superintendent Robb as far as the 2nd accused was concerned. It may be mentioned that the 2nd accused has, in his statement made under Section 342 of the Code of Criminal Procedure, taken a totally different line from that which was adopted on his behalf in the course of cross-examination of Superintendent Robb. He has first stated that he did not give a statement at all and that Superintendent Robb may have written anything he pleased, but has then proceeded to say that he wrote and signed as Superintendent Robb stated. There is, therefore, not even a suggestion of a threat contained in that statement which accused No. 2 has made under Sec. 342 of the Criminal Procedure Code. Even as far as accused No. 1 is concerned since no such case was put to Superintendent Robb in the course of cross-examination, in my opinion, there is nothing in the evidence to lead us to the conclusion that any threat "appears" to have been used in procuring the confession of the 1st accused and I decline to come to such a conclusion merely on what he has said in his statement. A mere bald assertion of that nature by him cannot be accepted as true without more (AIR 1954 S.C. 462 para 8). Under the circumstances, the first and the main contention of Mr. Jethmalani that

the confessions in question are involuntary and are, therefore, hit by the provisions of Section 24 of the Evidence Act and should be excluded from consideration, must be rejected.

5. The next contention of Mr. Jethmalani that the confessions of the accused persons in this case cannot be true must also be rejected. It is true that the confession of the 1st accused is recorded in a manner which is somewhat incoherent, in so far as it states that what they set out to bring from Bassein were spare parts, and then abruptly states, in the course of the narrative which follows, that the accused got down from the car, went down the road and contacted the fishermen and ascertained that they had brought gold, but the mere fact that the confession is somewhat inartistically recorded cannot lead to the conclusion that it is not true. Mr. Jethmalani has also commented on the fact that, according to him, there is a discrepancy between the respective versions given by the 1st accused and by the 2nd accused in regard to the circumstances in which they got acquainted with each other. The first accused has in his confession (Ex. 17) said that, about a month prior to the date of that confession, he had been to the New Roshan Talkies on Faulkland Road to see a picture, and that he got acquainted with accused No. 2 who was sitting by his side, and during the course of casual talk he came to know that accused No. 2 was a person who could arrange to provide motor cars on hire, and that he showed him his house which was in the vicinity of the said cinema theatre. He has stated that thereafter they used to meet each other. The 2nd accused has in his confession (Ex. 18) said that the 1st accused was staying in a hotel at Dadar but used to come daily to Opera House to purchase motor parts and at times used to dine in a hotel named Bilam Hotel near Grant Road which was located in the vicinity of the residence of the 2nd accused himself, that he (the 2nd accused) used to go for walks towards the Grant Road Hotel daily at night after meals and that he used to talk to the 1st accused who would come to dine in the said hotel, and it was in that way that their acquaintance developed. I do not think there is any inconsistency in the versions which each of the accused persons has given in regard to how he came to know the other. It may well be that they first happened to meet in the New Roshan Talkies and got acquainted with each other, but that their acquaintance developed thereafter in the manner stated by the 2nd accused in his statement.

Mr. Jethmalani has next relied upon what he states to be the discrepancy in the versions given by the accused persons and the versions given by the excise wit-

nesses in regard to what precisely transpired at the place where the accused were first contacted near Bassein on the night of 21st March 1965. The 1st accused has in his confessional statement (Ex. 17) stated that after they reached the bridge near the Bassein railway crossing at about 2 a.m. on the 22nd of March 1965, they asked the driver to dim the lights and hoot the horn, that he and the 2nd accused then got down from the car and told the driver to proceed a bit ahead and turn the car and come back where they had got down, that the car accordingly went ahead and turned back to the place where they were waiting, and that in the meantime he and the 2nd accused had gone down the road and contacted fishermen and ascertained that they had brought the gold. He proceeded to state that he told the driver to get down from the car and to keep the engine running and the four packages containing gold were then placed in the dicky of the car, and they got in and started, but were intercepted by the excise officers as soon as they started. The 2nd accused has in his statement given almost exactly the same version. Superintendent Wagh has in his evidence no doubt stated that the car in which the accused were travelling halted after going off the road, that they waited for a while to watch the movements of that car, and that for 10 or 15 minutes they did not "mark or notice any movement" and they then started going towards the bridge near which that car was halted. The point which Mr. Jethmalani sought to make was that Superintendent Wagh does not speak in his evidence of having seen the accused persons getting down from the car, or of the gold being loaded into the dicky of the car, as the accused persons have said in their confessions.

In this connection, it must, however, be pointed out that the excise party was about 4 or 4½ furlongs away from the place where the car of the accused had halted and the lights having been put off, it may well be that the excise officers could not see the precise movements of the occupants of the car or the loading of the gold into its dicky in darkness at that hour of the night. Mr. Jethmalani has also commented on the fact that Inspector Surti has not only not mentioned the getting down of the accused persons from their car or loading of the gold into the dicky of the car, but has not even mentioned that they were, for 10 or 15 minutes, watching the movements of the car of the accused. I do not think that the mere omission to state this little detail should affect the credibility of the evidence given by witness Wagh or witness Surti or the truth of the confessions made by the accused persons. In my opinion, there is no substance in

the contention of Mr. Jethmalani that there is material, either intrinsic in the confessions themselves or extrinsic in the evidence in this case, to show that the confessions in question are not true.

6. The last contention of Mr. Jethmalani is that there is no corroboration in regard to the only important point in this case viz., as to whether the possession of gold by the accused was conscious possession. As far as the extra-judicial confessions of the accused are concerned, it is true that it is prudent to require corroboration in the case of a retracted confession (AIR 1957 S.C. 637 at p. 643 and AIR 1959 S.C. 18 para 8), the latter of which deals expressly with an extra-judicial confession. There is, in my opinion, however, abundant corroboration of the confessions (Exs. 17 and 18) made by the accused persons which have been recorded by Superintendent Robb under Section 108 of the Customs Act, 1962. First and foremost, there is the evidence that when the accused persons were confronted by the excise party and were questioned as soon as they were intercepted as to why they had come there, they remained silent for some time, but then accused No. 2 admitted that they had gold in the dicky of the car. That the excise party would question the accused persons as to why they had come there is quite natural and, in fact, the 1st accused has expressly admitted as correct the question put to him in regard to the evidence of Superintendent Wagh that he had asked them why they had come there that night and what was in the car, and that they did not initially give any reply. It may, however, be mentioned that the 2nd accused has in his statement denied that Wagh put any question to him, a statement which I decline to believe as it is inconceivable that a raiding party would not confront the persons with whom they had concern with that question at the earliest opportunity. The 1st accused has no doubt said that he did not know whether accused No. 2 had admitted that there was gold in the dicky of the car, when he was questioned under Section 342 of the Criminal Procedure Code, but in his confessional statement (Ex. 17) he has stated that when the excise party questioned them, they gave the correct answer and said that there was gold in their car as, realising that their game was up, they thought they should give a correct answer. Apart from the express admission made by the 2nd accused at the spot that they were carrying gold which cannot be used against the 1st accused, as far as the 1st accused is concerned, he has admitted that he kept quiet when he was questioned by Superintendent Wagh about his movements and in regard to what was in the car. That by itself, and

the absence of a statement expressing his ignorance in regard to the contents of the car or explaining his movements, would show that he knew that there was gold in the car. There are other facts and circumstances proved by the evidence which also show that the accused persons knew that they were carrying gold in their car. In addition to the fact that gold was actually found in the car and the accused persons were also found in the same car, the movements of the car at dead of night lurking from one place to the other, as disclosed by the evidence, are themselves sufficient to show consciousness on the part of those occupants in regard to what it contained. Mr. Jethmalani has, however, strongly commented on the fact that the driver of the car Bapu who, it is admitted in the evidence of panch witness Kane as well as Inspector Surti and Superintendent Robb, was actually present in the course of the trial in the lower court, has not been called. He has asked the court to draw an inference in the manner stated in Illustration (g) to Section 114 of the Evidence Act by reason of the fact that the said driver has not been examined by the prosecution as a witness. It can certainly not be doubted that the driver Bapu would have been in a position to throw light on the circumstances in which he was engaged, and perhaps also the circumstances in which the gold came to be loaded into the car. It is, however, not obligatory on a court to draw a presumption of adverse inference under Section 114 of the Evidence Act, the illustrations to which themselves show that the court must have regard to the facts and circumstances of the case. No question seems to have been raised in the course of the trial, whilst the evidence was being led, as to why the driver was not being called as a witness by the prosecution. The record shows that a purshis was filed on behalf of the prosecution on 21st March 1966 stating that the prosecution did not propose to lead any further evidence, and not only is there nothing else on record to show by way of cross-examination why the driver was not examined, but no objection appears to have been raised on behalf of the accused persons when that purshis was filed suggesting that the driver should be called, or that he was required by them for cross-examination. In a similar situation the Privy Council in the case of Banwari Lal v. Mahesh, 45 Ind. App. 284 at pp. 287-288 = (AIR 1918 P.C. 118 at pp. 119-120) declined to draw an adverse inference when no question had been raised at the trial as to the absence of the mother of the plaintiff in a civil suit for the recovery of certain property. The Privy Council observed in that case that if any point had been made about her absence it was quite possible that an explanation might have

been offered for not calling her as a witness. In the absence of the prosecution being given an opportunity to explain why the driver Bapu, whose statement had admittedly been recorded by Superintendent Robb even before the confessional statements of accused Nos. 1 and 2 were recorded by him, was not called, in the exercise of my discretion, I decline to draw an adverse inference against the prosecution on that account under S. 114 of the Evidence Act as Mr. Jethmalani has urged upon the court. In view of the facts and circumstances proved by the evidence to which I have just referred, I hold that there is abundant corroboration for the retracted extra-judicial confessions of the accused persons (Exs. 17 and 18) in the present case, and the trial court was right in relying upon those confessions which, taken with the other evidence in the case, establish the guilt of accused Nos. 1 and 2 beyond reasonable doubt in regard to the offences of which they have been found guilty.

7. In the result, this appeal must be dismissed, and the conviction of both the accused as well as the sentences passed upon them by the lower court confirmed. The accused to surrender to bail within two weeks.

8. KAMAT, J.: I agree and have nothing to add.

Appeal dismissed.

AIR 1970 BOMBAY 86 (V 57 C 12)
(NAGPUR BENCH)

PADHYE AND DESHPANDE, JJ.

Ganpat Ragho and another, Petitioners v. Maharashtra Revenue Tribunal, Nagpur and others, Respondents.

Spl. Civil Appln. No. 396 of 1966, D/- 25-11-1968.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 110 — Scope of revisional jurisdiction of Collector — Limitations — Order is revisable irrespective of whether it is appealable or not under S. 107 or interlocutory — Revisional jurisdiction is excluded only in cases where an appeal filed within limitation is pending before him — “Where no appeal has been filed within the period provided” — Interpretation of — Spl. Civ. Applns. Nos. 1189 of 1965 and 394 of 1966, D/- 20-12-1966 (Bom), Overruled.

An order of the Tahsildar or the Tribunal is revisable under S. 110 of the Act (which corresponds to S. 76-A of Bom. Act (67 of 1948)) whether or not such order is appealable. The revisional powers of the Collector under Section 110 are not

limited only to orders that are made appealable under Section 107 of the Act but this power can be exercised by him suo motu without regard to whether the particular order is appealable or not. AIR 1959 SC 1331, Dist.; Spl. Civ. Applns. Nos. 1189 of 1965 and 394 of 1966, D/- 20-12-1966 (Bom), Overruled. (Paras 11, 17)

Suo motu revisional powers can also be invoked if attention of the Collector is drawn to some such errors even by any aggrieved party even though the section in terms does not refer to such powers being capable of being invoked at the instance of the aggrieved party. This power, however, is subject to two limitations contained in the proviso to sub-section (1) of Section 110. First limitation is that no record and proceedings can be sent for after the expiry of one year from the date of such order. Second limitation is that the order of the Tahsildar or the Tribunal cannot be modified, annulled or reversed unless opportunity has been given to the interested parties to appear and be heard. (Para 5)

The opening clause of S. 110(1) viz., “where no appeal has been filed within the period of limitation provided for it” cannot be so interpreted as to introduce a third limitation so as to confine the scope of revisional power under S. 110 only to appealable orders. The true interpretation, therefore, of this opening clause of sub-section (1) of Section 110 is that appealability of the order has nothing to do with the revisability of the same by the Collector in exercise of the power conferred under this section and its effect must be limited only to such cases where the appeal is competent, actually filed and is pending. Where, however, no appeal is competent or where appeal is competent but same is not filed, Collector appears to be free to proceed to revise any order provided of course the other requirements of this section are satisfied. (Para 9)

The word ‘order’ in S. 110 means any order whether interlocutory or final and whether appealable or non-appealable. (Para 14)

The words in the opening clause of the section appear to be intended to distinguish orders in which appeal has actually been filed and all other orders in which no appeal is or could be filed. AIR 1964 S.C. 497, Ref. to. (Para 16)

(B) Civil P. C. (1908), Pre. — Interpretation of Statutes — Language of doubtful import — More than one interpretation possible — That which advances remedy and suppresses mischief to be accepted.

Merely because certain interpretation is capable of causing inconvenience and producing unjust results, the same cannot be a ground for interpreting a certain statute in a manner found convenient and

just by the Court. Plain language of a statute must be given its due effect where the language is unambiguous and admits of no doubt. Where, however the language is doubtful and is capable of being interpreted in more than one way, the same must be interpreted in such a way which will have the effect of suppressing the mischief and advancing the cause and the object for which the same was enacted. (Para 11)

Cases Referred: Chronological Paras

- (1966) Spl. Civil Applns. Nos. 1189 of 1965 and 394 of 1966, D/- 20-12-1966 (Bom) 1
 (1964) AIR 1964 SC 497 (V 51)= 15
 1964 S.C.D. 435, S. S. Khanna v. F. J. Dhillon
 (1959) AIR 1959 SC 1331 (V 46)=
 1960-1 SCR 168, British India General Insurance Co. v. Itbar Singh 6
 (1953) AIR 1953 Raj. 90 (V 40)=
 ILR (1952) 2 Raj 608, Pyarchand v. Dungar Singh 15
 (1953) AIR 1953 Raj 137 (V 40)=
 ILR (1953) 3 Raj 483 (FB), Swarup-narain v. Gopinath 15
 J. N. Chandurkar, for Petitioners;
 V. M. Kulkarni, for Respondent No. 4.

DESHPANDE, J.:— In this Special Civil Application the petitioners challenge the legality and the correctness of the order passed by the Full Bench of the Maharashtra Revenue Tribunal in their Revision No. 1113 of 1965 on 18th November 1965. The Special Civil Application was heard by our learned brother Abhyankar J. on 4th July 1968 and he has referred the following question to the Division Bench for decision as the view taken by Paranjpe J. on this point in his judgment D/- 20-12-1966 in Spl. Civil Applns. Nos. 1189 of 1965 and 394 of 1966 (Bom), was not acceptable to him. The question referred to, is as follows:—

“Whether an order of the Tahsildar or the Tribunal is revisable under Sec. 110 of the new Tenancy Act, whether or not such order is appealable?”

2. It is not necessary to refer in details to the facts of the case. Suffice it to say that the proceedings out of which the Special Civil Applications arise were initiated by the present respondent No. 4 Ninaji son of Raghoji, claiming declaration under Section 100(2) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, hereinafter referred to as the Vidarbha Tenancy Act, to the effect that petitioners in these Special Civil Applications were not the tenants of the land survey No. 407/4, situated at village Malkapur, Taluq Malkapur, District Buldhana. The petitioners resisted the claim of the original applicant. However, the Naib-Tahsildar Malkapur granted the declaration to the respondent No. 4

by his order dated 16th June 1964, holding that petitioners were not the tenants of the said suit land within the meaning of Section 6 of the Vidarbha Tenancy Act. Petitioners then challenged this order of the Naib-Tahsildar in appeal before the Special Deputy Collector Buldhana, and their appeal was rejected by him on 23rd February 1965. Petitioners carried the matter in revision to the Maharashtra Revenue Tribunal in Revision Application No. 1113/Ten/1965. In the meanwhile doubt seems to have been raised before the Maharashtra Revenue Tribunal in several cases as to the competency of the Tahsildar to entertain application for such declarations and also about the competency of any appeal against such order of the Tahsildar in such cases before the Special Deputy Collector and the competency of the revision against the order of the Deputy Collector to the Maharashtra Revenue Tribunal under Section 110 or 111 of the Tenancy Act. This matter therefore was referred to a Full Bench of the Maharashtra Revenue Tribunal and was heard along with some other revision cases including revision application No. 2244/64 and revision application No. 745/64. By order dated 18-11-1965 the Full Bench of the Maharashtra Revenue Tribunal held that such applications for negative declarations were maintainable and Tahsildar was competent to decide the same. Maharashtra Revenue Tribunal, however, further held that no appeal was competent against such order to the Collector or the Deputy Collector as Section 107 of the Vidarbha Tenancy Act did not in terms provide for any appeal against order passed by Tahsildar under Section 6 of the Act though in the corresponding Bombay Tenancy and Agricultural Lands Act, 1948, Section 74 did in terms provide for an appeal against such order passed by the Mamlatdar. The Maharashtra Revenue Tribunal further held that revisional powers of the Collector under Section 110 could be exercised only against the orders passed by the Tahsildars in cases made appealable under Section 107 of the Vidarbha Tenancy Act and no revision was competent before the Collector, in the present case, as the order passed by the Naib-Tahsildar on 16-6-1964 was not appealable under Section 107 of the Tenancy Act. It is this order that is challenged in this Special Civil Application.

3. In the meanwhile, aggrieved parties in Revision Application No. 2244/64 had preferred a Special Civil Application to this Court being Special Civil Application No. 1189/65 against the same order of the Maharashtra Revenue Tribunal dated 18-11-1965. Applicants in Revision No. 745 of 1964 had also preferred a Special Civil Application being Special Civil Application No. 394/66 against the same order of

the Maharashtra Revenue Tribunal. Both these Special Civil Applications were heard by Paranjpe J. on 20th December 1966. Paranjpe J. confirmed the view of the Maharashtra Revenue Tribunal on all the points and consequently held that no appeal was competent before the Collector or Deputy Collector against the order of the Mamlatdar giving negative declaration as to the tenancy claims of the tenants and as such the said order also was not revisable under Section 110 of the Tenancy Act as the revisional powers of the Collector under Section 110 are confined to only such orders which are rendered appealable under Section 107 of the said Act. As stated above, when the present Special Civil Application came up for hearing before Abhyankar J. on 4-7-1968, he did not find it possible to agree with the view of Paranjpe J. as far as the competency of the Collector to revise the order of the Tahsildar under Section 110 of the Tenancy Act is concerned. On other two points, however, Abhyankar J. has concurred with view of Paranjpe J. Hence this reference by Abhyankar J., to this Division Bench on a limited question formulated by him and extracted in the earlier part of this judgment.

4. We, therefore, proceed to dispose of this question referred to us on the basis that order passed by the Naib Tahsildar dated 16th June 1964 is not appealable, and that the order passed by the Special Deputy Collector on 23rd February 1965 can be said to have been passed by him in his revisional jurisdiction under S. 110 of the Tenancy Act in case we hold that Collector can revise the order of the Tahsildar without regard to whether the same is appealable under Section 107 of the Act. It is not disputed that revision to Maharashtra Revenue Tribunal under Section 111, in that event will be maintainable. After the judgment of Maharashtra Revenue Tribunal dated 18-11-65, Section 107 of the Tenancy Act has been now amended by Maharashtra Act No. 17 of 1966 and order passed to that effect under Section 6 of the Tenancy Act i.e. adjudicating the claim to the tenancy of any claimant is made specifically appealable by virtue of this amendment. For the purpose of recording our answer to the question formulated by Abhyankar J. it is not necessary to consider the effect of this amendment on the present controversy as the same is beyond the purview of the limited scope of the reference made to us. We may also add that notwithstanding the prayer for possession made by the respondent No. 4 in the residuary clause of his petition, the Courts below have proceeded in this case on the basis that the proceedings initiated by respondent No. 4 essentially are for claiming negative declaration of the petitioner not being the tenant of the suit land. S. 110 of the Tenancy Act is as follows:—

"(1) Where no appeal has been filed within the period provided for it, the Collector may, suo motu or on a reference made in this behalf by the Commissioner or the State Government, at any time, —

(a) call for the record of any inquiry or the proceedings of any Tahsildar or Tribunal for the purpose of satisfying himself as to the legality or propriety of any order passed by, and as to the regularity of the proceedings of such Tahsildar or Tribunal, as the case may be and

(b) pass such order thereon as he deems fit; Provided that no such record shall be called for after the expiry of one year from the date of such order and no order of such Tahsildar or Tribunal shall be modified, annulled or reversed unless opportunity has been given to the interested parties to appear and be heard.

(2) Where any order under Section 81 is made by an Assistant or Deputy Collector performing the duties or exercising the powers of the Collector or by an officer specially empowered by the State Government to perform the functions of the Collector under this Act, such order shall be subject to revision by the Collector and the provisions of sub-section (1) shall apply to the proceedings of the Assistant or Deputy Collector or officer concerned, as they apply to the proceedings of a Tahsildar or Tribunal."

5. Section 110 occurs in Chapter 10. Section 97 to Section 116 of this Act deal with procedure and jurisdiction of Tribunal, Tahsildar and Collector, appeal and revision. Duties and functions of the Tahsildar are enumerated in Section 100. Section 107 provides for the appeal against the order of the Tahsildar or Tribunal and only certain specific orders passed by them are made appealable. Ss. 110 and 111 provide for the revisional powers. Parties aggrieved by any order of the Collector including the orders in appeal or revision, can approach the Maharashtra Revenue Tribunal under Section 111 of the Tenancy Act and Maharashtra Revenue Tribunal can revise the said order if any case, as contemplated in clauses (a) to (c) of sub-section (1) of the said section is made out. These revisional powers, however, can be invoked only by the aggrieved parties and Revenue Tribunal does not possess any jurisdiction to revise any order suo motu. Section 110, however, authorises the Collector to suo motu revise any order passed by the Tahsildar or the Tribunal if he considers so necessary or fit after sending for the records for the purpose of satisfying himself as to the legality or propriety of any order or as to the regularity of the proceedings before such Tahsildar or the Tribunal. Collector can also proceed to send for the records of the Tahsildar or Tribunal and revise the

order if he so thought necessary if reference in this behalf is made by the Commissioner or the State Government. It is now well settled that suo motu revisional powers can also be invoked if attention of the Collector is drawn to some such errors even by any aggrieved party even though the section in terms does not refer to such powers being capable of being invoked at the instance of the aggrieved party. This power, however, is subject to two limitations contained in the proviso to sub-section (1) of S. 110. First, limitation is that no record and proceedings can be sent for after the expiry of one year from the date of such order. Second limitation is that the order of the Tahsildar or the Tribunal cannot be modified, annulled or reversed unless opportunity has been given to the interested parties to appear and be heard. Next question is: Is this revisional power subject to any further limitation?

6. It is argued by Mr. Kulkarni, the learned Advocate for respondent No. 4, that the opening clause of sub-section (1) of Section 110 introduces one more limitation on the revisional powers of the Collector. Sub-section (1) of Section 110 opens with the words, "where no appeal has been filed within the period provided for it." It is urged that clear implication of this clause is that Collector's revisional powers can only be invoked in regard to such orders in which appeal can be filed by the aggrieved party. If the order of the Tahsildar or the Tribunal itself is not appealable under Section 107 of the Act or under any other section of the Act the question of filing any appeal within the period provided for it, does not arise at all, and such non-appealable orders cannot be revised by the Collector, otherwise this clause will be redundant and meaningless if it is held that Collector can revise any order of the Tahsildar or the Tribunal in exercise of the powers under this section without regard to whether the said order is appealable or not. This contention of the respondent found favour with the Maharashtra Revenue Tribunal and the same view commended itself to Paranjpe J. In support of his view, Paranjpe J. also relied on the judgment of the Supreme Court in the case of *British India General Insurance Co. v. Itbar Singh*, AIR 1959 S.C. 1331. To our mind, the ratio of the judgment of the Supreme Court is, at any rate, not directly relevant for the decision of the point that has arisen in this case. But it must be conceded that the interpretation sought to be placed on this opening clause of sub-section (1) of Section 110 by Paranjpe J. cannot be said to be not possible. The basis of the entire approach is the implication of the plain wording of the above opening clause when it says that the Collector may call for the record of any en-

quiry or proceedings of any Tahsildar or the Tribunal, "where no appeal has been filed within the period provided for it."

7. Mr. Chandurkar, the learned Advocate for the petitioners, however, argues that this clause has the effect only of excluding such cases from the revisional jurisdiction of the Collector where in any appealable case, in fact, any appeal has been filed before the appellate authority and the same is pending. According to Mr. Chandurkar, the Collector can revise any order of the Tahsildar, whether appealable or not except in the case where the appeal is actually pending before the appellate authority and the error is capable of being corrected by the appellate authority in view of the pendency of the said appeal. Contention is that the errors of Tahsildar or Tribunal are always capable of being corrected by the appellate authority once the appeal is filed, and, therefore, legislature wanted to exclude such pending cases from the scope of revisional powers of the Collector when the appeals were lodged before the appellate authority within time. According to Mr. Chandurkar, the clause "where no appeal has been filed within the period provided for it" only means that all other orders of Tahsildar and Tribunal are capable of being revised by the Collector excepting in the limited contingencies where the appellate authority is seized of the matter.

8. In our opinion, interpretation suggested by Mr. Chandurkar also is equally possible. In fact, the said interpretation has commended itself to Abhyankar J. We are also inclined to accept the same as in our opinion, the same is more sound and logical, and accords with the tenor of the section as a whole.

9. Comparison of the revisional powers of the Collector under section 110 with the revisional powers of the High Court under Section 115 of the Code of Civil Procedure will not be without some benefit to get a correct answer to the controversy raised in this case. Material portion of Section 115 of the Code of Civil Procedure reads as follows:—

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

- (a) x x x
- (b) x x x
- (c) x x x

the High Court may make such order in the case as it thinks fit"

The clause "in which no appeal lies thereto" in Section 115 is decisive and excludes all appealable orders from its purview. Under Section 115, therefore, no appealable order is capable of being revised. Now, the clause, "Where no appeal

has been filed within the period provided for it" in sub-section (1) of Section 110 of the Tenancy Act cannot be said to be as clear and unambiguous as "in which no appeal lies thereto". The scope of the revisional powers conferred under S. 110 on the Collector appears *prima facie* to be extremely wide, unfettered and unrestricted. One would expect a very strong clear, unambiguous and compelling phraseology to exclude the non-appealable orders from its sweep and confine the scope of Collector's such powers only to appealable orders. The true interpretation, therefore, of this opening clause of sub-section (1) of Section 110 to our mind is that appealability of the order has nothing to do with the revisability of the same by the Collector in exercise of the power conferred under this section and its effect must be limited only to such cases where the appeal is actually filed and is pending where the appeal is competent. Where, however, no appeal is competent or where appeal is competent but same is not filed, Collector appears to be free to proceed to revise any order provided of course the other requirements of this section are satisfied.

10. It is worthy of note that S. 76-A of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Bombay Tenancy Act) is identically worded as sub-section (1) of Section 110 of the Vidarbha Tenancy Act. In fact, Section 110 (1) is verbatim copy of Section 76-A of the Bombay Tenancy Act. Chapter 6 of the Bombay Tenancy Act is identically the same as Chapter 10 of the Vidarbha Tenancy Act, both of which deal with identical heading viz. Procedure and Jurisdiction of Tribunal, Mamlatdar and Collector; Appeals and Revision. When originally the Bombay Tenancy Act was enacted in 1948, S. 76-A was not there. This section was introduced for the first time in the Act by Bombay Act No. 38 of 1957. Even prior to the introduction of Section 76-A, aggrieved parties could have recourse to the revisional jurisdiction of the Maharashtra Revenue Tribunal under Section 76 of the Bombay Tenancy Act. There was, however, no section authorising the Collector or the Revenue Tribunal to exercise *suo motu* revisional powers to correct the illegality or impropriety in the orders passed by the Mamlatdar or the Tribunal or correct the irregularity in the proceedings before them. The legislature found it necessary to introduce Section 76-A in the statute with a view to meet certain ends and ensure that the underlined policy behind the Tenancy Act was duly implemented. No doubt, sweeping rights have been created in favour of the tenants, and aggrieved tenants can always get redress by preferring appeals and revisions as provided in this chapter. It

is, however, clear that, apart from the landlords and tenants, the State is equally interested not only in implementing the policy behind the Tenancy Act but also in seeing that policy of the State is not affected either by the ignorance of the tenants or their indolence or their collusion with the landlords. It appears, with a view to meet such contingencies where the ignorant and helpless tenants could not avail of the remedies provided for them or with a view to avoid the policy of the enactment being defeated by the collusion between the landlord and the tenant, it was found necessary to confer such revisional powers on the Collector to initiate the proceedings *suo motu* wherever he himself comes to know of certain illegalities or improprieties or where his attention is drawn by some one else. The Vidarbha Tenancy Act, 1958, was brought on the statute book after Bombay enactment of 1948. The Section 76-A has therefore been copied verbatim in Section 110(1) of the Vidarbha Tenancy Act presumably with the same object. If this is the legislative history and if this is the object with which Section 76-A in Bombay Tenancy Act and corresponding Section 110, sub-section (1) is brought on the statute book, this object can better be advanced by accepting the interpretation suggested by Mr. Chandurkar, particularly when both interpretations are found to be possible.

11. As observed by Abhyankar J. in his referring order interpretation accepted by Revenue Tribunal and confirmed by Paranjpe J. is likely to lead to unintended and startling results. The enactment confers powers on the Tahsildar to pass orders in several contingencies and, many of his such orders are not made appealable. Some of his unappealable orders are capable of producing sweeping consequences having a bearing on the policy of the State in regard to the tenancy legislation. It is inconceivable that legislature could have contemplated to exclude all such orders from the sweep of the Collector's revisional powers under Section 110 merely because they are not appealable under Section 107 of the Tenancy Act. In fact, non-appealability of such orders itself affords a strong ground why legislature must be intended to have included all such orders within the sweep of the Collector's revisional powers. It is true that merely because certain interpretation is capable of causing inconvenience and producing unjust results, the same cannot be a ground for interpreting a certain statute in a manner found convenient and just by the Court. Plain language of a statute must be given its due effect where the language is unambiguous and admits of no doubt. Where, however, as here, the

language is doubtful and is capable of being interpreted more than one way, the same must be interpreted in such a way which will have the effect of suppressing the mischief and advancing the cause and the object for which the same was enacted. In this view of the matter, we are inclined to hold that the revisional powers of the Collector under Section 110 are not limited only to orders that are made appealable under Section 107 of the Act but this power can be exercised by him suo motu without regard to whether the particular order is appealable or not.

12. Acceptance of Paranjpe J.'s interpretation would mean that the legislature wanted the Collector to exercise his revisional powers only in appealable orders even when the aggrieved party could have availed of the remedy of appeal with a view to get his grievances redressed and has failed to do so and slept over his rights, but the legislature did not intend the Collector to come to the rescue of those who could not have appealed at all for want of appeal provision and who were forced to acquiesce in the injustice and wrong done to them under the orders of the Tahsildar or the Tribunal even when such orders defeated the legislative policy. We do not think that there is any warrant for attributing any such intention to the legislature.

13. This interpretation of ours, gains further strength from two more factors. Now the clause (a) of sub-section (1) of Section 110 authorises the Collector suo motu to call for the record of "any" enquiry or the proceedings of any Tahsildar or Tribunal. Thus, the words, "record of any enquiry" are not restricted to the appealable orders when no appeal is filed implying that the powers of the Collector are not restricted or confined to call for the records of only "such enquiry", "where no appeal has been filed within the period provided for it". The absence of word "such" in this clause, to our mind, is not unintentional and affords a further clue to understand what precisely is meant by the opening clause of this section viz., "where no appeal has been filed within the period provided for it". It can only mean that there is no direct nexus between the case referred to in the opening clause of sub-section (1) "where no appeal was filed within the period provided for", and the powers of the Collector to send for the record of any enquiry. On the plain interpretation of clause (a), Collector's power to call for the record of any enquiry is unrestricted without regard as to whether the said enquiry has actually resulted in an appealable order or not and whether appeal could, in fact, have been filed against any order passed in the said enquiry. Only limitation and restriction contemplated appears to be that records

of any enquiry shall not be sent for where appeal is filed, and the opportunity to get redress has been, in fact, availed of within the prescribed period of limitation provided for it. This language of clause (1), therefore, also supports the interpretations suggested to us by Mr. Chandurkar.

14. The power to send for the records or the proceedings of any Tahsildar or the Tribunal contemplated in clause (a) of sub-section (1) of Section 110 is not confined to any particular kind of orders. Object of the sending for the records as specified in clause (a) is to satisfy the Collector "as to the legality or propriety of any order" and (b) "as to the regularity of the proceedings of the Tahsildar or the Tribunal". There is nothing in the language of clause (a) to suggest that such legality or propriety is required to be considered only in regard to the final orders passed in any proceedings or that regularity of any proceedings before any Tahsildar or Tribunal can be examined by the Collector only after the said proceedings ultimately come to an end. The word, 'order' is capable of being meant as any order whether interlocutory or final. It is true, in the context sometimes the word, 'order' can only mean final order, and not any interlocutory order. But as stated above, that depends upon the context in which the word 'order' is employed by the legislature. In one context, it may mean the final order and yet in another context it may mean any order whether interlocutory or final and whether appealable or non-appealable. The appealable orders are in terms enumerated under Section 107 of the Act. A bare glance at the list of these enumerated orders will at once show that all these orders on the face of them appear to be final orders in regard to which the section authorises an appeal to the Collector. There is nothing in Section 110 to restrict the meaning of the word 'order' only to appealable orders. If the word is permitted to take its colour from the context in which it is used under S. 110, it appears to us that this word 'order' means any order whether interlocutory or final and whether appealable or non-appealable. The power to examine legality or propriety of the order passed by the Tahsildar or the Tribunal and the regularity of the proceedings before them is not restricted to depend on its appealability. Appealability does not appear to be the necessary attribute of the orders passed by these authorities for the purposes of being revised by the Collector. Having regard to the object with which this section has been enacted and having regard to the nature of the revisional powers of the Collector contemplated under this section, it will not be open for the Courts to arbitrarily exclude some

orders from the sweep of this section by some unnatural interpretation without any rhyme or reason.

15. Our attention has also been drawn to some observations of the Supreme Court in the judgment in AIR 1964 S.C. 497, S. S. Khanna v. F. J. Dillon. These observations may not be directly relevant for the purposes of deciding the point that has arisen before us. These observations, however, can be of immense help and guide to correctly interpret the restrictive scope of the opening clause of Section 110 of the Vidarbha Tenancy Act. The Supreme Court in the above case was called upon to interpret the words "any case which has been decided by any Court in which no appeal lies thereto," in Section 115 of Civil Procedure Code. Relying on the two judgments of the Rajasthan High Court, AIR 1953 Raj. 90 and AIR 1953 Raj. 137, the scope of revisional powers under Section 115 was sought to be restricted only to such final orders passed by any subordinate Court against which no appeal lies. All other interim orders were sought to be excluded from its purview which could be corrected in appeal, preferred against the final order in the case made appealable either as a decree or an order under Order 43 read with Section 104 of the Civil Procedure Code. This contention was negated by the Supreme Court and the judgments of the Rajasthan High Court were overruled, holding firstly that the word 'case' includes a part of a case or a suit, and even interlocutory orders can be revised by the High Court, provided the order raises a question of jurisdiction contemplated in sub-ss. (a) to (c) of Section 115 of the Civil Procedure Code. The Supreme Court also further held that the words 'case in which no appeal lies' do not warrant the interpretation that interlocutory orders capable of being corrected in the course of the appeal preferred against the final order are excluded from the revisional jurisdiction of the High Court. The expression 'in which no appeal lies thereto' according to the Supreme Court is not susceptible of the interpretation that it excludes to exercise the revisional jurisdiction when an appeal may be competent from the final order. The use of the word 'no' is not intended to distinguish orders passed in proceedings not subject to appeal from the final adjudication from those from which no appeal lies.

16. In the present case, we are called upon to restrict the revisional powers of the Collector by the opening clause of the said section "where no appeal has been filed within the period provided for it". Borrowing from the reasoning of the Supreme Court, in the above case, we can safely say that these words in the opening clause of the section were never

intended to distinguish the appealable orders against which no appeal was filed within time, from the non-appealable orders which are sought to be excluded from his revisional jurisdiction. These words appear to be intended to distinguish orders in which appeal has actually been filed and all other orders in which no appeal is or could be filed.

17. Sub-section (2) of Section 110 also gives further support to the above interpretation of ours. There is no such sub-section (2) in the corresponding S. 76-A of the Bombay Tenancy Act. Reason seems to be that the Bombay Act does not contain any Chapter corresponding to Chapter 7 of the Vidarbha Tenancy Act. The orders passed under Section 81 of the Vidarbha Tenancy Act referred to in sub-section (2) of Section 110 are not made appealable under the Act and yet sub-section (2) in terms enables the Collector to revise any order passed by any authority performing the functions of the Collector as contemplated under sub-section (2) of Section 110. But for this sub-section (2), the orders of such officer could not have been capable of being revised by the Collector as sub-section (1) authorises the Collector only to revise the orders of Tahsildar and the Tribunal. The circumstance that sub-section (2) deals with non-appealable orders, lends further support to the view that the revisional powers of the Collector under Section 110 do not depend upon the appealability of the order and that only such orders of Tahsildar or Tribunal are contemplated to be excluded from the sweep of this section where appeal has been filed and the remedy of the appeal is being availed of by the aggrieved party. We accordingly hold that the revisional powers of the Collector under Section 110 are not restricted by the legislature only to the appealable orders under the Act. Within the sweep of the revisional powers of the Collector under this section are included, not only the appealable orders against which appeal could have been filed, but also other orders whether appealable or not. Only such orders are excluded from the sweep of the revisional powers of the Collector in regard to which appeal has been filed within time and the remedy of the appeal is being availed of. We answer the reference in the affirmative. The case will now be placed before the learned single Judge for disposal according to law.

Answer in the affirmative.

AIR 1970 BOMBAY 93 (V 57 C 13)

PATEL AND WAGLE, JJ.

Sadashiv Vishnu Nagarkar and another, Petitioners v. Maruti Baloba Vyavahare and others, Opponents.

Special Civil Appln. No. 1914 of 1968 with Special C. A. No. 1934 of 1968, D/-10-10-1968.

(A) Panchayats — Bombay Village Panchayats Election Rules (1959), R. 13—R. 13 is ambiguous and unworkable — Fixation of specific date by Tahsildar for withdrawal of nomination — Names of candidates withdrawing by specified date not shown by Returning Officer as candidates to election — Election held not invalid.

Rule 13 is ambiguous and unworkable as it does not provide a particular terminal date for withdrawal of a candidate from election. The rule cannot be read to mean that if a candidate has not filed an appeal, then he must give notice of withdrawal of his candidature on the fourth day and if he had filed an appeal, then he must give notice of his withdrawal on the seventh day or on the day next after the date of which the Mamlatdar decides his appeal. The words "any candidates" in R. 13(1) are wide enough to apply to each of the candidates who have sent their nomination papers and cannot be confined only to those who are concerned with the appeal and want to withdraw. Inasmuch as Rule 13 is indefinite and vague and cannot possibly be observed by the candidates, the Tahsildar can fix a specific date for withdrawal from the elections by a candidate. The election, in such case cannot be held invalid on the ground that the names of candidates who had withdrawn on the specified date of

withdrawal were not shown by the Returning Officer as candidates contesting the election. (Paras 7, 8, 9)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Bye-Laws made under statutory powers — Must be clear, definite and free from ambiguity.

Instruments and bye-laws made under statutory powers enforceable by penalties are construed like other provisions encroaching on the ordinary rights of persons. They must on pain of invalidity be clear and definite and free from ambiguity. (Para 7)

(C) Panchayats — Bombay Village Panchayats Election Rules (1959)—Practice of modifying election rules from time to time deprecated — Observed further that it was desirable that a provision similar to the one in the Representation of the People Act, 1950 and in the Zilla Parishad Act which prevents election being set aside on technical grounds should be added even to the Village Panchayat Act and the Municipal Act where it does not exist. (Para 11)

U. R. Lalit, for the Petitioners (in both); P. S. Shah, for Opponents (Nos. 1 and 2 in both and 1 to 3 in both); M. A. Rane, Asstt. Govt. Pleader, for Opponents (Nos. 5 to 8 and 4 to 7 in both.)

PATEL, J.:— These two applications are directed against the orders of the Election Court setting aside the elections of the respective petitioners. In Special Civil Application No. 1911 of 1968 the two petitioners and respondents Nos. 1 and 2 and two others were candidates for the general constituency in Ward No. 2 of the village Karkamb in Pandharpur Taluka. The election programme published by the Tahsildar was as follows:—

| | |
|---|------------------------|
| 1. The date of publication of voters' list | ... November 25, 1967. |
| 2. The date of filing of nominations | ... December 12, 1967. |
| 3. The date of scrutiny of nominations | ... December 13, 1967. |
| 4. The date of withdrawal of the same | ... December 21, 1967. |
| 5. The date of publishing the list of candidates | ... December 23, 1967. |
| 6. The date of recording of votes | ... December 29, 1967. |
| 7. The date of counting of votes and declaration of the results | ... December 30, 1967. |

On December 21, 1967, two of the candidates filed an application for withdrawal from the election. The returning officer published on December 23, 1967, the list of candidates omitting the names of those who had withdrawn. Elections were held in accordance with the programme on December 29, 1967, and the results of the election were declared on the next day.

2. At the poll petitioner No. 1, Sadashiv Nagarkar secured 366 votes, petitioner No. 2, Pandharinath Dudhane secured 345 votes, respondent No. 1 Maruti secured 325 votes and respondent No. 2 Vithal secured 324 votes. Respondents Nos. 3 and 4 contested for reserved

seat. Respondent No. 5 is the returning Officer. Respondent No. 6 is the village Grampanchayat — Respondent No. 7 is the Civil Judge, Senior Division, Pandharpur and respondent No. 8 is the Tahsildar of Pandharpur. Respondent No. 1 filed the application for setting aside the election of the petitioners on the ground that the withdrawal by the two candidates on December 21, 1967, of the date having been fixed by the Tahsildar for the same, was not in accordance with the terms of Rule 13 of the Village Panchayats Election Rules, 1959 (hereinafter referred to as the Rules of 1959) framed by the State Government under the Village Panchayat Act, 1958 (hereinafter referred to as the Act of 1958). The whole election,

therefore, suffers from invalidity and it should be ordered afresh. It was contended before the learned Judge that the provisions of Rule 13 of the Rules 1959, are mandatory and that the withdrawal not being in accordance with the same, the candidates still continued to be candidates for the election, that their names should have been notified for the purpose and that the voters should have been entitled to vote for them. As Returning Officer did not do this, the elections ought to be declared as invalid. The contention appealed to the learned Judge and he accordingly set aside the election. The two petitioners contended that the learned Judge was not right in the view that he took.

3. Special Civil Application No. 1934 of 1968 relates to elections in the same village in Ward No. 5 and the contention in this case also is the same.

4. Mr. Lalit, for the petitioners, argued that Rule 13 of the Rules of 1959 is not a wholly understandable rule, it is not clear and definite and is not workable at all. Under the circumstances, if the officer fixed a date for withdrawal of candidature which did not in any manner affect the election programme and the relevant conditions, the election ought to be held to be good as it is not shown that the results of the election have suffered. Mr. Shah and Mr. Rane, for the respondents, have supported the judgment under review on the same grounds as in the court below.

Section 11(1) of the Act of 1958 requires the Election to be held by a panchayat on such date as may be appointed by the Collector in that behalf. Sub-section (2) provides that the election shall be conducted in the prescribed manner. The word "prescribed" has been defined under S. 3(15) to mean prescribed by Rules. A duty is cast upon the Govt. to frame rules under S. 176 of the Act amongst other things for the purpose of S. 11 prescribing the manner in which the election of members shall be held. Under sub-section (5) of S. 176, the rules are required to be laid before each House of Legislature.

5. Accordingly, the rules of 1959 have been framed. These are revised rules, the original rule has now been substituted by Rule 13 and it has created the difficulty of application, resulting both in waste of money and public time. For the present purposes, only a few rules need be referred to. Under Rule 7(1) the Mamlatdar is required to appoint the dates, the hours and place or places for the stages of an election, namely (i) the nomination of candidates, (ii) the scrutiny of nominations, (iii) the recording of votes and (iv) the counting of votes, the condition being that between the date fixed for the nomination of candidates and the date fixed

for the poll there must be at least an interval of twentyfive days and that the date for the scrutiny of nominations should be the date immediately following the date fixed for the nomination of candidates. Sub-r. (2) is regarding the publication of all the necessary matters in a due and proper manner and need not detain us. Sub-r. (3) prohibits the change of venue appointed for various purposes under sub-rule (1) without the sanction of the Collector subject to the proviso. Rule 8 relates to the manner in which the nomination of candidates has to be made. Rule 10 relates to the deposit to be made by a candidate who wants to be nominated as a candidate. Sub-rule (2) relates to the return of the deposit in the contingencies mentioned therein. Rule 11 relates to scrutiny of nominations. Under sub-rule (2) the Returning Officer has to examine the papers and decide all objections which may be made before him to any nomination and after such inquiry as he considers necessary, reject a nomination paper on the grounds mentioned therein. But he is not entitled to reject any nomination paper on the ground of a defect which is not of a substantial character. Rule 12 relates to completion of scrutiny and appeal against rejection of nomination. Under sub-r. (1) the Returning Officer is required to complete the scrutiny on the appointed day for the purpose. Under sub-r. (2) he had to endorse on the same day on each nomination paper his decision accepting or rejecting the same and in case of rejection he is required to record in brief the statement of his reasons for such rejection. By sub-rule (3) he is required to supply within twenty-four hours of the receipt of such application a copy of the decision along with his reasons for the same. By sub-rule (4) a candidate is permitted to present an appeal from the order of the Returning Officer rejecting his nomination paper to the Mamlatdar within two days of the date of the order of rejection and the Mamlatdar is required to decide the same within three days of the presentation of appeal and immediately communicate the decision to the Returning Officer. The order passed by the Mamlatdar is made final. Rule 13 relates to withdrawal of candidature. By sub-rule (1) of Rule 14 the Returning Officer is required to prepare a list of candidates validly nominated and post it at the village Chavdi and the Village Panchayat Office at least ten days before the date appointed for the poll. By sub-rule (2) he is required to give a notice by beat of drum in the village and invite the voters to remain present at the polling stations.

6. Rule 13 is the rule in question and it reads as follows (so far as relevant):—

"(1) Any candidate may withdraw his candidature by a notice in writing....."

where no appeal is presented under sub-rule (4) of Rule 12, on the day immediately after the expiry of the appeal period referred to in the said sub-rule and where such appeal is presented under the sub-rule, on the day immediately the following day on which the decision of the appeal is given Any notice of withdrawal which is given after the expiry of the period prescribed in this rule shall not have any effect."

Sub-rule (2) is not material for the present purpose. Sub-rule (3) reads as under:—

"The Returning Officer, on receiving notice of withdrawal under sub-rule (1) shall, as soon as may be thereafter, cause a notice of withdrawal to be affixed at the village Chavdi and at the village panchayat office."

Mr. Lalit contends that the said Rule is very uncertain in its application and is purposeless in its present form. Where no appeal is presented under sub-rule (4) of Rule 12 any candidate could withdraw only on the day immediately after the expiry of the period of appeal. On the other hand, where such an appeal is presented under that rule, then any candidate could withdraw on the day immediately the following day on which the decision of the Mamlatdar is given. It is argued that a candidate may not know whether or not some other candidate has filed an appeal, nor a candidate would know whether or not the Mamlatdar has made a decision. It is also difficult to understand the purpose why such two requirements are prescribed, the one for withdrawing on the fourth day and the second for withdrawing between the fourth and the seventh day. It is difficult to see what was intended to be achieved by making a provision of this nature. The result of such requirement would be that in respect of different Wards some withdrawals may be on the fourth day, some withdrawals may be on the fifth day, some on the sixth day and some may on the seventh day, if at all it is assumed that the decision of the appeal by the Mamlatdar is known to the candidates. Under sub-rule (4) of Rule 12 the Mamlatdar is required to communicate his decision to the Returning Officer. Does the rule require that the candidates must go to the office of the Returning Officer every day to make inquiry as to whether the Mamlatdar has decided the appeal? Unless such an obligation is imposed it is possible that the candidates would not be in a position to know whether or not the Mamlatdar has made a decision in the appeal. It may also be that though the Mamlatdar is required to decide the appeal within three days of the presentation of the appeal, he may not be able to decide it and his decision may be delayed by a day. It is contended by

M/s Shah and Rane that in such a case the decision may be without jurisdiction. That, however, is difficult to spell out from this portion of the rule. It may also, therefore, be assumed as a possible contingency that the decision may not be, in some case, rendered within three days as required by this Rule. Unless there is anything in the rule which can enable us to fix the date for withdrawal with certainty, the Rule must be held to be indefinite, vague, unworkable and therefore invalid.

7. In order to get over this difficulty it is argued by both M/s Shah and Rane that the later period in Rule 13 must be related only to a candidate who has filed an appeal. They want us to read the rule to mean that if a candidate has not filed an appeal, then he must give notice of withdrawal of his candidature on the fourth day and if he had filed an appeal, then he must give notice of his withdrawal on the seventh day or on the day next after the date on which the Mamlatdar decides his appeal. In the first place, if we attempt to read the Rule in the manner suggested, we will have to add words to the Rule, and in substance instead of interpreting the rule perform the duty of framing the rule which is not ours. Language is meant for exposing one's thoughts and not for concealing them. If the framers of the rule wanted that this rule should apply only to candidate who appeals or does not appeal, they could have said so by adding the words "by him" after the words "where no appeal is presented" and before the words "under sub-rule (4) of Rule 12" and again after the words "where such appeal is presented" and before the words "under that sub-rule" in sub-rule (1) of Rule 13. We do not think that we would be justified in reading the Rule in the manner suggested. The words "any candidates" are wide enough to apply to each of the candidates who have sent their nomination papers and cannot be confined only to those who are concerned with the appeal and want to withdraw. It is settled that "instruments and by-laws made under statutory powers enforceable by penalties are construed like other provisions encroaching on the ordinary rights of persons. They must on pain of invalidity, be clear and definite and free from ambiguity, and should not make unlawful things that are otherwise innocent" (Vide Maxwell on Interpretation of Statutes, 11th edition, page 290). As in our view Rule 13 of the Rules 1959 is ambiguous and unworkable, it cannot be given effect in the same manner as where there is a clear rule which provides a particular terminal date for the withdrawal of a candidate from the election.

8. It was argued that in the present case, the provision being in a negative

form, that is "Any notice of withdrawal which is given after the expiry of the period prescribed in this rule shall not have any effect", we must hold that whatever may be the nature of the Rule, it must apply to a given case, and as the names of the candidates who had withdrawn on December 21, 1967 were not shown as candidates contesting the elections, the elections ought to be held invalid. Now it is true that the Rule which prescribes doing of certain things except in the manner provided must be held to be mandatory. But where, as in this case, it is difficult to enforce the Rule at all and is, therefore, invalid, it would not be right to say that the Returning Officer was not right in not showing them as candidates.

9. In the present, case, the Tahsildar had fixed December 21, 1967 as the date of withdrawal from elections by a candidate. In the old Rule a period of seven days was provided for such withdrawal from the date of scrutiny. Apparently, the Tahsildar has acted under that rule. Inasmuch as Rule 13, in our view, is indefinite and vague and could not possibly be observed by the candidates, the Tahsildar was right in fixing a specific date for withdrawal from the elections by a candidate. That being so, the Returning Officer was right in not showing those candidates who had withdrawn from the elections as candidates. Rule 14, which is a peremptory rule, requires at least ten days to elapse between the publication of the list of validly nominated candidates and the poll, and that rule has been observed inasmuch as sixteen days are allowed between the two dates.

10. Under these circumstances, the second question as to whether the results of the elections have suffered prejudicially against the respondents does not fall to be decided. In the first place, no evidence was led by any of the parties and there was not even an allegation in that respect.

11. We may observe that we have noticed that the election rules are being modified from time to time which results in much litigation of this kind and which can very well be avoided if the Rules are specific, clear and are not changed or tinkered with so often. It would also appear that in order that elections should not be set aside on technical grounds because of errors of Returning Officers in conducting the elections to small bodies, it is desirable that a provision similar to the one in the Representation of the People Act, 1950 and in the Zilla Parishad Act which prevents election being set aside on such technical grounds should be added even to the Act of 1958 and the Municipal Act where it does not exist.

If such a provision is added, a great deal of waste of time of the Government, its officers, the public and also the Courts will be saved.

12. In the result, we make the rule absolute in both these applications and set aside the orders made by the learned Civil Judge, Junior Division, Pandharpur, and dismiss the applications of respondent No. 1 in each of these matters. Parties to bear their own costs.

Rule made absolute.

AIR 1970 BOMBAY 96 (V 57 C 14)
(AT NAGPUR)

PADHYE AND VIMADALAL, JJ.

Ramdas Sheoramji, Petitioner v. Panjab Govindraoji and others, Respondents.

Spl. Civil Appln. No. 449 of 1968, D/- 19-2-1969.

Panchayats — Bombay Village Panchayats Act (3 of 1959), Ss. 13 and 13-A — There is no prohibition for a person whose name has been recorded in the voters' list of more than one ward from voting in more than one ward — Where such a person votes in both the wards, the votes cannot be excluded unless such person is disqualified under S. 13(1) — Provisions of Representation of the People Act cannot be read into the Bombay Village Panchayats Act. (Paras 10, 11 and 15)

P. T. Trivedi, P. S. Badiye and G. J. Mundhada, for Petitioner; S. P. Deshpande, for Respondent (No. 1).

PADHYE, J.:— Village Jaola Shahapur in taluq Achalpur, district Amravati has been divided into four wards for the purposes of Village Panchayat. Ward No. 4 with which we are concerned in this petition is a double-member constituency. The elections to the Village Panchayat in this village were held on 11-4-1967. The petitioner and the respondents Nos. 1 to 3 were the four candidates for election to the Village Panchayat from Ward No. 4. Two members were to be elected from this constituency. As a result of the counting on 13th April, 1967 it was found that the respondent No. 2 Ganeshrao Malluji secured 92 votes, the petitioner and the respondent No. 1 secured 87 votes each and the respondent No. 3 Hiran secured 72 votes. Being a double-member constituency, the respondent No. 2 Ganeshrao who secured largest number of votes was first declared elected. So as to secure the second seat, there was a tie between the petitioner and the respondent No. 1, each of them having secured 87 votes. Since the petitioner and the respondent No. 1 secured equal votes, the Returning Officer

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acted under Rule 34, sub-rule (3) of the Bombay Village Panchayats Rules, 1959 and lots were drawn as a result of which the petitioner was declared elected. The respondent No. 1, therefore, filed an election petition under Section 15 of the Bombay Village Panchayats Act, 1958.

2. It was alleged on behalf of the respondent No. 1 Panjabrao that voter by name Bainabai Kanekar voted in both the wards Nos. 1 and 4 and therefore, both of her votes were to be declared void and since in Ward No. 4 Bainabai had voted for the present petitioner, that vote should be excluded from the number of votes he obtained as a result of which the respondent No. 1 would get 87 votes, that is, one vote more than the votes polled by the petitioner. The votes from Wards Nos. 1 and 4 were, therefore, scrutinised by the Second Civil Judge, Achalpur before whom the election petition was filed and on scrutiny he found that the said Bainabai had voted both in Ward No. 1 as well as in Ward No. 4. Bainabai's name was included in the voters' list of Ward No. 1 at serial No. 155 and in the voters' list of Ward No. 4 at serial No. 13. The learned Civil Judge found that her name appeared in the voters' lists of Wards Nos. 1 and 4, that she was issued ballot papers in both these wards and that she voted in both these wards. It was further found by him that in Ward No. 4 she had cast the vote in favour of the present petitioner and, therefore, held that the petitioner's votes should be counted as 86 instead of 87 after excluding the vote of Bainabai and the respondent No. 1's votes would be 87 as already declared. On these findings the learned Civil Judge set aside the election of the present petitioner and declared the respondent No. 1 Panjabrao as elected to the Village Panchayat from Ward No. 4. This decision is challenged by the present petitioner.

3. In deciding this question, the learned Civil Judge placed reliance on the provisions of Section 62 of the Representation of the People Act, 1951, and particularly on clause (3) which states that:

"No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void."

He also relied upon the provisions of Section 13 of the Bombay Village Panchayats Act read with the provisions in the Representation of the People Act, 1951, for the purposes of holding that Bainabai was not qualified to vote in both the wards and she ought to have voted in one ward only.

4. In this petition, the present petitioner alleges that it has not been established that Smt. Bainabai Kanekar in

both these wards was the same person and that one person Smt. Bainabai has voted both in Ward No. 1 as well as in Ward No. 4. It is also contended that the learned Civil Judge has not given any reasons whatsoever for coming to this conclusion that Smt. Bainabai Kanekar, whose name is included in the voters' list of Ward No. 1 is the same Bainabai Kanekar whose name is included in the voters' list of Ward No. 4. It is also alleged that the learned Civil Judge has not given any reasons to hold that only one lady by name Smt. Bainabai Kanekar cast her vote both in Ward No. 1 as well as in Ward No. 4.

5. Rule 23, sub-rule (iv) of the Bombay Village Panchayats Election Rules, 1959, provides the manner in which the ballot papers are issued to the voters whose names are in the voters' list. It provides:

"(iv) In cases where no objection has been raised, after recording the serial number of the ballot paper against the entry relating to the voter in the copy of the voters' list, the polling officer shall give the ballot paper to the voter and admit him to the polling room, but not more than one voter shall be admitted to the polling room at a time."

From this sub-rule it is clear that every ballot paper is given a serial number. This also is nowhere disputed by the petitioner. Then there is the voters' list and whenever a ballot paper is issued that serial number of the ballot paper is noted against the name of that particular voter to whom the ballot paper is issued. On a mere scrutiny, therefore, of the voters' lists both of Ward No. 1 and Ward No. 4 it could be found out that a ballot paper was issued to Smt. Bainabai Kanekar from Ward No. 1 and Ward No. 4, and the learned Civil Judge has so found. No further evidence in fact was necessary to arrive at this conclusion and we do not see any force in the contention on behalf of the petitioner on this count.

6. It was then urged that it has not been established that the voter Bainabai who voted in Ward No. 4 was the same Bainabai who voted in Ward No. 1, as there could be two different persons in the village bearing the same name. We do not find any averment in the petition or in the affidavit filed by the petitioner that there are more than one person by the name Smt. Bainabai Kanekar. On the other hand, the respondent No. 1 in his affidavit has categorically stated that there is only one person in the whole of the village by the name of Smt. Bainabai Kanekar and there is no other person by that name. It is, therefore, clear that it is the same Bainabai Kanekar whose name is included in the voters' lists both of Ward No. 1 as well as Ward No. 4 and she is the same person who has voted in

both the wards. It is then urged that there was nothing to show, and the learned Civil Judge has not discussed how he came to the conclusion, that this Bainabai voted for the petitioner in Ward No. 4. It can be found out from a particular ballot paper as to for which candidate the voter has voted, because against the name of that voter a mark has to be made as provided. It is also possible to find out from the serial number given on the ballot paper as to who is the voter as that serial number is noted against the name of the voter in the voters' list. From this it can be clearly found out that Smt. Bainabai Kanekar had voted for the petitioner in Ward No. 4 and on scrutiny of the ballot papers, the learned Civil Judge has so found. We do not see why the conclusion arrived at by him should be disregarded. We see, therefore, no force in any of the contentions raised on behalf of the petitioner in the grounds raised by him.

7. While hearing the arguments of the counsel, it appeared to us that in the Bombay Village Panchayats Act or the Bombay Village Panchayats Election Rules, there was no bar to one person being in the voters' list of more than one ward and further voting in more than one ward. The learned Civil Judge has referred to the provisions of the Representation of the People Act, 1951, S. 62 of which makes a provision in respect of the right to vote. Sub-section (1) of S. 62 states:

"No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency."

Sub-section (2) provides:

"No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in Section 16 of the Representation of the People Act, 1950 (43 of 1950)."

Sub-section (3) provides that no person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void. Section 13 of the Bombay Village Panchayats Act gives the qualifications of a person to vote and be elected. It provides by sub-section (1) that every person whose name is in the list of voters shall, unless disqualified, under this Act or any other law for the time being in force, be qualified to vote at the election of a member for the ward to which such list pertains. Section 12 of the said Act provides for the preparation of the list of voters and sub-section (1) states that the electoral roll of the Maharashtra Legislative Assembly prepared

under the provisions of the Representation of the People Act, 1950, and in force on such day as the State Government may by general or special order notify in this behalf for such part of the constituency of the Assembly as is included in a ward or a village shall be the list of voters for such ward or village. Sub-section (2) of Section 12 provides that an officer designated by the Collector in this behalf shall maintain a list of voters for each such ward or village. Under sub-section (1) of Section 12, therefore, the electoral roll of the Maharashtra Legislative Assembly is to be taken as a guide or basis for preparing the voters' list in a particular ward and those voters from a particular ward or voters of the constituency of the Assembly from that ward are to be the voters in that ward for the purposes of the Village Panchayat Elections. Sub-section (3) of Section 13 provides that subject to any disqualification incurred by a person, the list of voters shall be conclusive evidence for the purpose of determining under this section whether any person is qualified or is not qualified to vote, or as the case may be, is qualified or is not qualified to be elected, at any election. In this Act no disqualifications have been given for being a voter, though for being a member of the Panchayat disqualifications have been given under Section 14 of the Act. It would thus appear on the reading of sub-section (1) of Section 13 that every person whose name is in the list of voters will be qualified to vote at the election of a member for that ward to which such list pertains, unless he is disqualified either under this Act or any other law for the time being in force. The only law under which disqualifications of a voter have been given is the Representation of the People Act, 1950. We could not find, and it was not shown to us, that in any other Act like the Zilla Parishads Act or the Municipalities Act, there are any such disqualifications given for being a voter. The learned Civil Judge has relied on Section 16 of the Representation of the People Act, 1950, in order to hold that Bainabai was disqualified to vote in two wards.

8. Section 16 of the Representation of the People Act, 1950 (43 of 1950) gives the disqualifications for registration in an electoral roll and they are only three, namely, (1) that he is not a citizen of India, (2) that he is of unsound mind and stands so declared by a competent court and (3) that he is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections. It has not been shown that Bainabai Kanekar falls within any of the three categories referred to above and in the absence of that, she is not disqualified for registration either in the

electoral roll of the Parliamentary Constituency or the Assembly Constituency and in consequence, in the electoral roll or the voters' list of the Village Panchayat. There is no such bar to be found anywhere either in the Representation of the People Act or the Bombay Village Panchayats Act or any other Act that a person's name cannot be entered in more than one Constituency or in more than one ward. The only bar, so far as the Representation of the People Act and the Maharashtra Municipalities Act are concerned is, that if such a person whose name is included in more than one voters' list votes in more than one ward, then his votes in all such constituencies or wards shall be void. In fact, Section 13-A of the Bombay Village Panchayats Act permits a person to be elected to more than one seat in the Village Panchayat, but after he is elected to more than one seat, he has to resign from all but one of the seats and if he does not do so within the prescribed time, then all the seats become vacant.

9. Section 14 of the Maharashtra Municipalities Act 1965 may be referred to in this connection. Sub-section (1) of Section 14 of the said Act provides that no person shall be entitled to vote at a general election in more than one ward, notwithstanding that his name may appear in the list of voters for more than one ward, and if a person votes in more than one ward his votes in all wards shall be void. It thus contemplates cases where a person's name may appear in the list of voters for more than one ward and there does not appear to be any bar to such inclusion of the names in more than one ward. The only restriction which has been imposed by this provision of the Maharashtra Municipalities Act, which is similar to sub-section (3) of Section 62 of the Representation of the People Act, 1951, is that if he votes in more than one ward then all his votes would become void.

10. The question, therefore, now is whether Bainabai Kanekar whose name is included in the list of voters for ward No. 1 as well as ward No. 4 having voted in both the Wards, her votes are liable to be excluded from both the wards being void. For this, we do not find any specific provision either in the Bombay Village Panchayats Act or in the rules framed under the said Act, just as, there is a specific provision in that respect in the Representation of the People Act, 1951 or the Maharashtra Municipalities Act, 1965. In the absence of a specific provision to that effect, the votes given by Bainabai in ward No. 1 as well as in ward No. 4 cannot be excluded as she is not otherwise disqualified and in fact she is a qualified voter as contemplated by

Section 13(1) of the Bombay Village Panchayats Act.

11. It is contended that the Representation of the People Act makes a provision for such a contingency and that should be applied to the elections of the Village Panchayats under the Bombay Village Panchayats Act also. The provisions of the Representation of the People Act are not made applicable to the elections of the Village Panchayats under the Bombay Act and it is only in certain respects that the provisions of the Representation of the People Act have been referred to in the Bombay Village Panchayats Act. For example, the provisions of the Representation of the People Act could be brought in by reference for the purposes of Section 12 and Section 13 of the Bombay Village Panchayats Act. The said Act has specifically been referred to in Section 12 of the Bombay Village Panchayats Act and also would be included in the term 'any other law for the time being in force' under Section 13(1) of the Bombay Village Panchayats Act. However, the whole of the Representation of the People Act cannot be made applicable to the elections under the Bombay Village Panchayats Act. It will not, therefore, avail the respondent No. 1 to say that the provisions of Section 62(3) of the Representation of the People Act, 1951, should be read into the Bombay Village Panchayats Act and on its basis the votes of Bainabai should be excluded.

12. It has to be noted that a specific provision for this purpose has been made in the Representation of the People Act without which the Legislature must have thought that the votes of such a voter voting in more than one constituency could not be excluded. A similar provision has been made in a Local Act, namely, the Maharashtra Municipalities Act, 1965, on the lines of Section 62(3) of the Representation of the People Act. There also the need must have been felt by the Legislature that without making such a provision the votes of such a voter could not be excluded. If that was the intention of the Legislature so far as the Village Panchayat elections are concerned, such a provision also ought to have found place in the Village Panchayats Act; but there is no such provision either in the Act or the rules framed thereunder. The effect of this would naturally be that a person whose name appears in the voters' list for more than one ward and who is otherwise qualified to vote will be entitled to vote in more than one ward, since there is no such prohibition laid down in the Act. Mr. Deshpande, the learned counsel for the respondent No. 1, however, contends that such a prohibition must be implied in the Act from the various rules to which he has drawn our

attention. He referred to the provisions of Section 13-A under which a person cannot be elected to more than one seat and from this he wants us to infer that since a person could not hold more than one seat in the Village Panchayat, he also could not be a voter for more than one ward in a Village Panchayat, that is, he could not vote for two candidates from two different wards. It is also urged that except in the case of a plural constituency, each voter must have one vote in the whole of the Village Panchayat and cannot have two votes. We cannot spell out any such result from the provisions of Section 13-A of the Act.

13. He then referred us to Rule 21(1) (iii), Rule 23(ii), Rule 29(2), Rule 33(1)(d) and Rule 2(2) of the Bombay Village Panchayats Election Rules, 1959. Rule 21 is made for the purpose of prohibiting the candidates or their agents from speaking or addressing any voters in any part of the polling station and whatever objections they have to make with respect to a particular voter, such objections have to be addressed to the Presiding Officer and the kinds of objections they can make are given in the three clauses under that sub-rule. The one referred to by the learned counsel for the respondent No. 1 is clause (iii) of sub-rule (1) of Rule 21 which is to the effect: "that he has already voted at the election". Referring to the definition of "Election" in sub-rule (2) of Rule 2, the learned counsel argues that if a voter has voted at any place in the village for the election of the Village Panchayat, then an objection could be taken by the candidate or his agent so as to debar him from voting at any polling station in the village in that election. We are unable to read this meaning into clause (iii) in sub-rule (1) of Rule 21 aforesaid. It must be noted that these objections are to be addressed to the Presiding Officer concerned who presides over the polling station of a particular ward and any objection to the voter having already voted must be confined to the election at that particular polling station and must be made to the Presiding Officer of that polling station. For example, if a voter in the voters' list of Ward No. 4 has already cast his vote once in that polling station of Ward No. 4, then if he again comes to vote at the same polling station of that ward, an objection under clause (iii) could be taken that he has already voted. This would not pertain to an objection to the Presiding Officer of a particular polling station that he has already voted at some other polling station in some other ward which is not in charge of that Presiding Officer. The objection must, therefore, be confined only to that polling station so that a person at the particular polling station cannot vote more than once.

14. The other provision referred to was sub-rule (1) of Rule 23 together with Rule 33(1)(d). Rule 23(1) provides for recording of votes and under sub-rule (i) every voter is entitled to give as many votes as there are seats for filling which votes are to be taken in each ward, but no voter shall give more than one vote to any one candidate; whereas clause (d) of Rule 33(1) provides for rejection of ballot papers contained in the ballot box if a voter has recorded more votes than he is entitled to give or has recorded more than one vote for any one candidate. We do not see how it can be implied from these rules that a voter whose name is included in the voters' lists of more than one ward cannot record his votes in those wards. Sub-rule (1) of Rule 23 provides for a case of a plural constituency and it says that in such a constituency or such a ward a voter will have as many votes as there are seats. Thus if there are three seats, three candidates could be elected from a particular ward and every voter will have three votes. It lays down a further prohibition that such a voter, though he has got three votes, cannot cast all the three votes to a single candidate. He can only cast one vote in favour of one candidate. This clause does not, therefore, contemplate a case which is before us. Similarly, clause (d) of Rule 33(1) also does not help the respondent No. 1. This clause only shows that a voter cannot record more than one vote for one candidate. It also provides that if in a particular ward he has got only one vote, he cannot record more than one vote at that election for one candidate or for different candidates. This also has no bearing on the question that is before us. Here, Bainabai by reason of the inclusion of her name in the voters' list of Ward No. 1 has a vote for that ward. Similarly, by reason of the inclusion of her name in ward No. 4 she has a vote in that ward and she could vote in both the wards unless there is a specific bar and if there was any such bar, then she could have exercised a choice of voting in either of these two wards. To such a case either Rule 23 or Rule 33 does not apply.

15. Reference was then made to Rule 29(2). This rule in fact provides for the challenging of votes by a candidate or his election agent and it provides against personation at voting. If a candidate or his agent makes a challenge that any person applying for a ballot paper and claiming to be a particular voter is not that person entered in the list but is personating for him and when such a challenge is made, then he is to be confronted by the Presiding Officer under sub-rule (2) of Rule 29. He is required to enter his name and address in the list of challenged votes in Form 'D'. He also may be required to produce evidence of

identification. If, however, the alleged voter refuses to comply with such requisition, he shall not be permitted to vote. If he complies with the requisition under sub-rule (1) of Rule 29, then he is questioned by the Presiding Officer and after giving the answers as required by sub-rule (1) he is allowed to vote after he has been warned of the penalty for personation. The two questions that are to be asked to him are (1) whether he is the person named in the list and (2) whether he has voted at the said election in the ward or in any other ward. If he answers the first question in the affirmative and the second question in the negative, then alone he is allowed to vote after he has been warned of the penalty for personation. From the last portion, namely, the negative answer to the question whether he has voted at the election in the ward or 'in any other ward' (underlining (here in ' ') ours), the learned counsel for the respondent No. 1 wants us to infer that a voter can vote only in one ward and not in more than one ward, because, according to him, the ballot paper is to be given to such a person only on his declaring that he has not voted either in that ward or in any other ward. This rule, in our opinion, only provides for finding out as to whether the particular voter is a genuine voter for that ward or is personating for some other person. For example, there may be two different persons in the same ward or the same village in different wards bearing the same name. Names of both these individuals are entered in the voters' list, each of them having a right of vote. Let us say, they are A and B. Now, A records his vote for himself and taking advantage of the similarity of the name and description also wants to record the vote in place of B. This would amount to personation for B. When anybody knowing A takes an objection then the Presiding Officer has to follow the procedure laid down in this rule. Such a precaution has to be taken to prevent personation as far as possible. If however, there is only one person of that name whose name is entered in the voters' list of more than one ward, either by mistake or because he may have some connection with each ward and he records his vote in each of those wards, it could not be called a case of personation. The whole Rule 29 deals with the cases of personation at a voting and has nothing to do with the right of a voter to vote in a particular ward. We do not see, therefore, that from sub-rule (2) of Rule 29 it can be implied, much less necessarily, as is suggested by the learned counsel on behalf of the respondent No. 1, that a person whose name is in the voters' list of more than one ward can only record his vote only in one ward and not two. It would thus be found that neither there is

any express provision debarring a person from voting in more than one ward if his name is included in the voters' list of those wards, nor can such a provision be implied from the rules or the sections of the Bombay Village Panchayats Act. We are, therefore, of the view that the vote of Smt. Bainabai Kanekar could not have been excluded by the learned Civil Judge on scrutiny. If the vote of Bainabai is taken as a valid vote for the election of ward No. 4, then the petitioner and the respondent No. 1 each got 87 votes and the votes of both these candidates being equal, lot had to be drawn and it was so drawn. In the lots the petitioner was favoured and under the relevant rule, one more vote has to be counted for him and as such he was rightly declared elected by the Returning Officer.

16. The petition, therefore, must succeed and is allowed in terms of prayer clause (a). We accordingly quash the order of the learned Civil Judge dated 2-5-1968 and maintain the result declared by the Returning Officer on 13-4-1967.

17. The point on which the petitioner succeeds was not, however, taken by him either before the Returning Officer or the Civil Judge or before us by this petition, nor was it argued before us, but it was in the course of the discussion in the arguments that it was found that this point has an important bearing on the case. In view of this we do not allow any costs to the petitioner even though he succeeds.

Petition allowed.

AIR 1970 BOMBAY 101 (V 57 C 15)

K. K. DESAI, J.

Vithalbhai T. Patel, Bombay, Applicant v. Shyamlal Durgadas Khanna, Opponent.

Civil Revn. Appln. No. 454 of 1967, D/- 19-11-1968 from order of City Civil Court, Bombay, D/- 28-10-1966.

Civil P. C. (1908), O. 37, R. 3(4) (Bom); S. 148 — Bombay City Civil Court Rules (1948), R. 123 — Summons for judgment taken under O. 37 — Leave to defend granted on certain conditions — Default — Application for extension of time by defendant — Court has jurisdiction to grant it.

Where in a summons for judgment taken out under O. 37 C. P. C. the defendant appears and obtains leave to defend on compliance of certain directions by certain fixed dates, the application by defendant, on failure to comply with the direction, for extension of time does not amount to a second application for leave

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to defend. The effect of R. 3(4) of O. 37 and R. 123, City Civil Court Rules, is that the default made by a defendant in compliance with the directions given in an order granting leave to defend, does not operate to finally dispose of the suit in favour of the plaintiff. The Court would be entitled, therefore, to entertain applications for extensions of time in connection with such directions until a final ex parte decree is passed in favour of the plaintiff. The Court being seized of the suit would always have jurisdiction to consider such applications. The Court will not be functus officio in the matter of the suit and accordingly in the matter of applications for extensions of time. (1949) 53 Cal. W. N. 192, Distinguished.

(Para 8)

Cases Referred: Chronological Paras

(1949) 53 Cal. W.N. 192, Pulin

Krishna v. Susil Kumar 8

J. M. Patel with B. S. Purohit, for Applicant; M. G. Mani, for Opponent.

JUDGMENT:— This is a revisional application on behalf of the original plaintiff from the order dated October 28, 1966, made on the Chamber summons dated October 17, 1966, whereby the City Civil Court directed that the time to deposit the balance amount of Rs. 2,000/- pursuant to the order dated August 5, 1966 be extended till November 1, 1966. The above order dated August 5, 1966 was made on the summons for judgment taken out by the plaintiff. By that order the defendant was directed to deposit the sum of Rs. 7,725/- by three instalments respectively of Rs. 3,308.30 within one week (on or before August 12, 1966), Rs. 2,000/- within eight weeks (on or before October 9, 1966) and the balance of Rs. 2,416.70 within four weeks thereafter. The deposit order was conditional order granting leave to the defendant to defend the suit.

2. In pursuance of the above order dated August 5, 1966, the defendant duly deposited in trial Court the sum of Rs. 3,308.30 on August 12, 1966. He failed to deposit the sum of Rs. 2,000/- on or before October 9, 1966. By the chamber summons dated October 17, 1966, he applied for extension of time to enable him to make the deposit of the second instalment. The trial Court thereupon extended the time to make deposit till November 1, 1966.

3. Mr. Patel for the plaintiff contends that the order extending time is invalid, because the Court had no jurisdiction to make that order and the application for extension of time was in effect a second application for leave to defend. That second application is not contemplated by any of the provisions of the Code of Civil Procedure and was in fact beyond time and, therefore, liable to be dismissed.

4. In support of his first contention Mr. Patel has relied upon sub-rule (4) of Rule 3 of Order 37 as amended by this Court and also on Rule 123 of the City Civil Court Rules and Section 148 of the Code of Civil Procedure. In his submission the true effect of sub-rule (4) read with Rule 123 is that upon default being made by a defendant in complying with and carrying out the conditions fixed by the order granting him leave to defend, the plaintiff becomes entitled to judgment forthwith. The default made by a defendant in complying with such conditions automatically entitles the plaintiff to a decree for the amount mentioned in the summons for judgment. In the result, the Court becomes functus officio and is left with no powers to extend time fixed for compliance with such conditions. In those circumstances, the Court cannot have any power under Section 148 of the Code to extend time fixed for compliance with conditions. In the result, the Court can have no jurisdiction to extend time in connection with compliance of conditions fixed by an order granting leave to defend.

5. The relevant part of sub-rule (4) runs as follows:

"x x x x x x x"

If the defendant be permitted to defend x x x x x the Judge shall direct that on failure to complete the security (if any), or to carry out such other directions as the Court or the Judge may have given within the time limited in order, the plaintiff shall be entitled to judgment forthwith".

6. The relevant part of Rule 123 of the City Civil Court Rules provides:

"If the defendant does not complete his security (if any) or carry out such other directions as the Judge may have given within the time limited in the order, the plaintiff shall be at liberty to apply to put the suit down for hearing forthwith x x x x x, as if no such order" (granting leave to defend) "had been made".

7. Now, therefore, it is quite clear that in connection with a default made by a defendant in complying with the directions fixed by the order granting him leave to defend, under sub-rule (4), the provision is that the Judge shall by the very order direct that on failure to carry out such directions the plaintiff shall be entitled to judgment forthwith. The provision in Rule 123 is that the plaintiff should be at liberty to apply to put the suit down for hearing forthwith as if the order granting leave to defend had not been made. These provisions have operated so that in a case where a defendant defaults in complying with the directions given by order granting him leave to defend the plaintiff becomes entitled to and applies for and after getting the suit placed for hearing obtains ex parte decree. The question is whether the

failure of a defendant to comply with directions contained in the order granting leave to defend automatically so operates that the Court ceases to have seisin of the suit and becomes *functus officio*.

In Mr. Patel's submission, the question is not of the Court ceasing to have seisin of the suit but the Court ceasing to have seisin of (i) the application of the defendant for leave to defend as also (ii) the summons for judgment. In his submission, the failure of the defendant to comply with the directions contained in the order granting leave to defend so operates that the Court ceases to have seisin of these matters and the Court becomes *functus officio* and disentitled to consider the question of leave to defend on application in that connection any further. Now, it appears to me that the true effect and construction of the above provisions in the sub-rule (4) and Rule 123 is that upon default made by defendant in complying with the conditions imposed by the order granting conditional leave the plaintiff in the suit becomes entitled to apply to the Court that an *ex parte* decree may be passed in his favour. The Court thus continues to have seisin of the suit and does not become *functus officio* or cease to have jurisdiction in the matter of the plaintiff's suit. In this connection, it is important to notice that the Rule 4 of Order 37 of the Code of Civil Procedure provides that:—

"After (*ex parte*) decree the court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."

It is important to notice that the summons in the summary suit informs the defendant that in default of his filing appearance and obtaining leave to defend, an *ex parte* decree will be passed against him. In spite of that position, under R. 4, the Court is empowered to set aside *ex parte* decrees passed in cases in which the defendant fails to appear and/or appears but fails to obtain leave to defend in the first instance. It is difficult to accept Mr. Patel's submission that because the summons for judgment was completely disposed of and the question of leave to defend had been once considered, the trial Court ceased to have jurisdiction altogether and could not deal with the question of extension of time fixed by the order granting leave to defend. Now, it is true that under Section 148 of the Code provision is made entitling Courts to enlarge time where any period is fixed or granted by the Court for the doing of any act prescribed by the Code even though the period originally fixed or granted may have expired. In spite of that

restricted provision in Section 148, it has now been well established that in cases in which power to extend time is not given under Section 148 Court has jurisdiction to extend time in matters not finally disposed of. Where a matter is not finally disposed of by it Court retains control over it and is seized of the same and it accordingly has power to make any just or necessary order including the appropriate cases an order for extension of time previously fixed. As the failure of the defendant to comply with the directions given by the order dated August 5, 1966, did not automatically operate so as to finally dispose of the plaintiff's suit, the trial Court had jurisdiction to deal with the application for extension of time. In other words, as the non-compliance with the conditions imposed by the order dated August 5, 1966, did not operate automatically to give an *ex parte* decree to the plaintiff in the matter of the suit, the trial Court was not *functus officio* and had jurisdiction to deal with the summons that the defendant took out for extension of time.

8. In connection with his second contention, Mr. Patel relied upon the decision of a single Judge of the Calcutta High Court in *Pulin Krishna v. Susil Kumar*, 53 Cal. W. N. 192. On an application for extension of time, in circumstances similar to those in this case, the Court held that failure of the defendant to comply with the conditions imposed on him had resulted automatically into the dismissal of the defendant's application for leave to defend. There was no provision entitling the defendant to make a second application for leave to defend beyond the period of limitation fixed in that connection.

The application for extension of time made by the defendant was second application for leave to defend, the Court had ceased to have seisin of the matter and had become *functus officio*. The second application was not maintainable and was beyond time. The Court accordingly dismissed the application. Now, it requires to be remembered that the procedure prescribed by the rules of the High Court at Calcutta made it incumbent upon defendants in summary suits to make their own separate applications for leave to defend. These were liable to be made within a period of 10 days from the date of the service of the summons in the suit on the defendants. To these applications, provisions in Section 5 of the Limitation Act were not made applicable. The applications for leave to defend were always treated as separate independent proceedings in Court. The rules of the City Civil Court do not require any defendant to make any independent application for leave to defend. The rules provide that the defendant must file his appearance

within the time prescribed. This time is liable to be extended. The further provision is that in the event of a defendant in summary suit filing an appearance the plaintiff must get a summons for judgment issued. In this proceeding to be undertaken by plaintiff defendant may at any time within 10 days from the service of the summons for judgment by affidavit or otherwise disclose facts which may be deemed sufficient to entitle him to leave to defend. On those facts, at the hearing of the summons for judgment, he can apply to Court that he should be granted leave to defend. It is quite, clear, having regard to the rules of the City Civil Court, that defendant in a summary suit is not bound to take any independent proceedings for claiming leave to defend. Ordinarily leave to defend is granted in the proceedings by way of summons for judgment instituted by plaintiff. Having regard to the above different provisions in the rules of the City Civil Court, it is difficult to hold that the reasoning in the above Calcutta decision is applicable to the facts of this case. It is difficult to accept Mr. Patel's contention that the application for extension of time would amount to a second application for leave to defend. As already discussed above, the true effect of the sub-rule (4) of R. 3 of Order 37 and Rule 123 of the City Civil Court Rules is that the default made by a defendant in compliance with the directions given in an order granting leave to defend does not operate to finally dispose of the suit in favour of the plaintiff. The Court would be entitled, therefore, to entertain applications for extensions of time in connection with such directions until a final ex parte decree is passed in favour of the plaintiff. The Court being seized of the suit would always have jurisdiction to consider such applications. The Court will not be functus officio in the matter of the suit and accordingly in the matter of applications for extensions of time.

9. In the result, this revisional application fails. Rule discharged with costs.

Revision application dismissed.

AIR 1970 BOMBAY 104 (V 57 C 16)

CHANDRACHUD AND NAIN, JJ.

Rajaram Ganpat Patil and others, Petitioners v. Yeshwant Datto Patil and others, Opponents No. 1.

Spl. Civil Appln. No. 1343 of 1968 (with Special C. A. No. 1344 of 1968), D/- 6-11-1968.

(A) Constitution of India, Arts. 226 and 227 — Finding of fact — Re-appreciation of evidence — Grounds.

GM/GM/C827/69/MVJ/D

The jurisdiction of the High Court under Arts. 226 and 227 of the Constitution is limited and it should not re-appreciate evidence and substitute its conclusion of fact for that recorded by the Tribunal below. But where the lower Court bases its conclusion on the evidence of a person without exercising the caution of seeking for some corroboration to the bare word of such person, the High Court is compelled in the interests of justice to interfere with the order passed by the lower Court, (Paras 9, 10)

(B) Panchayats — Bombay Village Panchayats Election Rules, 1959, Rr. 3(5) and 7(1) — Non-observance of R. 3(5) — Election is not vitiated.

The provisions contained in R. 3(5) or any other provisions of the Bombay Panchayat Act or the Rules cannot be flouted by persons who are charged with the duty of conducting the elections. However, the non-observance of a part of sub-rule (5) of Rule 3, in that the places where the copies of the relevant lists of voters were kept open for public inspection, were not mentioned in the notification of the Mamlatdar, will not vitiate the election. AIR 1954 Bom. 116 & (1964) 66 Bom. L.R. 584, Rel. on. (Paras 14, 15)

(C) Panchayats — Bombay Village Panchayats Election Rules, 1959, R. 7(1) — Fixation of date for filing of nomination paper by candidates and date of scrutiny — Date for scrutiny must be the date immediately following the date for nomination of candidates — Next date of filing nominations a public holiday — Mamlatdar is not justified in postponing the scrutiny by one day — No prejudice caused by such postponement — Election held was not vitiated. (Para 17)

Cases Referred: Chronological Paras (1964) 66 Bom. L.R. 584=ILR (1964)

Bom. 815, Eknath Shankar v. Gorakh Krishna 14

(1957) AIR 1957 S.C. 912 (V 44)= 1958 S.C.R. 533, State of U. P. v. Manbodhan Lal Srivastava 13

(1954) AIR 1954 Bom. 116 (V 41)= 55 Bom. L.R. 882, Bhairulal Chuni-lal v. State of Bombay 14

(1945) AIR 1945 F.C. 67 (V 32)= 1945 FCR 99, Biswanath Khemka v. Emperor 13

(1917) AIR 1917 P.C. 142 (V 4)= 1917 A.C. 170, Montreal Street Rly. Co. v. Normandin 13

M. L. Pendse, for Petitioners; M. A. Rane, for Opponents No. 1; C. R. Dalvi, Asst. Govt. Pleader, for Respondent No. 8.

CHANDRACHUD, J.:— This is a petition under Articles 226 and 227 of the Constitution by which the petitioners, who have been elected in the Mhalunge Village Panchayat election, challenge the order passed by the learned Joint Civil Judge, Junior Division, Kolhapur, setting

aside their election on an application filed by the 1st respondent. The facts leading to this petition are as follows:—

2. The village Mhalunge which is at a distance of 12 miles from Kolhapur was divided into three wards A, B and C for the purposes of election to the village Panchayat. There were three seats in every ward, one of them being reserved for women. We are concerned in this petition with the election to Ward B in which there are 386 voters.

3. On the 28th of March, 1967, the Mamlatdar of Karveer issued a notification under Rule 7(1) of the Bombay Village Panchayats Election Rules, 1959 (hereinafter called "the Rules") publishing the programme of elections to the Mhalunge village Panchayat. The notification mentioned that the last date for filing nominations would be the 13th of April, 1967, that the nominations will be scrutinised on the 15th of April, 1967 and that the elections will be held on the 29th of April, 1967. The three petitioners and respondents 1 to 4 contested the election to Ward B. The result of the election was declared on the 30th of April, 1967 and the petitioners were declared to have been elected. The three petitioners secured 261, 255 and 264 votes respectively, while respondents 1 to 4 secured 4, 103, 111 and 107 votes respectively.

4. On the 13th of May, 1967, the 1st respondent filed an election petition under Section 15 of the Bombay Village Panchayats Act, 1958 (hereinafter called "the Act") to the learned Joint Civil Judge, Junior Division, Kolhapur, challenging the election of the petitioners. The election of the petitioners was challenged on the grounds, in so far as they are relevant now, that Rule 3(5) and Rule 7(1) were contravened. The case of the 1st respondent is that Rule 3(5) was contravened in that the notification issued by the Mamlatdar under Rule 7(1) was not published at least 15 days before the date fixed for the nomination of candidates and that no public notice was given of the places where copies of the relevant lists of voters were kept open for public inspection. Rule 7(1), according to the 1st respondent, was contravened, because the date for the scrutiny of nominations was not the date immediately following the date fixed for the nomination of candidates. It may be recalled that the last date for filing nominations was fixed as the 13th of April, whereas the date for the scrutiny of nominations was fixed on the 15th of April.

5. The petitioners contended by their written statement (Ex. 29) that the notification issued by the Mamlatdar under Rule 7(1) was in fact published in the village on the 28th of March and not on the 31st of March and that a false report was made by the Sarpanch of the village

that the notification was published on the 31st. According to the petitioners, the Sarpanch lost his majority in the elections and he, therefore, discovered an easy means of invalidating the elections by purporting to admit that an illegality was committed by his office in publishing the notification of the Mamlatdar on the 31st instead of the 28th of March.

6. The Mamlatdar of Karveer who is the 8th respondent to this petition also filed a written statement (Ex. 39) explaining that the scrutiny of nomination papers was not fixed on the 14th of April which was the date immediately following the last date for filing nominations, because 14th was a public holiday on account of Ambedkar Jayanti.

7. The rival parties led evidence before the learned Judge in support of their respective versions. The 1st respondent examined the Sarpanch to say that the notification issued by the Mamlatdar under Rule 7(1) was published on the 31st and not on the 28th of March 1967. According to the Sarpanch, the notification was received in his office but the Gram Sevak of the Panchayat was on unauthorised leave from the 20th of March and that, he, the Sarpanch accidentally found the notification of the Mamlatdar lying in the drawer of the Gram Sevak's desk. The Sarpanch stated in his evidence that on thus finding the notification on the 31st, he had it immediately published.

8. The learned trial Judge has accepted the evidence of the Sarpanch and has held that the notification regarding the election programme was published in the Mhalunge village on the 31st and not on the 28th of March 1967. Admittedly the notification does not mention the place where copies of lists of voters were kept open for public inspection and this, according to the learned Judge, is a contravention of Rule 3(5) of the Rules. The learned Judge has also taken the view that even though the 14th of April was a public holiday, the second part of the proviso to sub-rule (1) of Rule 7, which requires that the nominations must be scrutinised on the date immediately following the date fixed for the nomination of candidates, admits of no exception and, therefore, it was illegal to fix the 15th as the date for the scrutiny of nominations. According to the learned Judge, the provisions contained in sub-rule (5) of the Rule 3 and sub-rule (1) of R. 7 are mandatory in character and their contravention must necessarily vitiate the elections. It was urged before the learned Judge that the 1st respondent had failed to show that the non-observance of the particular provisions had caused him any prejudice, but the learned Judge has taken the view that since a mandatory requirement was violated, absence of

prejudice was a matter of no relevance. The learned Judge has, without a pleading or argument in that behalf, set aside the election on an additional ground, namely, that the notification issued under Rule 7(1) was not published at least one month prior to the date fixed for filing nomination papers, it is common ground before us that in this the learned Judge has clearly erred, because there has been a subsequent amendment which reduces the period from one month to fifteen days.

9. It is necessary to remember that our jurisdiction under Articles 226 and 227 of the Constitution is limited and that we should not re-appreciate evidence and substitute our conclusion of fact for that recorded by the Tribunal below. There are however, larger issues involved in this matter. Besides, the finding of fact recorded by the learned Judge that the notification issued by the Mamlatdar under R. 7(1) was published in the village of Mhalunge not on the 28th of March but on the 31st of March 1967 is so predominantly based on unwarranted assumptions that it seems to us impossible to accept that finding. The learned Judge observes that the Mamlatdar of Karveer had issued the notification on the 28th of March and one should assume that the notification was dispatched by him to the Sarpanch of Mhalunge by post. Not only if there is no warrant for this assumption — and common experience in such matters runs counter to such an assumption — but there is a covering letter sent by the Mamlatdar to the Sarpanch along with the notification of the 28th which furnishes intrinsic evidence to show that the notification was not despatched by post but was personally forwarded through a messenger. The covering letter, a part of which is addressed to the Sarpanch, requests the latter in clear terms that the notification accompanying the letter should be published "today itself". It is in our opinion impossible that the Mamlatdar, who, as is clear from the covering letter, was alive to the urgency of the publication of the notification on the very same day, would take the risk of dispatching the notification by post.

10. The view of the learned Judge that the notification was not published on the 28th of March is largely influenced by the assumption which he has made that if the notification was dated the 28th of March 1967, it might not have been received by the Sarpanch at a distance of twelve miles away from Kolhapur on the 28th itself. But then Mr. Rane, who appears on behalf of the 1st respondent, says that the Sarpanch was examined by the 1st respondent as a witness and the Sarpanch has stated in his evidence that the notification was published at his

instance on the 31st and not on the 28th. Now this is where a larger issue is involved. It is undisputed that the Sarpanch contested the election to the Mhalunge village Panchayat and that though he was elected as a candidate, he lost his majority. It would also appear from the record that after he ceased to be the Sarpanch in the normal course of affairs, the Collector had considerable difficulty in taking over charge of the office from him. That, however, is another matter and that consideration cannot be permitted to influence our appreciation of the Sarpanch's evidence. What is important is that though the Sarpanch was requested by the Mamlatdar to make an immediate report as to the publication of the notification, the Sarpanch did not make any report to the Mamlatdar that he had published the notification on the 31st. In these circumstances, the learned Judge need not have felt constrained to accept the word of the Sarpanch that the Gram Sevak had gone on unauthorised leave from the 20th March, that the notification issued by the Mamlatdar under R. 7(1) was found lying unattended in the desk of the Gram Sevak, that the Sarpanch accidentally hit upon it on the 31st and that he took immediate steps to have the notification published. We are conscious that we are re-appreciating evidence and we are fully conscious of the limitations on our jurisdiction under Article 227 of the Constitution. We, however, feel compelled in the interests of justice, to interfere with the order passed by the learned trial Judge, because if the evidence such as the one given by the Sarpanch in this case is accepted, the results of elections would have to depend upon the sweet will of the Sarpanchas. A Sarpanch, who loses an election or his majority, might allege after the election results are declared that certain illegalities were committed by him or by someone in his office and whether those illegalities have been committed or not would have to depend upon his bare word. We are, therefore, of the opinion that the learned Judge should have exercised the caution of seeking for some corroboration to the bare word of the Sarpanch. This is not a case in which in the very nature of things it might have been difficult to look but for some corroborations, because the best corroboration would have been a contemporaneous report made by the Sarpanch in accordance with the request made by the Mamlatdar that a report regarding the publication of the notification in the village should be immediately forwarded. There is no such report on the record and the Sarpanch has in fact admitted in his cross-examination that he did not make any contemporaneous report to the Mamlatdar. We, therefore, take the view that the Sarpanch, finding that he had lost the majority, has given an

untruthful account in regard to the date of publication of the notification.

11. It must, therefore, be held that what was required to be done in the ordinary course of business was in fact done and that, as stated by the petitioners in their evidence, the notification of the Mamlatdar was published in the village not on the 31st but on the 28th itself. If the notification was published on the 28th, the last date for filing nominations could be fixed as the 13th of April and, therefore, one of the three challenges made by the 1st respondent to the election of the petitioners must clearly fail.

12. The second challenge to the election is that the place where the lists of voters were kept for public inspection is not mentioned in the notification of the Mamlatdar dated the 28th of March 1967. Now, sub-rule (5) of Rule 3, which is stated to have been contravened on account of this omission says, in so far as is relevant, that the Mamlatdar shall give a public notice of the places where copies of the relevant lists of voters are kept open for public inspection. It is clear that in the notification issued by the Mamlatdar, the place where the copies of the relevant lists of voters were kept for public inspection is not specified. The question which arises for consideration is whether the non-observance of the provision contained in sub-rule 5 of Rule 3 would vitiate the election.

13. It is contended by Mr. Rane that the provision of sub-rule (5) is mandatory and a failure to comply therewith must vitiate the election. Now, it is true that sub-rule (5) is an imperative form, for it says that "the Mamlatdar shall, at least fifteen days before the date fixed for the nomination of candidates for every general election of the village panchayat, give a public notice of the places where copies of the relevant lists of voters are kept open for public inspection. However, as observed by the Privy Council in *Montreal Street Rly. Co. v. Normandin*, 1917 A.C. 170=(AIR 1917 PC 142), no general rule can be laid down in construing whether the provisions of a Statute are directory or imperative and that in every case the object of the Statute must be looked at. This principle was adopted by the Federal Court in the case of *Biswanath Khemka v. Emperor*, 1945 F.C.R. 99=(AIR 1945 F.C. 67). These two cases have been cited with approval by the Supreme Court in *State of U. P. v. Manbodhan Lal Srivastava*, 1958 SCR 533 at page 545=(AIR 1957 S.C. 912 at p. 917). In that case the Supreme Court was considering the question whether the provisions of Article 320(3)(c) of the Constitution are mandatory. The particular provision is couched in mandatory terms, for it says briefly, that the Union Public Service Commission "shall be con-

sulted" on all disciplinary matters affecting a certain class of persons. It was held by their Lordships that the use of the word "shall" in a Statute though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, unless the words of the Statute are punctiliously followed, the proceeding, or the customs of the proceeding, would be valid. The following passage from Crawford on "Statutory Construction" Article 261, page 516, which is referred to by their Lordships at p. 546 of (SCR)=(at p. 918 of AIR) of their judgment is useful for our purposes and it runs thus:

"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other....."

14. In the light of this principle, it would be necessary to consider the purpose and the intendment of sub-rule 5 of Rule 3. It would also be necessary to consider the possible prejudice that may be caused to a voter or to a candidate if the particular provision is not complied with. The requirement of the sub-rule is that the Mamlatdar must give a public notice of the places where copies of the relevant lists of voters are kept open for public inspection. Sub-r. (4) of the same rule provides that copies of lists of voters maintained under the rule shall be kept open for public inspection at the village chavdi, if any, and at the village Panchayat Office. Speaking generally, the constituencies in Village Panchayat election are compact. In the case before us, the village was divided into three small wards, the number of voters in ward B being 386. It would normally not be difficult for any person interested in perusing or scrutinising the list of voters to ascertain whether the lists of voters have been kept open for public inspection and if so, where. We are not suggesting that the provision contained in sub-r. (5), any more than the other provisions of the Act and the Rules, can be flouted by persons who are charged with the duty of conducting the elections. However, as observed by Chagla C. J., in *Bhairulal Chunilal v. State of Bombay*, 55 Bom. L.R. 882 at p. 889=(AIR 1954 Bom. 116 at p. 121), the effect of the non-observance of a rule has to be assessed in every case. In that case, a certain person was elected by the Councillors of a Municipality as a President, and in his capacity as a President he discharged certain functions

under the Election Rules in regard to the election of Councillors. His own election was invalid and it was contended that as he could not have validly discharged his functions as a President qua the elections of Councillors, the election of the Councillors was invalid. It was held that the election of the Councillors could not be set aside, because, at best, nothing more than an irregularity had occurred. This view was taken for the reason that the invalidity of the election of the President himself would not bring about a corresponding infirmity or invalidity in the election of the Councillors. A similar view has been taken by a Division Bench of this Court in *Eknath Shankar v. Gorakh Krishna*, 1964-66 Bom. L.R. 584 where identical symbols were assigned to different candidates contesting an election from the same ward on behalf of the same party. The test applied by the learned Judges for ascertaining whether the election could be set aside on the ground that certain rules were contravened is whether the allocation of similar symbols could have caused any confusion in the minds of voters, and if so, whether any prejudice was in fact caused to any particular candidate.

15. Applying these principles to the case before us, we are of the view that the non-observance of a part of sub-rule (5) of R. 3, in that the places where the copies of the relevant lists of voters were kept open for public inspection were not mentioned in the notification of the Mamlatdar, will not vitiate the election. It is not alleged that the copies of lists of voters were in fact not kept open for public inspection for it seems to us that the substance of the matter really is whether the copies of lists of voters are in fact kept open for public inspection. It is also not alleged that by reason of the omission in the notification to mention the places where copies of the lists of voters were kept open for public inspection, any person was unable to ascertain whether he was a voter in a particular ward or whether he was a voter at all. As the copies of the lists of voters were indisputably displayed both at the Chavdi and the village Panchayat Office, no prejudice could possibly have been caused to any voter or to any candidate by reason of the notification not specifying the places where the lists of voters were kept open for public inspection.

16. As the copies of the lists of voters were in fact kept open for public inspection and as no prejudice is shown to have been caused by the particular omission to specify the places, we are of the opinion that the omission is mere irregularity. The election cannot, therefore, be set aside for the technical reason that the notification did not specify the places

where the copies of lists of voters were kept open for public inspection. The second ground of challenge to the election must, therefore, fail.

17. The third ground on which the election of the petitioners was challenged is that the second part of the proviso to sub-rule (1) of R. 7 has not been complied with. It provides that the Mamlatdar shall by notification publish the election programme fixing the various dates for the nomination of candidates, the scrutiny of nominations, the recording of votes and the counting of votes, provided that "the date for the scrutiny of nominations shall be the date immediately following the date fixed for the nomination of candidates". The notification issued by the Mamlatdar on the 28th of March 1967 mentioned the 13th of April 1967 as the last date for filing nominations and the 15th of April 1967 as the date for the scrutiny of nominations. The argument is that the last date for filing nominations was fixed as the 13th of April, that therefore the 14th of April should have been fixed as the date for scrutiny of nominations and as the 15th and not the 14th of April was fixed for the scrutiny of nominations, the elections are vitiated. It is unnecessary to refer once again to the principle which we have discussed above that the mere use of the word "shall" does not mean that the particular provision must be punctiliously followed. The Mamlatdar who is the 8th respondent to this petition had filed his written statement before the learned Joint Civil Judge explaining that the scrutiny of nominations was not fixed for the 14th as it was a public holiday on account of Ambedkar Jayanti. We do not think that the Mamlatdar was justified in postponing the date for scrutiny of nominations for the mere reason that the date immediately following the date fixed for the nomination of candidates happened to be a public holiday. But as stated earlier, every non-compliance with what *prima facie* appears to be a mandatory provision cannot have the effect of invalidating the elections. The object of the rule that nominations must be scrutinised on the date immediately following the date fixed for nomination of candidates is that no time should be lost between the last date of nominations and the date for scrutiny of nominations. The reason why the scrutiny of nominations is required to be done expeditiously is that the candidates who have offered themselves for election must know immediately whether their nominations have been accepted, so that they can commence their campaigns. Now the first part of the proviso to sub-rule (1) of R. 7 provides that an interval of at least fifteen days must be kept between the date fixed for the nomination of candidates and the date fixed for the

recording of votes. Normally, a period of not more than fifteen days is thus kept and, therefore, it is necessary to scrutinise the nominations immediately after the period for filing nominations has expired. It is however not alleged in this case that the Mamlatdar had any oblique motive in postponing the scrutiny of nominations or that the postponement of scrutiny of nominations by one day has caused prejudice to any voter or candidate. The non-compliance therefore, with the provision contained in the second part of the proviso to Rule 7(1) cannot, in our opinion, invalidate the election.

18. This disposes of the grounds on which the election of the petitioners was assailed by the 1st respondent. The learned Judge has, on his own, held that a mandatory provision contained in sub-rule (2) of R. 7 has been contravened, as the notification contemplated by Rule 7(1) was not published at least one month prior to the date of filing the nominations. No arguments were advanced before the learned Judge on this point, but it seems that he made some research on his own and came to the conclusion that there was one more valid challenge to the election of the petitioners. We appreciate that the learned Judge pursued the matter for himself, but there is always some risk in a Judge taking up a point and deciding the case on that point without putting the point to the Bar. If the learned Judge were to put his point of view to the Advocates, they would have drawn his attention to the amendment to sub-rule 2 under which the period has been reduced from one month to fifteen days.

19. For these reasons, we set aside the order passed by the learned trial Judge and make the rule in this petition absolute with costs against the 1st respondent.

20. This judgment would also govern the companion petition, Special Civil Application No. 1344 of 1968. The rule in that petition will also be made absolute with costs against the 1st respondent.

21. One more petition was filed before the learned Joint Civil Judge by which the election of the Sarpanch himself was challenged. The Sarpanch seems to have submitted to the orders of the Tribunal. In fact, he ensured an adverse order by admitting the various allegations in the petition. The petition was allowed and his election was also set aside. The Sarpanch has not taken any proceeding to challenge the order of the learned Judge setting aside his election and, therefore, the order in regard to his election would remain unaffected by this judgment. We must hasten to add that we should not be taken as suggesting that if the Sarpanch were to file such a proceeding, we would have necessarily interfered on his behalf.

Order accordingly.

AIR 1970 BOMBAY 109 (V 57 C 17)

VIMADALAL, J.

Leela Dhundiraj Divekar, Plaintiff v. E. C. Shinde, Sub-Registrar and another, Defendants.

Short Cause Suit No. 265 of 1967, D/- 23-7-1968.

(A) Court-fees and Suits Valuations — Suits Valuation Act (1887), Ss. 8 and 9 — Suit to enforce Registration of document under S. 77, Registration Act — Forum — Suit is not capable of valuation and is not governed by S. 8, Suits Valuation Act and there being no rules framed under S. 9 plaintiff is entitled to put his own valuation for jurisdiction — Plaintiff valuing suit at value of property comprised in deed which was beyond pecuniary jurisdiction of Bombay City Civil Court — Suit is properly filed in High Court and S. 15, Civil P. C. is not violated — AIR 1926 Cal. 1091, Foll.; (1884) ILR 8 Bom. 269, Ref. — (Registration Act (1908), S. 77) — (Civil P. C. (1908), S. 15).

(Paras 7, 8)

(B) Bombay City Civil Court Act (40 of 1948), S. 3(c) — 'Special Law' — Registration Act is a special law — Suit to enforce registration of document under S. 77, Registration Act — Jurisdiction of Bombay City Civil Court is excluded under S. 3(c) — (Registration Act (1908), S. 77) — (Words and Phrases — Special Law).

The Registration Act is a complete Code in itself and Section 77 thereof is a provision which is not applicable generally, but which applies to a particular subject viz. the enforcement of a right to get a document registered by filing a civil suit which, but for the special provisions of that section, would not be maintainable. Section 77 is a "Special law" and the jurisdiction of the Bombay City Civil Court to entertain a suit under S. 77 which is cognizable by the High Court is excluded by reason of S. 3(c) of the Bombay City Civil Court Act, 1948. (1895) ILR 18 Mad. 99 (FB) & AIR 1961 Bom. 154 (FB), Rel. on. (Para 9)

(C) Registration Act (1908), S. 78 — Registration fees — Art. I (3) of Table of Fees of Maharashtra Government — Deed of release — Absence of definition in Act — Words used must be given meaning they bear in law of conveyancing — Deed — Construction — On construction document held to be a deed of release and not a receipt — Registration fee payable as such under Art. I (3) — (T. P. Act (1882), S. 8 — Interpretation of deeds).

If the document of which registration is sought is in effect a deed of release neither the fact that it is labelled as being a deed of transfer, nor the fact that the word "release" is not used in the body of it can take it out of Article I (3) of the

Table of Fees. What the court has to determine is the substance of the document and not the label which it bears, and the court cannot allow the ingenuity of the draftsman to affect the question of the document before it which must be governed by the real nature of the document. (Para 10)

The Registration Act deals primarily with the conveyance of property and interests in property, and words used in the Registration Act must therefore be given the meaning which they bear in the law of conveyancing. (Para 13)

A document whereby the legatees give a full discharge to the executor on payment of their respective shares is called a deed of release. (Para 13)

An instrument called a deed of transfer was executed between a widow of deceased D and her two sons S and B. The operative part thereof acknowledged the receipt of certain sums in full satisfaction of the respective shares of the parties in the property of the deceased D. In the concluding portion the heirs of the deceased discharged the widow L as administratrix from all their respective rights, claims and interest in the property and effects of the deceased and from all actions, accounts, claims and demands in respect thereof.

Held on an interpretation of the terms of the document that it was a deed of release because it was an instrument whereby the heirs of the deceased D renounced all their claims and demands upon the administratrix in her capacity as such, and also renounced all their rights as heirs against the property comprised in the estate of the deceased. The concluding clause in the operative portion of the Deed was neither a mere receipt evidencing payment, nor did it merely discharge the administratrix from all obligations, liabilities and claims, but it annihilated the debt due to the heirs, in the sense that it completely extinguished all rights of the heirs of the deceased to share in his estate. There being no consideration for the deed in suit in any view of the matter, the said deed falls within the expression "Release other than one falling under (2) above" in Art. I (3) of the Table of Fees prepared by the Government of Maharashtra in exercise of the powers conferred upon it by S. 78, Registration Act, 1908. (Paras 12, 13)

(D) Words and Phrases — 'Discharge' and 'Release' — Distinction between pointed out.

The word "discharge" is ordinarily used only in the context of exonerating a person from liability or relieving him of his obligations, and is not used in the sense of giving up of rights. The appropriate word to be used in connection with the renouncing of rights would be the word "release", though no doubt the word

"release" is also used, as a matter of plain language, both for extinguishing liability as well as for annihilating the right corresponding thereto. It is a wider term which includes the concept of freeing a person from liability. AIR 1960 S.C. 1058 & AIR 1961 S.C. 1074, Ref. to. (Para 11)

(E) Registration Act (1908), Pre. and S. 2 — Stamp Act and Registration Act though not strictly in *pari materia* may be read together — Definitions in Stamp Act apply to Registration Act — There being no definition of 'Release' under Registration Act, definition in Art. 55 of Stamp Act is useful — AIR 1914 Bom. 55 & AIR 1928 Bom. 553, Rel. on. (Para 12)

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- (1961) AIR 1961 S.C. 1074 (V 48)
=1960-3 SCR 875, Sarada Prasad v. Jumna Prasad 11
(1961) AIR 1961 Bom. 154 (V 48)
=63 Bom. L.R. 98=1961 (1) Cri. L.J. 637 (FB), Anjanabai v. Yashwantrao 9
(1960) AIR 1960 S.C. 1058 (V 47)
=(1960) 3 SCR 820, East & West Steamship Co. v. Ramalingam 11
(1928) AIR 1928 Bom. 553 (V 15)
=30 Bom LR 1396, In re, Maneklal Manilal 12
(1926) AIR 1926 Cal. 1091 (V 13)=
ILR 53 Cal. 1023, Golam Rahman v. Sabekjan Bibi 7
(1914) AIR 1914 Bom. 55 (V 1)=16 Bom. L.R. 236, Chandrashankar v. Bai Magan 12
(1895) ILR 18 Mad. 99 (FB), Veeramma v. Abbiah 9
(1884) ILR 8 Bom. 269, Vishwambhar Pandit v. Prabhakar Bhat 7
(1858) 27 L.J. Ex. 262=6 W.R. 257, Bowes v. Foster 11
B. R. Zaiwalla, for Plaintiff; S. P. Bharucha, for Defendants.

JUDGMENT:— This is a suit filed by one of the executants of a document under Section 77 of the Indian Registration Act, 1908, for a decree directing the Defendants, who are the appropriate registering authorities, to register the document in question within 30 days from the date of the passing of the decree in this suit.

2. The short facts necessary for the purpose of this suit are that the plaintiff is the administratrix of the estate of one Dhundiraj Balwant Divekar who died intestate in Bombay on the 10th of October 1962, leaving him surviving as his only heirs according to the Hindu Succession Act, 1956, his widow the Plaintiff herself and two sons, one named Suresh, and the other a minor named Bakul. The Plaintiff obtained a grant of Letters of Administration to the estate of the deceased Dhundiraj from this Court on 21st May 1964, and having completed the administration of the said estate, paid to the said Suresh

a sum of Rs. 52,106, and paid to herself in her personal capacity as the heir of the deceased Dhundiraj, and to herself as the mother and natural guardian of her minor son Bakul, a sum of Rs. 1,04,212/- made up of Rs. 29,212 in cash and Rs. 75,000 being the value of a flat on Pedder Road in Bombay. By agreement between the parties, the share of the deceased in the business of United Sound Services was continued to be held in common between his heirs, the said Suresh, the Plaintiff and the said minor Bakul, and was not included in the distribution of the estate mentioned above. On the 10th of August 1966 an instrument which was called a Deed of Transfer was executed between the parties, a copy of which is annexed to the plaint and marked 'A' and it is in respect of the said Deed that the present suit has been filed. It is, therefore, necessary to set out in some detail the nature of the said Deed.

3. After several recitals, the operative part of the said Deed declares that the plaintiff, as administratrix, has made the payments mentioned above to the said Suresh, and to herself in the dual capacity which she holds as stated above, and states that the said Suresh as well as the plaintiff herself "acknowledge" that they have received the respective amounts due to them as well as the said flat "in full satisfaction" of their respective shares in the property and effects of the deceased Dhundiraj, except his share in the business of United Sound Services. The concluding portion of the said Deed, which is very important for the purpose of this case, is in the following terms:—

"And the said Suresh and the said Leela for herself and as the mother and natural guardian of the said Bakul do hereby discharge Leela the Administratrix from all their respective rights, claims and interest in the property and effects mentioned in the said Schedule I hereunder written and from all actions, accounts, claims and demands in respect thereof".

It may be mentioned that Schedule I to the said Deed contains an enumeration of all the property belonging to the estate of the deceased, other than the share of the deceased in the United Sound Services which is shown in Schedule II to the said Deed.

4. In accordance with the adjudication by the Assistant Superintendent of Stamps, Bombay, the said Deed was stamped with a stamp of Rs. 10/-. After its execution, the said Deed was presented for registration to the first Defendant on the 24th of October 1966, and the first Defendant computed the registration fee payable thereon on an ad valorem basis at Rs. 679 which he demanded from the

plaintiff. The Plaintiff declined to pay the same, contending that a fixed registration fee of only Rs. 10/- was leviable on the said Deed. The first defendant having thereupon refused to register the said Deed, the Plaintiff filed an appeal against the order of the first Defendant before the second Defendant under Section 72 of the Registration Act. The second Defendant by his order dated 7th April 1967, however, upheld the decision of the first Defendant in regard to the ad valorem registration fees payable on the said Deed. The Plaintiff has thereafter filed this suit under Section 77 of the Registration Act. It is the case of the Plaintiff in paragraph 7 of the plaint that the said Deed falls within Article III of the Table of Fees prepared by the Government of Maharashtra in exercise of the powers conferred upon it under Section 78 of the Registration Act, as being a Release executed in pursuance of some other document on which full ad valorem fee under Art. I has been paid, and a maximum registration fee of Rs. 10/- only is payable thereon. The alternative case of the plaintiff also set out in paragraph 7 of the plaint is that the said Deed is a document which does not fall within any other Article of the Fee Table and is, therefore, governed by Article IV of the said Table of Fees, and a fixed registration fee of Rs. 10/- only is leviable in respect of the same. It may, however, be mentioned that, at the very commencement of the hearing before me, Mr. Zaiwala for the plaintiff gave up the main contention in paragraph 7 of the plaint that the Deed in question falls under Article III of the Table of Fees, and made a statement that he would base his client's case only on the alternative ground stated in paragraph 7 of the plaint that the said document fell within Article IV of the Table of Fees as being one which did not fall under any other Article thereof.

5. Apart from certain technical defences, the case of the Defendants in paragraph 10 of their Written Statement is that the said Deed is a Release without consideration, and as such does not fall under Article I (2) of the Table of Fees, but is governed by an ad valorem registration fee as laid down in Article I (3) thereof. It may be mentioned that it has been stated by Mr. Bharucha before me that the words "Article I (2)" in line four of paragraph 10 of the Written Statement are a typing mistake for the words "Article I (3)". In view of these rival contentions of the parties, the following issues were framed by me:—

(1) Whether this Hon'ble Court has jurisdiction to entertain and try this suit.

(2) Whether the Deed of Release in suit is chargeable in respect of registration fee under Article I (3) of the Table

of Fees in force in the State of Maharashtra as alleged in paragraph 10 of the Written Statement.

(3) Whether the Deed of Release in suit is chargeable in respect of registration fee under Article IV of the said Table of Fees as alleged in paragraph 7 of the plaint.

(4) Whether the Plaintiff is entitled to any and, if so, what relief?

6. It may be mentioned that Mr. Bharucha for the Defendants stated that he desired to give up the plea of limitation as well as the plea of non-maintainability of the suit which are to be found pleaded in paragraphs 1 and 2 of the written statement. No issues have, therefore, been framed by me in regard to the same. The questions which survive for determination in this suit are only two:— (1) the question of jurisdiction, and (2) the question of the registration fee payable on the Deed.

7. As far as the question of jurisdiction is concerned, it is the contention of Mr. Bharucha for the Defendants that this suit should have been filed in the Bombay City Civil Court as being the Civil Court of the lowest grade within the local limits of whose original jurisdiction the registering office is situated. There is no substance whatsoever in that contention of Mr. Bharucha. In support of that contention, Mr. Bharucha relied upon the decision in the case of Vishwambhar Pandit v. Prabhakar Bhat, (1884) ILR 8 Bom. 269, but it is unnecessary to deal with that case as it lays down nothing more on this point than what S. 15 of the Code of Civil Procedure, 1908, enacts. There can be no dispute about the proposition that a suit must be instituted in the court of the lowest grade competent to try it. The question that arises, however, is — Is the Bombay City Civil Court "competent" to try this suit? As Mr. Zaiwalla has rightly contended, this suit is not capable of monetary evaluation and the Plaintiff is, therefore, entitled to put his own valuation thereon for the purpose of jurisdiction. In my opinion, such a suit would not be governed by Section 8 of the Suits Valuation Act, 1887, and there being no Rules framed by the High Court under Section 9 of that Act, the plaintiff would be entitled to put his own valuation thereon. That, in substance, was the view taken in the case of Golam Rahman v. Sabekjan Bibi, AIR 1926 Cal 1091 in which this very question arose and it was held by a Division Bench of the Calcutta High Court that the sole object of a suit under Section 77 of the Registration Act being to get a certain document registered, the plaintiff was entitled

to put his own valuation thereon. As in Golam Rahman's case, AIR 1926 Cal 1091 the plaintiff in the present suit has, in para 9 of the plaint, valued the suit at the value of the property comprised in the Deed which is well over Rs. 25,000. This suit would therefore be beyond the pecuniary jurisdiction of the Bombay City Civil Court and has been properly filed in this Court.

8. Even if I am wrong in the view which I have taken above, viz., that the subject-matter of the suit is not capable of monetary evaluation, the same result would follow. The subject-matter of the suit would be none other than the property affected by the Deed and even on the footing that the subject-matter of the suit is capable of monetary evaluation, the value thereof must be held to be well over Rs. 25,000 which is the pecuniary limit of the jurisdiction of the City Civil Court. That position is clear in view of the fact that the share of each of the heirs in the estate of the deceased Dhundiraj is Rs. 52,106 and the aggregate of the property in regard to which the Deed operates to give a discharge is Rs. 1,56,318.

9. There is one more ground on which, in my opinion, the jurisdiction of the City Civil Court would be clearly barred in respect of the present suit. That ground is that the Registration Act is a "special law", and proceedings under Section 77 thereof are proceedings under a "Special law" within the terms of Section 3 (c) of the Bombay City Civil Court Act, 1948, which lays down that that Court is not to have jurisdiction in suits or proceedings which are cognizable by the High Court under any Special law other than the Letters Patent. It has been held in the case of Veeramma v. Abbiah, (1895) ILR 18 Mad 99 at pp. 108-110 (FB) that the Registration Act is a Code complete in itself and is, therefore, a "Special law" to which it would be incongruous to apply the general provisions of the Limitation Act. It was held in the said case that the said suit, which was also a suit under Section 77 of the Registration Act of 1877 which was materially in the same terms as Section 77 of the present Registration Act, was barred and that the provisions of Section 7 of the Limitation Act, 1877, could not assist the plaintiff to maintain the suit by reason of his infancy. It may be mentioned that Section 6 of the Limitation Act of 1877 laid down that when by any special or local law, a period of limitation was specially prescribed for any suit, nothing contained in the Limitation Act could affect or alter the period so prescribed. The question which arose before the Court in that case, therefore, was whether Section 77 of the Registration Act could be said to be a "special law" so that the provisions of Section 7 of the

12. It was next urged that the very fact that the contribution of Rs. 10/- was agreed to be offered by the State Government at the request of the Parishad shows that the Government had no initiative in the matter and had not applied its mind to the need for the acquisition. On this point, reliance is made in the recital of the Government letter in question of February 18, 1961 which says that the contribution was being offered in pursuance of a letter received from the Parishad dated January 5, 1961. It is, however, now settled that provided there is a public purpose behind a proposal for acquisition it does not matter whether an individual or group of individuals are going to be proximately benefited by the acquisition or whether the move for the acquisition is initiated by such person or persons who are going to be immediately benefited (Cf. State of Bombay v. Bhanji, (1955) 1 SCR 777 at p. 785 = (AIR 1955 SC 41 at p. 46)). If that be so, it cannot be concluded that the Government, in making the order for acquisition, did not apply its mind to the need or the purpose for the acquisition merely because the proposal came from the Parishad which was going to be immediately benefited, for employment of the Governmental machine for the acquisition.

13. II. The next point urged on behalf of the Petitioner is more serious, namely, that Sec. 17(4) has been wrongly applied and the Petitioners have been wrongly deprived of the opportunity to object under Section 5A of the Act, inasmuch as the disputed lands are not 'waste or arable'. Upon a review of all the existing authorities, in Abdul Jabbar v. State of West Bengal, (1967) 71 Cal WN 129, I have stated the conditions for the application of sub-section (4), read with sub-section (1) of Section 17 of the Act which are:

(a) Satisfaction as to the urgency for the acquisition, which is a subjective condition of the State Government;

(b) The lands in question being 'waste or arable', which is an objective condition. Section 17 (4) cannot be applied to any land which is shown not to be arable or waste (vide Raja Anand v. State of U. P., AIR 1967 SC 1081 at p. 1086).

Coming now to the nature of the plots included in the disputed declaration under Section 6, namely 1822, 1725, 1727, 1728, 1729, they are recorded in the C. S. records as 'danga', which means high land.

In none of the affidavits it is stated that the lands are actually under cultivation. Government's case is that they are waste. In para. 4 of the Petition in C. R. 1140 it is stated that the plots are situated within the residential area of the town

of Konnagar and that the Petitioners have effected various improvements on the said lands by spending huge amount of money and have made the said lands fit for constructing residential buildings and industrial establishments on the same. The particulars of such improvements are, however, not given in the Petition and in the counter-affidavit of Respondents 2-3 it is stated that on inspection of the plots, "no tree nor any structure and no trace of any improvement could be detected" and that "the lands are near dumping ground". According to the Respondents, therefore, the disputed plots are 'waste'.

In paras 5-6 of the affidavit-in-reply in C. R. 295, it has been stated that the disputed lands are close to many brick-built buildings and that for municipal assessment, the disputed lands have been treated as building sites. In the affidavit in reply of the Petitioner in C. R. 1140 (Para. 7), it has been stated that "the lands and buildings of the Kalyan Parishad are much nearer to the trenching ground than the disputed land".

The conclusions that emerge from the foregoing affidavits are that the disputed lands are not under cultivation nor fit for cultivation; there are no trees or structures existing on them and no productive use is now being made. But buildings may possibly be constructed on such lands.

The question is, when land is at present empty and unoccupied, whether the fact that buildings may possibly be constructed on it is a ground for excluding it from the category of 'waste' land within the meaning of Section 17 (1) of the Act.

In the administrative instructions contained in the Bengal Land Acquisition Manual (1910, 89), it is the existing condition of the land which has been taken to be test as to whether a land is waste and it is laid down that Sec. 17 should not be applied to lands occupied by roads, tanks, buildings, gardens, orchards etc. Respondents have presumably acted according to these instructions.

But a different test of 'waste' land has been adopted by the Bombay High Court in Navnilal v. State of Bombay, AIR 1961 Bom 89 at p. 91:

"..... so far as lands in the urban area are concerned, the expression 'waste lands' may possibly be used with reference to pieces of land which are desolate, abandoned and not fit ordinarily for any use as building sites etc.

A building site which is quite suitable to be built upon cannot be regarded as a waste land simply because it is not put to any present use. It is its unfitness for use and not the mere fact that it is not put to any present use that must determine whether the land is waste or not."

The foregoing view of the Bombay High Court appears to find support from the observations of the Supreme Court in AIR 1967 SC 1081 at p. 1085. In the Oxford Dictionary, 'waste' is defined as follows:

"...uncultivated, incapable of cultivation or habitation; little or no vegetation; barren desert".

Following this Dictionary meaning the Supreme Court observed:

"The expression 'waste land' as contrasted to 'arable land' would, therefore, mean 'land which is unfit for cultivation or habitation, desolate and barren land with little or no vegetation thereon'.

Lands which are fit for habitation after constructing buildings cannot, therefore, be classified as waste. The averment in the petition that the disputed lands are situated within the residential area is not controverted and the very fact that the Parishad wants to build its staff quarters on the disputed land shows that it is possible to construct buildings upon the lands and to occupy them. The vague statement in the counter-affidavit of the Government that the disputed lands are near the dumping ground is of no worth in view of the fact that the Parishad wants to accommodate its staff on the disputed lands.

Having regard to the foregoing circumstances, I am satisfied that the disputed lands are not 'waste' lands within the meaning of sub-sections (1) and (4) of Section 17, so that the inquiry under Section 5A could not lawfully be dispensed with. The declaration under Section 6 must, accordingly, be struck down as invalid.

Petitioners also rely on the other aspect of S. 17(4), namely that there was no satisfaction of the Government as to the 'urgency' for the acquisition, under Section 17 (1), which is a condition precedent for the application of Section 17(4). In AIR 1967 SC 1081 and Jaichand v. State of West Bengal, AIR 1967 SC 483, the Supreme Court has laid down that —

(i) It is not competent for the Court to inquire into the sufficiency of the grounds which led to the formation of the opinion of the Government that the need for acquisition was urgent and that, accordingly, the inquiry under Section 5A should be dispensed with.

(ii) Nevertheless, the Court can interfere if it is shown that the Government never applied its mind to the matter or that the action of the Government is mala fide.

There are decisions to the effect that where there is a recital in the impugned order that the Government was satisfied as to the urgency or other condition precedent for the exercise of the statutory power, such recital would, in the absence

of any evidence as to its inaccuracy, be accepted by the Court as evidence that the necessary condition was fulfilled (Emp. v. Sibnath, AIR 1945 PC 156 at p. 161; AIR 1967 SC 483).

There is, however, no mention of 'urgency' or the Governor's 'satisfaction' as to that fact at all in the impugned declaration. It merely says —

"In exercise of the powers conferred by Section 17 (4) of the Land Acquisition Act ..., the Governor is pleased to direct that the provisions of Section 5A of the Act shall not apply to the waste and arable land mentioned in Sch. A above to which, in the opinion of the Governor, the provisions of sub-section (1) of Section 17 are applicable".

But even if the foregoing words be held to be a recital that the Governor was satisfied that the instant case was a 'case of urgency' referred to in sub-section (1), which would brook no delay as would be caused by an inquiry under Section 5A, it is still open to the petitioners to show by evidence that the Governor did not apply his mind to the question of urgency or acted mala fides (Cf. Ganga Bishnu v. Calcutta Pinjrapole Society, AIR 1968 SC 615 at p. 619). The broad fact in this case is that there were some existing educational institutions for which additional lands were needed, the question that additional lands were needed for their expansion or proper functioning is one thing and another thing to say that the need was so imperative that the lapse of time required for holding an inquiry under Section 5A could not be suffered. The use of the word 'etc', 'swimming pool', and the like show that this aspect of the matter was not fully attended to. There was no emergency, such as a natural calamity, to meet with which the lands were needed. To my mind the circumstances disclosed do not show that the Government applied its mind to the particular question, namely, whether the proceedings under Section 5A of the Act should be dispensed with. It is, however, not necessary to rest my decision upon this branch of the petitioner's case, because of my finding that the disputed lands not being 'arable' or 'waste' within the meaning of sub-section (1) of Section 17, sub-section (4) of that section could not be legitimately applied, to dispense with the proceeding under Section 5A.

My conclusions are —

(i) There is a public purpose to support the impugned acquisition. Hence, the notification under Section 4(1) cannot be quashed, but the last paragraph of the notification will be deemed to be cancelled.

(ii) But since the proceeding under Section 5A has been wrongly dispensed with,

the declaration under Section 6 cannot be upheld; Government must make a fresh declaration, if any, only after hearing objections under Section 5A and after considering the Collector's report thereon.

In the result, C. R. 1140(W)/67 is discharged, excepting that the last paragraph of the notification at Annexure B to the petition in that case shall be deemed to be cancelled.

C. R. 295(W)/62 is made absolute and the declaration under Section 6 at Annexure B of the petition thereto is quashed. But respondents shall have the liberty to make a fresh declaration according to law after complying with the requirements of Section 5A of the Land Acquisition Act. Parties will bear their own costs in both the Rules.

14. III. Before parting with this case, another matter has to be disposed of, namely, as application under Section 476 of the Criminal Procedure Code, filed on behalf of the Parishad on account of certain statements made by Samar Mitra, the son of petitioner Jatadhar who had died during the pendency of the Rules, in the supplementary affidavit filed by him on July 16, 1968. The statements, it is urged, impute the criminal offences of misappropriation of money granted by the Central Government and of cheating the Government by making false representations. I do not, however, consider that this is a fit case for sanction for prosecution by the Court under Section 476, for the following reasons:

(a) The statements in question are at best defamatory, for which the applicants may have redress by private complaint.

(b) The applicant is a collective body and the statements are not levelled against any named individual.

(c) The statements are in the nature of a comment on the facts disclosed by the materials on the record and, in all probability, the drafting of the statements is the work of the lawyer for the petitioner and not the petitioner himself. Much of the irritation has been caused by the language used in the statements in question.

But even though I refuse to accord sanction under S. 476, I would direct the opposite party, Samar Mitra, to pay the costs of the application, assessed at ten gold mohurs, for the language used is provocative enough to impel the applicants to bring this application. The application is accordingly rejected but Opposite Party Samar Mitra must pay a cost of ten gold Mohurs to the Konnagar Kalyan Parishad.

Order accordingly.

AIR 1970 CALCUTTA 99

(V 57 C 13)

S. K. CHAKRAVARTI AND ANIL

K. SEN, JJ.

Kanailal Manna and others, Appellants
v. Bhabataran Santra and others, Respondents.

A. F. A. D. No. 757 of 1959, D/- 13-6-1969.

Civil P. C. (1908), O. 22, Rr. 1, 3 and 9 — Joint decree — Appeal against by defendants — Death of one plaintiff before hearing of appeal — Appeal dismissed and joint decree passed in ignorance of death — Decree abates — High Court neither can affirm decree of trial court nor can set aside abatement — Proper way is to set aside decree and to remand case — (1947) 51 Cal WN 654 Overruled.

Where one of the plaintiffs dies even before the appeal filed against a joint decree passed in their favour is heard by the lower appellate Court and the Court in ignorance of the death, dismisses the appeal and passes a decree, the decree abates and cannot be considered in law to be effective in any way. The High Court in appeal against such a decree cannot itself set aside the abatement nor it can affirm the decree passed by the trial Court. The proper procedure to be followed by the High Court is to set aside the ineffective decree and remand the case to the court where abatement has taken effect, keeping it open to the parties to move that court for an opportunity to have the abatement set aside if the parties could satisfy it that they are so entitled in law. (1947) 51 Cal WN 654 Overruled. Case law discussed. (Paras 17, 19, 22)

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Shyamacharan Mitter, Shyama Prasanna Roy Choudhury, for Appellants; Manindra Nath Ghose, Sudhanshu Kumar De and Anil Kumar Sett, for Respondents.

ANIL K. SEN, J.— This appeal from appellate decree is at the instance of defendant Nos. 4, 5 and 6 who are the transferees from defendant Nos. 2 and 3. The appeal arises out of a suit for declaration of title and possession of the properties described in the two schedules to the plaint brought by the three plaintiffs Bhabataran, Nrityataran and Gobardhan.

2. On May 19, 1913 one Kiranbala Dassi, a child widow sold away all her husband's properties to her husband's brother Srinibas the father of defendants 2 and 3 and came to live with her father and her brothers, the plaintiffs as aforesaid; the three plots of land which constitute the suit property, were purchased by her by three documents respectively dated May 18, 1924, November 19, 1928 and December 20, 1934; she died while possessing and enjoying these properties in 1360 B. S.; and it appears that later in her life she had separated even from her brothers, the plaintiffs, and was living in a homestead situate on a part of the suit property.

3. Plaintiffs claimed that of the two schedules, the first one was purchased by them in the benami of their sister late Kiranbala and that the second schedule was purchased by her out of her "Stri-

dhan" money and that on the death of Kiranbala they inherited the second schedule—the first schedule remaining their own property; in respect of the first schedule they had made an alternative claim namely that even if it was purchased by Kiranbala it was purchased out of her "Stridhan" money and as such they had inherited the same too; they instituted the suit because defendant No. 1, who was a bargadar, had set up a claim that on the death of Kiranbala it was defendants 2 and 3, her husband's brother's sons, who became the owners of the properties and because the plaintiffs also came to know that the defendants 2 and 3 treating the properties to be a part of their inheritance on the death of Kiranbala sold the same to defendants 4, 5 and 6, appellants.

4. The suit was contested by three sets of defendants, namely, defendant No. 1, defendant Nos. 2 and 3 and defendant Nos. 4 to 6.

5. Defendant No. 1 only pleaded that he was a bargadar in respect of all the three plots previously under Kiranbala and since her death he had been paying the bhag produce to defendant No. 2 and 3.

6. The defence of the other two sets of defendants were more or less the same; their claim was that all these properties were purchased by Kiranbala out of the purchase money which she had received from the father of the defendants 2 and 3 by selling her husband's properties in the year 1913 and as such must be treated to be accretions to the husband's estate which devolved on the death of Kiranbala on defendants 2 and 3 who, in their turn, lawfully transferred the same on December 8, 1953 in favour of defendants 4, 6.

7. In substance there was a rival claim to the suit properties left behind by Kiranbala plaintiffs claiming as preferential heirs as her brothers treating the property to be a part of her "Stridhan" while defendants 2 and 3 and through them the defendants 4-6 lay their claim by inheritance treating it to be a part of her husband's estate. It is, however, clear and undisputed that as amongst the plaintiffs the claim was one of joint title by inheritance.

8. The learned Judge in the trial Court decreed the suit on a finding that the properties of both the schedules were "Stridhan" properties of Kiranbala and that the plaintiffs are the preferential heirs; claim for possession however was decreed through defendant no. 1, the bargadar.

9. Against the said decree the defendants 4 to 6 preferred an appeal before the lower appellate court which was registered as Title Appeal No. 60 of 1957.

The appeal was heard on January 7, 1959 and was dismissed on merits on January 17, 1959. The learned Judge in the court of appeal below came to the same conclusion as the trial Court but on somewhat different reasonings.

10. It is not disputed before us that if the suit properties be a part of the acquisition by Kiranbala out of "Stridhan" money plaintiffs would be preferential heirs to the defendants 2 and 3.

11. An unfortunate event, however, happened before the appeal was heard and disposed of by the Court of Appeal below namely one of the plaintiff-respondents Nrityataran Satra died on January 12, 1958; none of the parties brought the said fact to the notice of the Court of appeal below and as such the decree proceeded on ignorance of such death and against a dead person. The defendants 4 to 6 preferred the present second appeal to this court treating the said Nrityataran to be alive but when in course of proceedings for service of summons it transpired that he had died, her heirs and legal representatives were added as parties-respondents to the present second appeal.

12. After Mr. Shyamacharan Mitter had opened the appeal on behalf of the appellants, Mr. Manindranath Ghosh appearing with Mr. Anil Kumar Sett on behalf of the plaintiffs including the heirs and legal representatives of Nrityataran took a preliminary objection that the decree passed by the trial court in favour of the plaintiffs being a joint decree on the death of one of the plaintiffs with consequent abatement as against him, the entire appeal before the lower appellate court should be deemed to have abated.

13. On the facts set out hereinbefore, there is no dispute that the title set up by the plaintiffs is an indivisible one and the consequent decree was a joint decree in favour of all of them. It is also not disputed that Nrityataran, one of the plaintiffs, having died on January 12, 1958 and 90 days having elapsed even prior to the hearing of the appeal by the Court of appeal below there was abatement of the appeal as against the said plaintiff respondent, Nrityataran. The effect of such abatement against one of the plaintiffs is either that the said appeal became imperfectly or improperly constituted against the others so that the same has to be dismissed vide *State of Punjab v. Nathu Ram*, AIR 1962 SC 89; *Kalidayal Bhattacharya v. Nagendra Nath*, 30 Cal LJ 217=(AIR 1920 Cal 264) or as is more commonly said that the entire appeal had abated vide *Ramsarup v. Munshi*, AIR 1963 SC 553. There is no dispute that whichever view be taken the effect is the same, namely, that the entire appeal must fail solely on account of the

abatement in respect of one of the plaintiffs in whose favour the decree had been passed when such decree proceeds upon common grounds vide *Rameshwar v. Shyambehari*, AIR 1963 SC 1901. Mr. Shyamacharan Mitter appearing for the appellants in his usual fairness has not disputed this proposition. He however has contended that as the decree was passed in ignorance of death of a person against whom there had been an abatement which in law leads to the failure of the entire appeal, his clients should be given an opportunity to have the abatement set aside under Order 22, Rule 9 of the Code of Civil Procedure and for that purpose the ineffective decree passed in the present case by the court of appeal below should be set aside and the appeal should be remanded to the court of appeal below to be reheard after giving his clients such an opportunity. As a matter of fact, in course of the argument Mr. Mitter even in this court made an oral prayer for setting aside the abatement in support whereof he had subsequently filed an application to that effect before us.

14. Mr. Ghosh appearing for the plaintiff-respondents, however, has strongly contested the submission made by Mr. Mitter: according to him this Court must hold that on the death of one of the plaintiff-respondents with consequent abatement as against him the entire appeal before the lower appellate court must be deemed to have abated and as such this Court should only hold that only effective decree which is binding between the parties is that passed by the trial court and we must affirm the same. Alternatively Mr. Ghosh has contended that as in the present case the decree passed by the lower appellate court is not one against but in favour of a person who is dead, none but the heirs and legal representatives of the deceased should be allowed to dispute the validity of the decree on the ground of abatement; so according to Mr. Ghosh we should treat the appeal to be one which had been disposed of on merits by the Court of appeal below and proceed to hear the second appeal on its merits too.

15. It is this rival contention which raises a somewhat difficult question of practice to be followed in law in the aforesaid circumstances where a decree has been passed in favour of a dead person in ignorance of such death and in ignorance of the fact that the appeal itself had abated.

16. We must, however, hold that the two contentions put forward by Mr. Ghosh are somewhat inconsistent with each other; because if we accept his first contention and hold that the entire appeal had abated on the death of one of the plaintiff-respondents in the court of appeal below, we cannot yet consider the

decree passed to be one on its merits nor could we go to hear the present second appeal on its merits. In our opinion if after hearing the present second appeal on its merits we come to a conclusion different from those arrived at the courts below, we are to pass a decree against the plaintiffs including the deceased plaintiff but that we cannot do in the present case because as against the deceased plaintiff the appeal had already abated by operation of law and there is no effective decree in the court of appeal below. Of course Mr. Ghosh has relied on two decisions of this Court in support of his second contention, namely, *Himangshu v. Monindra*, AIR 1954 Cal 205=58 Cal WN 221 and *Noai Chowkidar v. Official Trustee*, AIR 1929 Cal 527=49 Cal LJ 482; he has also relied on the decision in the case of *P. M. A. M. V. Chetty v. J. M. Ayer*, ILR 39 Mad 386 = 28 Mad LJ 138 =(AIR 1916 Mad 574). In our opinion, however, none of these three cases had considered the effect of abatement on the proceedings. In the case of AIR 1954 Cal 205 (supra) the legal representatives of the deceased party were already on record and his Lordship P. N. Mukherjee, J. (as his Lordship then was) only affirmed the legal proposition that an order or a decree in favour of a dead person is not always a nullity. In the case of AIR 1929 Cal 527 (supra) there was a proceeding under Order 21, Rule 90 of the Code of Civil Procedure against a decree-holder auction purchaser which was allowed by the trial court on December 17, 1926; there was an appeal by such decree-holder auction purchaser and pending the appeal he died on January 1, 1928 but the appellate court allowed the appeal in favour of the deceased appellant on January 30, 1928 in ignorance of his death; in such circumstances the petitioners in the proceedings under Order 21, Rule 90 of the Code of Civil Procedure wanted to have the appellate judgment set aside because of such death and this court, however, overruled such a claim on the view that it was only the heirs and legal representatives of such a deceased party who can ask for vacating such an order but not the others. It should be noted that on the day when the appeal was allowed there was no abatement and this court affirmed the legal position that an order in favour of a dead person is not altogether and in all circumstances a nullity. The learned Judge relied on the decision in the case of *Duke v. Devis*, (1893) 2 QB 260 and in particular on the following observations from the said decision: "The learned Lord Justice points out that if a party is dead, the records stand good so far as the living parties are concerned; and that any disposal of the case notwithstanding the death of one of the parties

will be valid subject to its being vacated at the instance of the legal representatives of the persons who had died." In the case of ILR 39 Mad 386=28 Mad LJ 138=(AIR 1916 Mad 574) (supra) the death was only two days prior to the judgment and the Madras High Court held that in such circumstances by the death there was no abatement of the suit and the unsuccessful litigant has no right to re-argue the matter on the ground that one of the other parties was dead.

17. In our opinion in all the above cases relied on by Mr. Ghosh the distinguishing feature is that there was no abatement even as against the deceased party. None of these cases, ever considered the position as in the present case where by operation of law there had been an abatement of the proceedings not only against the party deceased but as a whole. We are of the opinion that the fact of abatement is a distinguishing feature of great importance particularly where the decree proceeds on common grounds. We are of the opinion that on the facts of the present case on the death of one of the plaintiff-respondents in the court of appeal below the appellants before the said court who are also the appellants before us could no longer have in law invited the said court to adjudicate upon matters in controversy vide 30 Cal LJ 217=(AIR 1920 Cal 264). It has also been made expressly clear by the Supreme Court now that in such circumstances the court of appeal below could not but dismiss the appeal because of abatement against one of the plaintiff-respondents on the ground of defect in the constitution of the appeal without going into merits. If that is the clear position in law it matters little whether the court of appeal below had gone on the merits and decided the appeal on such merits in ignorance of the death and the abatement. We are therefore unable to consider the judgment and decree rendered by the court of appeal below to be any way effective in law on its merits and even if the Court of appeal below had done so we must hold that the said court had done it erroneously although the error might have arisen because of ignorance of the death. On the above conclusions we must overrule the second contention of Mr. Ghosh.

18. We now proceed to consider whether we should adopt the other procedure contended for by Mr. Ghosh namely that we should hold the appeal before the court of appeal below to have abated as a whole and restore the decree as passed by the trial Court or we should adopt the procedure contended for by Mr. Mitter namely that we should set aside the decree passed by the Court of appeal below and send the case back to the said court for re-hearing.

19. Before going into this question we should dispose of Mr. Mitter's prayer before us made on behalf of his clients for setting aside the abatement on the death of Nriyataran under the provisions of Order 22, Rule 9 of the Code of Civil Procedure. We must say that it is now more or less well settled and accepted by the different High Courts that it is the court where abatement has taken place which alone is competent to deal with a prayer for setting aside the abatement. It would be sufficient to refer to one of the Bench decisions of this court in the case of *Promode v. Abdul Majid*, AIR 1919 Cal 242(1) and we must further say that the contrary proposition laid down by a single Bench in the case of *Nabakumar Roy Chowdhury v. Prafulla Chandra Chowdhury*, (1947) 51 Cal WN 654 which took no notice of the earlier Bench decision referred to above does not represent the correct view. Therefore Mr. Mitter's prayer for setting aside the abatement before us is misconceived and we are not entitled in law to adjudicate upon the said prayer or the application filed by Mr. Mitter in support thereof before us.

20. In support of his contention that we should affirm the decision of the trial court, Mr. Ghosh has relied on a decision of this court in the case of *Balaram v. Kanysha Majhi*, AIR 1919 Cal 410=53 Ind Cas 480. In the said case there was an appeal by the unsuccessful plaintiffs; pending the appeal one of the appellants died and his heirs and legal representatives were not brought on record and the Court of appeal below decreed the appeal and passed a decree in favour of all the plaintiffs in ignorance of death of one of them. The facts recited show that the decree was passed after 33 days from the date of death and it is not clear how their Lordships proceeded on the basis that there had been an abatement of the appeal. Of course this Court in the said case on a further appeal by the defendants declared the decree passed by the court of appeal below to be a nullity and restored the decree as passed by the trial Court. Apart from the fact that there is some doubt as to whether there was at all any abatement in the said case what prevailed upon the learned Judges disposing of the said case to hold as they did, was that it was one of plaintiffs-appellants who had died and no attempt was made to substitute the heirs of the deceased plaintiff, such death being obviously known to the plaintiffs. In any event on the facts of the case, it appears this Court never considered any prayer for an opportunity to have the abatement set aside perhaps because on the facts there was no scope for affording any such opportunity.

21. On the other hand, Mr. Shyama-charan Mitter has relied on a number of decisions from different High Courts in support of his proposition that on the facts of a given case like the present one the only course that should be followed in law is to vacate the ineffective decree and remand the proceedings to the Court where abatement had taken effect to give the parties an opportunity to have the abatement set aside and to have the appeal effectively disposed of on merits. He has referred to a decision of the Madras High Court in the case of *American Baptist Foreign Mission Society v. A. Pattabhiramayya*, AIR 1919 Mad 685 at p. 690, a Bench decision of Bombay High Court in the case of *A. Indra Sangi v. Desai Umed*, AIR 1925 Bom 290 and four decisions of the Patna High Court in the cases of *Ramsaran v. Prithvi Nath*, AIR 1952 Pat 267, *Mrs. Gladys Coutts v. Dhar-khan Singh*, AIR 1956 Pat 373, *Kameshwar Pandey v. Dwelal Bohri*, AIR 1964 Pat 247 and *Sukhur Sah v. D. Tewari*, (1961) ILR 40 Pat 61. It may be pointed out that the Bench decision in the case of AIR 1956 Pat 373, had considered a number of decisions on the point including many of the decisions relied on by Mr. Ghosh in coming to the conclusion that the proper procedure to be followed is to set aside the ineffective decree and remand the case to the court where the abatement had taken effect. Mr. Mitter has also relied on the observations made by this court in the case of AIR 1919 Cal 242 (1) (supra) to the effect "if the applicant has any remedy, he is to make a proper application to the proper court if so advised." The remedy referred to is obviously remedy against the abatement. Mr. Mitter relies on this observation for contending that his clients should not be denied an opportunity to seek the remedy.

22. We are of the opinion that if we accept the contention of Mr. Ghosh and affirm the decree as passed by the trial Court we only take away a valuable right of the appellants before us to seek the remedy provided under law for setting aside the abatement consequent upon the death of one of the respondents. The statute has given him this right under Order 22, Rule 9 of the Code of Civil Procedure and it would not be just and proper to deprive the party of such a valuable right. If we have come to the conclusion that we are unable to entertain any application on behalf of the present appellants for having abatement, which has taken place in the court of appeal below, set aside it is but just and proper that we must at the same time see that he gets an opportunity to move the appropriate court with such a prayer. But if we, on the other hand, accepting

the contention of Mr. Ghosh in the meantime, affirm the decision as passed by the trial court we are afraid the Court of appeal below would no longer have any scope to entertain effectively any application for setting aside the abatement. In such circumstances, in our opinion, the uniform procedure followed by the other High Courts as referred to hereinbefore should be accepted, namely, the ineffective decree passed by the court of appeal below should be set aside and the appeal should be remanded to the said court, keeping it open to the appellants to move the said court for an opportunity to have the abatement set aside if the appellants could satisfy the said court that they are so entitled in law. In our opinion the decision relied upon by Mr. Ghosh in the case of AIR 1919 Cal 410 (supra) does not really go counter to the view we have taken; we are further fortified in our conclusion by the underlying principle of the Bench decision of this court in the case of Abdul v. Lakhisree Mazumdar, AIR 1923 Cal 676. In that case abatement had taken place pending a second appeal in this court and this court in ignorance of death decreed the second appeal and remanded the proceedings to the court of the District Judge, who however, considered the remand order to be wholly without jurisdiction because of the abatement and he further held that the decree as passed by the lower appellate court prior to remand should be restored. On a fresh second appeal to this court Asutosh Mukherjee, J., condemned the procedure followed by the District Judge and held that the proper procedure should have been to report the fact to the Court which had passed the remand order in ignorance of the death. His Lordship further went on to allow the appeal, set aside the decree passed by the District Judge after remand to remand the case once more and then recall the same to the file of this Court so that it may be placed before the appropriate Bench which had decided the appeal on the previous occasion. In our opinion the procedure followed in the above case on principle is in consonance with the view we have taken.

23. It is true that the litigation out of which the present appeal arises was started as early as in the year 1954 and it is unfortunate that we have to remand the case to the court of appeal below once more even at the instance of an unsuccessful party before the said court after so many years but on the view we have taken no alternative is open to us. We would only direct that the court of appeal below should now try to dispose of the appeal at the earliest possible time.

24. We therefore allow this appeal, aside the decree dated January 17,

1959 passed by the Court of appeal below and remand the appeal to the said court to re-hear the same, taking into consideration the effect of the abatement as against the plaintiff-respondent Nriyataran, subject, however, to his giving an opportunity to the appellants to have such abatement set aside in accordance with the law. We further direct that the application filed before us under Order 22, Rule 9 of the Code of Civil Procedure by the appellants should also be sent to the said court for being disposed of on its merits. We however make it clear that we have not expressed any opinion whatsoever on the merits of the appellants' prayer for setting aside the abatement. There will be no order as to costs.

25. S. K. CHAKRAVARTI, J. :— I agree.

Appeal allowed.

AIR 1970 CALCUTTA 104

(V 57 C 14)

B. C. MITRA, J.

Shri Krishnagopal Dutta, Petitioner v. Regional Transport Authority, Burdwan and others, Opposite Parties.

Civil Rule No. 675 (W) of 1969, D/- 10-6-1969.

(A) Motor Vehicles Act (1939), Ss. 62 and 47 — Grant of temporary permit — Notice to existing operators on the route necessary — Opportunity to make representations should be given even when permit is granted a second time — (Constitution of India, Art. 226—Natural justice).

While considering an application even for grant of a temporary permit the Regional Transport Authority is bound to follow the principles of natural justice and serve a notice to the operators already providing transport facilities on the same route or part of the route as they would be vitally affected by the grant of the permit. There is nothing in Section 47 to justify the conclusion that consideration of representations from interested parties is necessary only in the case of regular stage carriage permit and it is to be excluded when the R. T. A. considers an application under Section 62. The provision in Section 47 for taking into consideration representations from parties likely to be affected by the grant of a permit is mandatory in nature and the mere possibility that there may not be sufficient time for giving such notice and also of hearing such representations, is no excuse for disregarding the mandatory statutory provisions. AIR 1968 Punj 344, Rel. on.

(Para 6)

Such opportunity of making representation has to be given to the existing opera-

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tors not only while issuing the permit for the first time, but it must equally be given while issuing such a permit for the second or the third or the fourth time. AIR 1959 Punj 1 (FB), Disting. (Para 7)

(B) Motor Vehicles Act (1939), Section 62 — Purpose or ground for issue of temporary permit — Must be set out in order authorising issue of permit — Exercise of jurisdiction under Section 62 — Conditions precedent must be satisfied — (Civil P. C. (1908), S. 9).

The Regional Transport Authority must set out in the order authorising the issue of a permit the purpose or the ground on which a temporary permit is issued. This is necessary all the more because Section 62 itself imposes restrictions on the power to issue temporary permits. The Regional Transport Authority is a statutory authority. It derives its power, authority and jurisdiction, to issue or refuse permits, from the statute itself. Equally in exercising its power to grant a permit it must observe the limitations on its powers created by the statute. A statement of the purpose of the grant is necessary so that the order authorising issue of a temporary permit may be open to scrutiny, having regard to the restrictions created by the statute. (1965) 69 Cal WN 984, Distinguished. (Para 9)

The requirement in Section 62 that a temporary permit can be granted only for one or other of the reasons set out under Section 62 of the Act are conditions precedent to the exercise of the power to grant a temporary permit. If one or other of these conditions precedent do not exist, or if the prohibition in the first or the second proviso to Section 62 is attracted, a temporary permit cannot be granted by the Regional Transport Authority. It is well settled that where the exercise of jurisdiction is dependent upon the existence of conditions precedent, the authority exercising the jurisdiction or making an order in exercise thereof, must satisfy the Court that the conditions precedent to the exercise of the jurisdiction has been fulfilled, AIR 1967 SC 295 & AIR 1969 SC 630 & AIR 1961 SC 372, Rel. on. (Para 10)

(C) Motor Vehicles Act (1939), S. 62 — Renewal of temporary permit — Conditions precedent to exercise of power must be satisfied.

Where temporary permit was granted for the second or the third time for the same route, the conditions precedent to the exercise of the power must be satisfied in the same manner and to the same extent as in the case of grant of permit for the first time. Merely because a temporary permit was being granted for the second or the third time, there is no justification for making the impugned order

for a temporary permit without applying the mind at all to the need for such a permit or without coming to the conclusion that the mandatory conditions laid down in Section 62 has been fulfilled. (Para 11)

(D) Motor Vehicles Act (1939), S. 62 — Power to issue temporary permits — R. T. A. cannot delegate the power.

There is nothing in the Act which authorises delegation by a Regional Transport Authority of the power to issue temporary permits to its Secretary. This power has been conferred upon the Regional Transport Authority itself, and it cannot abdicate its power in favour of any other person or authority without a sanction in law. (Para 12)

(E) Constitution of India, Art. 226 — Rules framed under Motor Vehicles Act are part of statute itself and hence an application for temporary permit made in accordance with the Rules cannot be assailed in petition under Art. 226, Constitution of India — But that bar does not apply where the question whether the application was in accordance with law is not in issue in the petition and the validity of the permit is assailed on other grounds. AIR 1953 SC 79 & AIR 1956 SC 463, Disting.—(Motor Vehicles Act (1939) S. 62). (Para 12)

(F) Motor Vehicles Act (1939), S. 62 — Use of the word 're-issue' in a case where a temporary permit was granted for a second or a third time to the same applicant, would not make the order itself void as that would be a mere irregularity. (Para 13)

(G) Constitution of India, Art. 226 — Temporary permit — Order granting it found invalid by Court in writ proceedings — Permit holder also restrained from placing the bus on road by the Court by an interim order of injunction — Court will not refrain from interfering on the ground that the permit will be expiring shortly and allow the permit holder to make any use of the permit or to take any advantage or benefit thereunder — Motor Vehicles Act (1939), S. 62. (Para 14)

Cases Referred: Chronological Paras
 (1969) AIR 1969 SC 630 (V 56)=
 (1969) 1 SCC 325, Rhotas Industries Ltd. v. S. D. Agarwal 10
 (1968) AIR 1968 Punj 344 (V 55)=
 70 Pun LR 613, Prem Bus Service (Pvt.) Ltd. v. Regional Transport Authority Patiala 4
 (1967) AIR 1967 SC 295 (V 54)=
 1966 Supp SCR 311, Barium Chemicals Ltd. v. Company Law Board 10
 (1965) 69 Cal WN 984=(1966) 2
 ITJ 339, Shaikh Md. Shaffi Barry v. Income Tax Officer 10

- (1961) AIR 1961 SC 372 (V 48)=
 (1961) 2 SCR 241, Calcutta Discount
 Co. Ltd. v. Income Tax Officer,
 Companies District I 10
- (1959) AIR 1959 Punj 1 (V 46)=
 ILR (1958) Punj 1590 (FB), Ambala
 Ex-servicemen Transport Co-op.
 Society Ltd. Ambala City v. State
 of Punjab 7
- (1956) AIR 1956 SC 463 (V 43)=
 1956 SCR 256, Raman & Raman
 Ltd. v. State of Madras 12
- (1953) AIR 1953 SC 79 (V 40)=1953
 SCR 290, T. B. Ibrahim Proprietor,
 Bus Stand, Tanjore v. Regional
 Transport Authority, Tanjore 12

Kashi Kanta Moitra, Nripen Bhattacharjee and Asish Kumar Sanyal, for Petitioner; Balai Chandra Roy, for Respondent; Sushil Kumar Banerjee, for R. T. A.

ORDER:— The petitioner is a permit holder in respect of the route Burdwan to Guskara via Suri Road and owns a stage carriage being No. W.G.H. 8016. There is another permanent stage carriage route namely Guskara to Bon-Nabagram. The route between Burdwan to Bon-Nabagram via Suri Road covers the whole of the route Burdwan to Guskara and proceeds further on to a distance of 4 to 5 miles.

2. On February 13, 1969, the respondent No. 5 (Dayamoyee Transport Service) applied for a temporary permit for 4 months from February 16, 1969, to June 15, 1969, in the route Burdwan to Bon-Nabagram via Suri Road for two Up and Down trips daily. On this application the Secretary to the Regional Transport Authority the respondent No. 4 (B. K. Majumdar, Secretary, Regional Transport Authority, Burdwan) made an order on the next day February 14, 1969, granting a temporary permit for four months with effect from February 16, 1969. It is this order which is the subject-matter of challenge in this Writ petition. The petitioner as the holder of a regular stage carriage permit for the route Burdwan to Guskara via Suri Road contends that the order granting a temporary permit is bad on several grounds to which I shall presently refer; and therefore appropriate writs and orders should be issued directing the respondents to cancel, rescind and withdraw the said order granting the temporary permit to the respondent No. 5.

3. Four points were urged by Mr. K. K. Moitra learned Advocate for the petitioner. The first point urged by him was that his client was the holder of a permanent stage carriage permit in the shorter route mentioned above and was therefore seriously affected by the grant of a temporary permit to the petitioner. Therefore it was argued that a notice and an opportunity to show cause should have been

given to the petitioner, who should also have been heard in the matter of the grant of the temporary permit to the respondent No. 5. The second point urged by Mr. Moitra was that under Section 62 of the Motor Vehicles Act, 1939, (hereinafter referred to as the Act) a temporary permit could be granted only for one or other reasons set out in clauses (a), (b), (c) and (d) of the said section. But the order granting the permit does not specify for which of the four reasons the temporary permit was granted to the respondent No. 5 and therefore the order is bad. The third contention of Mr. Moitra was that the respondent No. 4 as the Secretary of the respondent No. 1 had no authority or jurisdiction to grant the temporary permit inasmuch as it is the respondent No. 1 alone who has the authority to grant a temporary permit under Section 62 of the Act. The fourth point urged by Mr. Moitra was that there is no provision in the Act for re-issuing a temporary permit as was purported to be done by the impugned order dated February 14, 1969, as the statute only authorised the grant of a temporary permit for a period of four months for the reasons set out in clauses (a), (b), (c) and (d) of Section 62 of the Act.

4. With regard to the first point mentioned above Mr. Moitra submitted that the procedure prescribed by Section 47 of the Act should have been followed by the respondent No. 1 in granting the temporary permit. This section requires that after taking into consideration the matters set out in clauses (a), (b), (c), (d), (e) and (f), the Regional Transport Authority shall take into consideration any representations made by persons already providing passenger transport facilities by any means along or near the proposed route or area. It was argued that the petitioner was a person, who already provided passenger transport facilities on the major portion of the route itself, and therefore, the respondent No. 1 was bound to give a show cause notice to the petitioner and an opportunity of making representations against the grant of the temporary permit to the respondent No. 5. It was next argued that the procedure prescribed by Section 47 should be followed by a Regional Transport Authority in all cases of grant of a stage carriage permit, whether such a permit was for a temporary period or the full period of 3 or 5 years, and that being so the respondent No. 1 was bound to give to the petitioner an opportunity of making representations against the grant of the temporary permit to the respondent No. 5. In support of this contention reliance was placed on a decision of the Punjab High Court reported in AIR 1968 Punj 344, Prem Bus Service (Pvt.) Ltd. v.

Regional Transport Authority, Patiala in which it was held that the requirement of Section 47 had to be followed in granting a temporary stage carriage permit under Section 62 of the Act in the same manner and to the same extent as was required in the case of the grant of a regular stage carriage permit, and that a statutory duty was cast on the Regional Transport Authority, to take into consideration any representations made by persons already providing passenger transport facilities. It was further held that the only manner in which it could be made possible for interested parties to make representations against grant of a temporary permit would be to give them a notice of the proposed grant of a temporary permit.

5. Mr. Balai Roy learned Advocate for the respondent No. 5 on the other hand contended that the Regional Transport Authority was not required to give a notice and an opportunity of being heard as prescribed by Section 47 in the case of temporary permits. He argued that as temporary permits were granted only for the particular purposes mentioned in clauses (a), (b), (c) and (d) of Section 62 of the Act, it might not in some cases be possible to serve a notice on an interested party and to give an opportunity of being heard. For instance, he argued, that there might be a natural calamity like flood or a special occasion like a foot-ball match in which cases it might not be possible to give a notice to a party who already held a permit on that route.

6. In my view the contentions of Mr. Moitra on this question must prevail. The statute requires the Regional Transport Authority to take into consideration any representations made by persons already providing passenger transport facilities, while considering an application for grant of a stage carriage permit. There is nothing in Section 47 of the Act to justify the conclusion that representations from interested parties would be taken into consideration in the case of regular stage carriage permit only and that such consideration of representation is to be excluded when the Regional Transport Authority considers an application for a temporary permit under Section 62 of the Act. A person already providing transport facilities on the same route or part of the route would be vitally affected by the grant of a permit, even though temporary, and in my view the Regional Transport Authority is bound to follow the principles of natural justice and serve a notice upon the party and also hear any representations from him if any, while considering an application for grant of a temporary permit. The provision in Section 47 for taking into consideration re-

presentations from parties likely to be affected by the grant of a permit is mandatory in nature and the mere possibility that there may not be sufficient time for giving such notice and also of hearing such representations, is no excuse for disregarding the mandatory statutory provisions.

7. Before passing I should mention that the learned Advocate for the respondent No. 1 submitted that while the Regional Transport Authority was bound to give opportunities for making representations against the grant of a temporary permit, and also to consider such representations while granting a temporary permit for the first time, such authority, was not bound either to give such opportunity of making representations, or to take into consideration such representations, while issuing a temporary permit for the second or the third time. In support of this contention reliance was placed on a decision of the Punjab High Court reported in AIR 1959 Punj 1. That case is no authority for the proposition that the Regional Transport Authority while bound to hear representations from interested parties at the time of issuing a temporary permit for the first time, is not so bound while issuing a permit for the second or the third time. In my view this contention of the learned Advocate for the respondent No. 1 is entirely untenable. If opportunity of making representation has to be given while issuing the permit for the first time, it must equally be given while issuing such a permit for the second or the third or the fourth time. There is neither merit nor force in this contention of the learned Advocate for the respondent No. 1.

8. Turning now to the question as to whether the Regional Transport Authority should specify in the order the ground on which the temporary permit was issued under Section 62 of the Act, it will be seen that the jurisdiction to issue a temporary permit is confined to the four grounds set out in Section 62 of the Act namely:—

(a) For the conveyance of passengers on special occasions such as to and from fairs and religious gatherings, or

(b) For the purposes of a seasonal business, or

(c) To meet a particular temporary need, or

(d) Pending decision on an application for the renewal of a permit.

9. The authority to issue a temporary permit is limited and confined to either one or the other of the four grounds mentioned above. But what is of importance is that the first proviso to Section 62 requires that temporary permit under Section 62 shall in no case be granted in respect of any route or area specified in

an application for the grant of a new permit under Section 46 or Section 54 during the pendency of the application. The second proviso requires that a temporary permit shall in no case be granted more than once in respect of any route or area specified in an application for the renewal of a permit during the pendency of such application for renewal. Quite apart from the restriction imposed upon the Regional Transport Authority by the four conditions mentioned above, further restrictions have been imposed by the statute to the grant of a temporary permit. The Regional Transport Authority is a statutory authority. It derives its power, authority and jurisdiction, to issue or refuse permits, from the statute itself. Equally in exercising its power to grant a permit it must observe the limitations on its powers created by the statute. In my view the Regional Transport Authority must set out in the order authorising the issue of a permit the purpose or the ground on which a temporary permit is issued. This is necessary all the more because Section 62 itself imposes restrictions on the power to issue temporary permits. A statement of the purpose of the grant, in my view, is necessary so that the order authorising issue of a temporary permit may be open to scrutiny, having regard to the restrictions created by the statute.

10. Mr. Balai Roy contended however that it was not necessary for the Regional Transport Authority to state the reason for which a temporary permit had been issued. In support of this contention reliance was placed by Mr. Roy on a Bench decision of this Court reported in (1965) 69 Cal WN 984, Shaik Md. Shaffi Barry v. Income-tax Officer. That decision, to my mind, is of no assistance in this case. In that case computation of income-tax under the first proviso to Section 41(1) of the Indian Income-tax Act, 1922, was made. But there was nothing in the order to indicate that the assessments were made under Section 41(1) of the said Act. It was held that the assessment order was not bad for want of a reference to the particular section under which the order was made and that since the Income-tax Officer had the jurisdiction to compute the tax at the highest rate under the statute, it was not necessary for him either to state the reasons or the section of the statute under which the order was made. The question with which I am concerned in this application is entirely different. The jurisdiction to issue temporary permits under Section 62 of the Act depends upon the existence of one or other of the four conditions set out in clauses (a), (b), (c) and (d) of Section 62. If neither of these conditions exists, the Regional Transport Authority would have no juris-

isdiction to grant a temporary permit to an applicant. The existence of one or other of the conditions therefore is the sine qua non to the exercise of the right to grant a temporary permit. The requirement in Section 62 that a temporary permit can be granted only for one or other of the reasons set out under Section 62 of the Act are conditions precedent to the exercise of the power to grant a temporary permit. If one or other of these conditions precedent do not exist, or if the prohibition in the first or the second proviso to Section 62 is attracted, a temporary permit cannot, in my view, be granted by the Regional Transport Authority. It is now well settled that where the exercise of jurisdiction is dependent upon the existence of conditions precedent, the authority exercising the jurisdiction or making an order in exercise thereof, must satisfy the Court that the conditions precedent to the exercise of the jurisdiction has been fulfilled. This question has been set at rest by the Supreme Court in Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295, Rhotas Industries Ltd. v. S. D. Agarwal, (1969) 1 SCC 325 = (AIR 1969 SC 630) and Calcutta Discount Company Limited v. Income-tax Officer, Companies District I, AIR 1961 SC 372.

11. In this case the petitioners have charged the respondent No. 1 with mala fide in granting a temporary permit to the respondent No. 5. He has alleged that the impugned temporary permit was granted to the respondent No. 5 on February 14, 1969, although the application for the same was made only on the previous day; and therefore the Regional Transport Authority did not apply its mind at all to the need or justification for the grant of a temporary permit. But although these serious allegations have been made against the respondent No. 1, no affidavit has been filed on its behalf to justify the grant of the temporary permit or to satisfy this Court that the conditions precedent to the exercise of the power to grant a temporary permit has been fulfilled. Both Mr. Roy and Mr. Banerjee submitted that it was not a case of a grant of a temporary permit for the first time, but it was a case where a temporary permit was being renewed or re-issued. In such a case in my view where temporary permit was granted for the second or the third time for the same route, the conditions precedent to the exercise of the power must be satisfied in the same manner and to the same extent. Merely because a temporary permit was being granted for the second or the third time, there is no justification for making the impugned order for a temporary permit without applying the mind at all to the need for such a permit or

without coming to the conclusion that the mandatory conditions laid down in Sec. 62 have been fulfilled. I therefore hold that the impugned order was made by the respondent No. 4 without applying his mind to the requirement of Sec. 62 of the Act and on extraneous considerations.

12. Turning now to the third contention of Mr. Moitra namely that the respondent No. 4 had no authority or jurisdiction to grant the temporary permit, it will be seen that under Section 62 of the Act a temporary permit can be issued by a Regional Transport Authority. There is nothing in this section which authorises a Regional Transport Authority to delegate its powers under the Section either to its Secretary or to anybody else. In this case the order for issue of a temporary permit was made by the respondent No. 4, as the Secretary of the respondent No. 1 and the permit itself was also issued by him. Admittedly there is no resolution of the respondent No. 1 authorising the grant of a temporary permit to the respondent No. 5. Mr. Roy, however, drew my attention to the proceedings of the meeting of the respondent No. 1 held on September 29, 1965, which is Annexure 'Z' to the petition of the respondent No. 5 verified by an affidavit affirmed by Ananda Kali Mukherjee on March 17, 1969. It appears from the minutes of the meeting of the respondent No. 1 that the following resolution was passed:—

"Resolved that the Secretary R. T. A. Burdwan be authorised to re-issue temporary permits if considered necessary, to persons already holding temporary permits and against whom there is no adverse reports." Quite clearly the respondent No. 1 delegated its authority to issue temporary permits to the respondent No. 4. But there is nothing in the Act which authorises delegation by a Regional Transport Authority of the power to issue temporary permits to its Secretary. This power has been conferred upon the Regional Transport Authority itself, and in my view it cannot abdicate its power in favour of any other person or authority without a sanction in law. In my view the Regional Transport Authority in this case by the resolution mentioned above surrendered its authority and jurisdiction, without any sanction in law to its Secretary. This the respondent No. 1 is not entitled to do. The delegation therefore must be held to be bad and in that view of the matter the order for issue of the temporary permit passed by the respondent No. 4 on February 14, 1969, must be held to be invalid and made without jurisdiction. This order must, in my view, be struck down.

13. Before proceeding to consider the last contention on behalf of the petitioner I should notice one argument advanced by Mr. Roy namely that the rules framed under the Act are part of the statute itself and therefore since the application by the respondent No. 5 was made according to the rules, it cannot be assailed by the petitioner. In support of this contention Mr. Roy relied upon a decision of the Supreme Court *T. B. Ibrahim, Proprietor, Bus Stand, Tanjore v. The Regional Transport Authority, Tanjore*, AIR 1953 SC 79. I accept this contention of Mr. Roy that rules framed under a statute are to be treated as part of the statute itself. But the question whether the application by the respondent No. 5 was in accordance with law is not a question in issue in this application. Reliance was also placed by Mr. Roy on another decision of the Supreme Court, *Raman & Raman Ltd. v. State of Madras*, AIR 1956 SC 463. This decision, to my mind, is also of no assistance to the respondent No. 5 in this application.

13. The last contention of Mr. Moitra was that there was no provision in the Act for re-issue of a temporary permit and therefore the impugned order for re-issue of a temporary permit in favour of the respondent No. 5 was bad. In other words, it was argued that Section 62 authorised the Regional Transport Authority to grant a temporary permit but there was no provision in that section for re-issue of a temporary permit. I cannot, however, accept this contention of Mr. Moitra. The operative part of the order is as follows:—

"Issue temporary permit for four months subject to the approval of the R. T. A."

In the permit itself there is nothing to show that it was re-issued. Therefore although in the body of the order it is said that it is to be considered that if a temporary stage carriage permit for four months from 16-2-69 or from the date of issue of the permit be re-issued to the permit-holder, there is nothing in the order itself or in the permit that it was re-issued. But even if it was stated in the order that the permit was being re-issued, that in my view would be a mere irregularity and would not make the order void. The use of the word 're-issue' in a case where a temporary permit was granted for second or a third time to the same applicant, would not in my view make the order itself void. This contention of Mr. Moitra therefore fails.

14. Before concluding I should note that Mr. Roy submitted that the validity of the temporary permit expires on June 15, 1969, and therefore it should not be interfered with and the respondent No.

5 should be allowed to place the bus on the route in accordance with the permit. I cannot, however, accept this contention of Mr. Roy. Where, as in this case, the order authorising the grant of a temporary permit is invalid on the grounds discussed by me earlier in this judgment and where the permit-holder has been restrained by an order of injunction of this Court from placing the bus on the route, the permit-holder cannot be allowed to make any use of the permit or take any advantage or benefit thereof.

15. For the reasons mentioned above this Rule is made absolute. Let writ in the nature of mandamus issue directing the respondents to cancel, rescind and withdraw the order dated February 14, 1969, granting temporary permit to the petitioner and also the permit dated February 14, 1969, valid from February 16, 1969, to June 15, 1969. There will be no order as to costs.

Rule made absolute.

AIR 1970 CALCUTTA 110
(V 57 C 15)

N. C. TALUKDAR, J.

Bijoyanand Patnaik, Accused-Petitioner
v. Mrs. K. A. A. Brinnand, Complainant-
Opposite Party.

Criminal Revn. Case No. 466 of 1968,
D/- 8-8-1969.

(A) Criminal P. C. (1898), Ch. XV, S. 177 — Scope — Offence under S. 406 I. P. C. — Where neither entrustment nor conversion has taken place within the territorial jurisdiction of the Court where complaint is lodged, the Court has no jurisdiction to proceed with complaint.

Section 177 of the Criminal P. C. apparently adopts the Common Law of England that all crimes are local and justiciable only by the local courts within whose jurisdiction they are committed. The venue of enquiry or trial of a case is primarily to be determined by the averments contained in the complaint or charge-sheet and unless the facts there are positively disproved, ordinarily the Court where the charge-sheet or complaint is filed, has to proceed with it, except where action has to be taken under Section 202 of the Criminal Procedure Code. In case of a complaint under Section 406, I. P. C. where neither the entrustment nor conversion has taken place within the territorial jurisdiction of the Court where the complaint is lodged, the court has no jurisdiction and the proceedings instituted there are bad in law and without jurisdiction AIR 1957 SC 196 Foll. AIR 1955 Cal 498 & AIR 1949 PC 264 & (1898) ILR 25 Cal 20 (PC) & AIR

IM/JM/E154/69/GGM/P

1917 Cal 137 (FB) & (1855) 7 Cox CC 158 & AIR 1942 Cal 575 & AIR 1925 Cal 613 & AIR 1931 Cal 528 & AIR 1931 Cal 521 & AIR 1922 Cal 46(1) & AIR 1934 Cal 392 & AIR 1921 All 12 (FB), AIR 1952 Mad 158 & AIR 1930 Bom 490 (FB), Rel. on.
(Para 5)

(B) Criminal P. C. (1898), S. 177 — Objection to jurisdiction — Complaint case — Objection can be taken after framing of charge.

When the attention of the court is called to an illegality regarding absence of jurisdiction at a very early stage, it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging somewhat difficult burden under Sec.537, Cr. P. C. of making out that such an error has in fact occasioned a failure of justice. AIR 1955 SC 196 Foll.
(Para 5)

(C) Penal Code (1860), Ss. 120B and 109 — Conspiracy and abetment — Offences are distinct.

Offences created by Sections 109 and 120B I. P. C. are quite distinct. There is no analogy between Section 120B and section 109 I. P. C. There may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Conspiracy to commit an offence is itself an offence and a person can be separately charged with in respect to such conspiracy. AIR 1961 SC 1241 Rel. on.
(Para 5)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 1241 (V 48)=
1961(2) Cri LJ 302, State of A. P.
v. Kandimalla Subbiah 5
(1957) AIR 1957 SC 196 (V 44)=
1957 Cri LJ 322, State of M. P.
v. K. P. Ghiara 5
(1955) AIR 1955 SC 196 (V 42)=
1955 SCA 258=1955 Cri LJ 526,
H. N. Rishbud v. State of Delhi 5
(1955) AIR 1955 Cal 498 (V 42)=
1955 Cri LJ 1257, Debendranath
Sen v. Rajendra Chandra Roy 5
(1952) AIR 1952 Mad 158 (V 39)=
1952 Cri LJ 308, Arunachala Goundan
v. K. S. Akhileshwara Ayyar 5
(1949) AIR 1949 PC 264 (V 36)=
76 Ind App 158, Yusofalli Mulla
Noorbhoy v. King 5
(1942) AIR 1942 Cal 575 (V 29)=
44 Cri LJ 132, Daityari Tripathi
v. Subodh Chandra Chowdhary 5
(1934) AIR 1934 Cal 392 (V 21)=
35 Cri LJ 734, Prokash Chandra
Sircar v. Mohim Chand Halder 5
(1931) AIR 1931 Cal 521 (V 18)=
32 Cri LJ 1042, G. N. Pascal v.
Raj Kishore Mathur 5

- (1931) AIR 1931 Cal 528 (V 18)=
35 Cal WN 809=32 Cri LJ 1167,
Paul De Flonder v. Emperor 5
(1930) AIR 1930 Bom 490 (V 17)=
32 Cri LJ 331 (FB), In re, Jiwan-
das Savchand 5
(1925) AIR 1925 Cal 613 (V 12)=
29 Cal WN 432=26 Cri LJ 725,
Gunananda Dhone v. Lala Santl
Prokash Nandy 5
(1922) AIR 1922 Cal 46 (1) (V 9)=
26 Cal WN 175, Abdul Latiff Yusuf
v. Abu Mahamed Kassim 5
(1921) AIR 1921 All 12 (V 8)=
22 Cri LJ 308 (FB), Sheo Shankar
v. Mohan Sarup 5
(1917) AIR 1917 Cal 137 (V 4)=
ILR 44 Cal 595 (FB), Charu
Chandra Mujumdar v. Emperor 5
(1898) ILR 25 Cal 20=24 Ind App 137,
Muhammad Yusuf-ud-Din v.
Queen Empress 5
(1855) 7 Cox CC 158, Reg v. Davison
and Gordan 5
Ajit Kumar Dutt, Milan Kumar Baner-
jee, Amiya Kumar Mukherjee, Birendra
Nath Banerjee, for Petitioner; J. P. Mitter,
Promode Ranjan Roy, for Opposite Party;
J. M. Banerjee, for State.

ORDER:— This Rule is for setting aside an order dated the 24th April, 1968 passed by Sri K. J. Sengupta, Chief Presidency Magistrate, Calcutta, holding that a prima facie case was made out against the accused-petitioner, Sri Bijoyanand Patnayak, and framing charges against him under Section 406 I. P. C. on two counts, in case No. C/1023 of 1967 and for quashing the said proceedings.

2. The facts leading on to the present Rule are chequered but can be put in a short compass. The prosecution case brings to light an unfortunate case of a friendship foundering on two airships. The bone of contention between the two parties, both of whom are respectable and were erstwhile friends, is two aircrafts viz. VT-CRA & VT-CXR, which originally belonged to M/s. Indamer and Company (P) Limited, Customs House Road, Bombay. The prosecution case inter alia is that Capt. Brinnand (P. W. 4) the husband of the present complainant, Mrs. K. A. A. Brinnand (P. W. 1), purchased the abovementioned two aircrafts on the basis of an agreement of hire-purchase (Ext. 4), entered into on the 26th October, 1954 for a sum of Rs. 3,42,300/- payable in instalments. It was agreed that on payment of the abovementioned amount in full, Capt. Brinnand will become the absolute owner of the aircrafts. The final payment was made on the 6th August, 1965 with the sum of Rs. 20,000/- which was the amount then due, to M/s. Indamer and Company (P) Ltd. through one of its directors, Mr. J. P. Koszarek

as per Ext. 6. Capt. Brinnand however having no operating licence or permit standing in his name for operating the aircrafts purchased by him as per the terms of the deed of agreement mentioned above, another agreement was entered into between him and M/s. Indamer and Company (P) Limited on the basis of a letter (Ext. 7), whereby the latter company allowed its chartered permit to be used by Capt. Brinnand on payment of a licence fee of Rs. 20,000 per year. The prosecution case further is that in the absence of an operating licence, the ownership of the two aircrafts also could not be changed from the name of M/s. Indamer and Co. (P) Limited to Capt. Brinnand's name in the certificate of registration, kept in the Civil Aviation Department, Govt. of India. The licence of M/s. Indamer and Company (P) Limited in the meanwhile was cancelled by the authorities because of some irregularities in the working of the said company and Capt. Brinnand out of his anxious consideration that the two aircrafts purchased by him did not remain idle, came into contact with Shri Bijoyanand Pattanayak for making arrangement for the operation thereof, on the strength of the operating licence or permit for non-scheduled flight of the aircrafts standing in the name of the Kalinga Air Lines, whereof Sri Pattanayak was the proprietor. An agreement (Ext. 11) accordingly was executed on the 1st March, 1958 between Sri Pattanayak and Capt. Brinnand on certain terms whereby Sri Pattanayak allowed Capt. Brinnand to use the operating licence, standing in the name of the Kalinga Air Lines, without taking any profit as the said licenses were remaining idle. As the two aircrafts stood in the name of M/s. Indamer and Company (P) Limited in the register of the Civil Aviation Department, Capt. Brinnand made arrangements to transfer the same to the Kalinga Air Lines (P) Limited, which in the meanwhile had come into existence. M/s. Indamer and Co. (P) Limited, agreed to allow the Kalinga Air Lines (P) Ltd. on the basis of an agreement (Ext. 12) dated the 1st March, 1958, to use six of their aircrafts including VT-CXR. With regard to the aircraft VT-CXR, it was agreed that the Kalinga Air Lines (P) Limited would not have to pay anything for its user. On the same date M/s. Indamer and Company (P) Limited wrote a letter to M/s. Kalinga Air Lines (P) Limited expressing their willingness to sell the Dakota aircraft, VT-CRA for Rs. 40,000. No consideration, however, was passed in the alleged sale of the said Dakota aircraft VT-CRA as would be borne out by Exts. 13 and 34 and it was merely a paper transaction. In order to produce the aircraft before the Director of Civil Avia-

tion at New Delhi for the transference of the name of the owner in respect of the same, the documents were required for allowing the party to use the operating licence or permit which stood in the name of the Kalinga Air Lines, subsequently changed to Kalinga Air Lines (P) Limited. In course of time, on the 12th April, 1960, Capt. Brinnand was authorised to deal with all matters belonging to the Kalinga Air Lines (P) Limited as is evident from a resolution (Ext. 15) passed at a meeting of the Board of Directors of the said company. Ext. 17 is an agreement dated the 23rd May, 1960 between M/s Indamer and Company (P) Limited on the one hand and M/s Kalinga Air Lines (P) Limited, represented by Capt. Brinnand on the other, described as the hirer, and it shows that three aircrafts belonging to M/s Indamer and Company (P) Limited were lent to the Kalinga Air Lines (P) Limited for their use and that the hire charges of those three aircrafts being VT-DGR, VT-DGX and VT-DFJ were fixed at a sum of Rs. 12,37,500 for three years. This was also described by the prosecution to be a paper transaction. Capt. Brinnand worked in the Kalinga Air Lines (P) Limited upto 10th August, 1967 and thereafter cut off all connections with the said organisation and called upon Sri Pattanayak to return back his aircrafts VT-CRA and VT-CXR which were entrusted with him. On Sri Pattanayak's refusal to do the same, the petitioner filed a petition of complaint before the learned Chief Presidency Magistrate, Calcutta on the 17th April, 1967 against the two accused persons viz., Mr. J. P. Koszarek and Sri Bijoyanand Pattanayak, under Section 406, I. P. C. The complainant was examined by the learned Chief Presidency Magistrate, Calcutta on the 17th April, 1967 and the case was sent for judicial enquiry by Sri A. Sengupta, Presidency Magistrate, 5th Court, Calcutta, fixing 1-6-67 for report. The learned enquiring Magistrate thereafter recorded evidence and ultimately submitted a report, holding that there was a prima facie case under Section 406 I. P. C. against the accused No. 2, Sri Bijoyanand Pattanayak. The learned Chief Presidency Magistrate, Calcutta, thereupon by his order dated the 7th June, 1967, issued process against Sri Bijoyanand Pattanayak under Section 406 I. P. C. 9 witnesses thereafter were examined on behalf of the prosecution to unfold the occurrence and several documents were proved both on behalf of the prosecution and the defence and as a result of the trial the learned Chief Presidency Magistrate by his order dated the 24th April, 1968 held that a prima facie case was made out for framing charges against the accused-petitioner and he ac-

cordingly framed against him charges under S. 406 I. P. C. on two counts but he rejected, however, the prayer made on behalf of the complainant for issuing process against the co-accused Mr. Koszarek, on the ground of a purported conspiracy between the two accused, for a criminal breach of trust in respect of the two aircrafts. The said order has been impugned and forms the subject matter of the present Rule.

3. Mr. Ajit Kumar Dutt, Advocate (with Mr. Milan Kumar Banerjee, Barrister-at-law, Mr. Amiya Kumar Mukherjee, Advocate and Mr. Birendra Nath Banerjee, Advocate) appearing on behalf of the accused-petitioner Sri Bijoyanand Pattanayak in support of the Rule, has made an eight-fold submission. The first contention of Mr. Dutt relates to jurisdiction and goes to the very root of the case. Mr. Dutt submitted that neither entrustment nor conversion having taken place within the territorial jurisdiction of the learned Chief Presidency Magistrate's Court, the present proceedings are bad in law and without jurisdiction and as such should be quashed. The second contention of Mr. Dutt relates to procedure and is that an erroneous view of Section 254 of the Code of Criminal Procedure having been taken, the resultant proceedings are bad and repugnant. The third contention of Mr. Dutt is about the inordinate delay in lodging the present complaint, ten years after the incident and six years after the civil suit. The fourth point urged by Mr. Dutt relates to the merits. Mr. Dutt has submitted in this context that the petition of complaint does not disclose any criminal offence, far less offence under Section 406 I. P. C. No entrustment within the meaning of Section 405 I. P. C. has been alleged in the petition of complaint and there is also no averment regarding the delivery of the aircrafts in Calcutta or of conversion thereof, in the said place. The fifth contention of Mr. Dutt is that the charge of criminal breach of trust is not sustainable on the evidence on record and in this context he referred to the evidence of P. Ws. 1 and 4 as also the averments made in the petition of complaint. Mr. Dutt's sixth submission relates to the pendency of the civil suit and its effect upon the present criminal proceedings. He contended that at best the dispute is one of civil nature and should properly be determined in a different forum. Mr. Dutt next contended that the petition of complaint being based upon a suppression of material facts and the processes having been issued on the said basis, the present proceedings are not maintainable in law. The eighth and the last submission of Mr. Dutt is that neither the complainant nor her husband is the competent person to insti-

tute the present criminal proceedings inasmuch as, amongst others, the husband, Capt. Brinnand is not even the registered owner of the two aircrafts. In this context Mr. Dutt referred to Sections 5 and 33 of the Indian Aircrafts Rules, 1937. Mr. J. P. Mitter, Counsel (with Mr. Promode Ranjan Roy, Advocate) appearing on behalf of the complainant-opposite party, Mrs. K. A. A. Brinnand, contended in the first instance that the first point in the nature of a preliminary objection raised by Mr. Dutt as to the jurisdiction is more technical than real and is not warranted upon ultimate analysis. In view of the averments made in the petition of complaint as also the statements made in the evidence, the proceedings are quite competent and within jurisdiction. Mr. Mitter submitted in this connection that neither the entrustment nor the conversion as alleged, having taken place outside the territorial jurisdiction of the learned Chief Presidency Magistrate's Court, there is no bar in law to the maintainability of the present proceedings in the said court. Mr. Mitter next contended that there is no defect in procedure as alleged or at all and that there has been no non-conformance to the provisions of Section 254 of the Code of Criminal Procedure. The learned Magistrate has not overlooked the statements made by the prosecution witnesses in cross-examination in framing the charges and the same would be evident from the findings arrived at in the judgment itself. Mr. Mitter's third submission relates to the objection raised on behalf of the accused-petitioner to the maintainability of the present proceedings on the ground of inordinate delay. He submitted that the said delay is not for a period of ten years as alleged and that it is due to an attempt to settle the matter in dispute because of the friendship that existed originally between the two parties. In this context, he further urged that there being no limitation to the institution of a criminal proceedings, the delay alleged is not in any way fatal to the same. Mr. Mitter's fourth contention is that the submissions made by Mr. Dutt relating to the merits of the case are premature and that the statements made in the petition of complaint do disclose a criminal offence while the evidence adduced by the material prosecution witnesses does make out the offence of criminal breach of trust as charged. Mr. Mitter submitted in this context that both entrustment and dishonest conversion have been proved by cogent evidence as having taken place within the jurisdiction of the court of the learned Chief Presidency Magistrate Calcutta. In this context for establishing entrustment, Mr. Mitter referred to Exts. 9, 11, 12, 13, 17, 18, 21,

22, 27 and 38 as also to the evidence of F. Ws. 4 and 9. As to the sixth submission of Mr. Dutt regarding the effect of the civil suit on the present criminal proceedings, Mr. Mitter submitted that both the accused are not parties thereto and the relief prayed for is also different. In any event, it was contended, that there is no bar in law to such an institution. Mr. Mitter next contended that there has been no suppression of material facts by the complainant either in the petition of complaint or in the evidence, as alleged or at all and that the complainant had been merely trying her utmost to establish the lawful claim of her husband, and that the resultant proceedings are but an aggrieved person's odyssey in quest of his rights. Mr. Mitter lastly contended that the objection raised by Mr. Dutt to the locus standi of the present complainant or her husband to institute the criminal proceedings is clearly unfounded inasmuch as the evidence on record would establish that Capt. Brinnand is the owner of the two aircrafts. To prove the same, Mr. Mitter referred to the evidence of P. Ws. 1, 4 and 6 and also exhibits 4, 5, 5/1, 6, 7, 18, 31 and 32. Mr. Mitter in this context referred also to the provisions of Sections 19 and 33 of the Sale of Goods Act and certain circumstances wherefrom the knowledge of the accused regarding the ownership of Capt. Brinnand might reasonably be inferred. Besides meeting the points raised by Mr. Dutt as above, Mr. Mitter also made a broad submission that the quashing of a criminal proceeding is an extraordinary procedure and should not be resorted to in the facts and circumstances obtaining in the present case. In this context Mr. Mitter further urged that the claims of aggrieved persons may not be scotched on technical grounds at an early stage, instead of being determined by a full-fledged trial.

4. Mr. J. M. Banerjee, Advocate, appearing on behalf of the State opposed the Rule and broadly adopted the submissions made on behalf of the complainant opposite-party by Mr. J. P. Mitter. He also made some further submissions. On the question of jurisdiction Mr. Banerjee submitted that the evidence on the record establishes the factum of entrustment within the jurisdiction of the court of the learned Chief Presidency Magistrate, Calcutta and even if no conversion could be proved within the said jurisdiction, it will not render the ultimate proceedings taking place there under Section 406 I. P. C. to be bad and without jurisdiction. Mr. Banerjee in this context further contended that even if such jurisdiction was not established in the petition of complaint, the objection to the same is merely academic at this stage when the

prosecution has led material evidence, both oral and documentary establishing such jurisdiction. On the point of delay, Mr. Banerjee contended that there is no bar in limine to the institution of a criminal proceeding because of any purported limitation and even if there was any such delay, it is for the learned trying Magistrate to determine the same. Mr. Banerjee finally contended that no case has been made out on behalf of the defence either under Section 253(1) or under Section 253(2) of the Code of Criminal Procedure and that even if the petition of complaint disclosed no offence, as alleged or at all, now that evidence has been taken, the said objection is unwarranted and untenable and the dominant consideration should be whether such evidence has made out the charges framed. In reply, Mr. Mitter further contended that the evidence on record establishes the offence of conspiracy between Sri Bejoyanand Pattanayak and Mr. J. P. Koszarek and if the same be taken into consideration, the present proceedings will not be bad for absence of jurisdiction and will certainly be maintainable in the court of the learned Chief Presidency Magistrate, Calcutta. Mr. Dutt, however, contended in the first place that not only was this point taken either in the court below or even in the arguments advanced in this court before now, but also the same is wholly untenable on merits and unwarranted by any procedure enjoined by law. The steps of Mr. Dutt's reasoning in this context are inter alia that even regarding Mr. Koszarek, no abetment was alleged in the petition of complaint and also no conspiracy; that the element of any conspiracy is non est in the present case and is even ruled out by the materials on the record; that Sri B. Pattanayak was discharged of the charge under Section 406/114 I. P. C. and has not even been impleaded in the other Rule, being Criminal Revision Case No. 508 of 1968, pending against Mr. Koszarek; that there will be apparently legal difficulties because at this stage no trial is possible in this case, also on the charge under Section 120B I. P. C. of Mr. Koszarek alone or along with Sri Pattanayak; that at this stage when no charge was framed against Mr. Koszarek, he cannot be tried under Section 120B/406 I. P. C. along with Sri Pattanayak in the same case unless and until everything is washed out including the present charges framed; and that even if any charge could be deemed to be tenable against Mr. Koszarek either under Section 406/114 I. P. C. or under Section 120B/406 I. P. C., he cannot be tried along with Sri Pattanayak in this case, excepting in a new trial.

5. Having heard the learned counsel appearing on behalf of the respective

parties and on going through the evidence, oral and documentary, which I have been taken through, I will take up for determination, in the first instance, the point raised on behalf of the accused-petitioner, relating to jurisdiction, as it goes to the very root of the case. Jurisdiction is the very foundation of the case; it is the plinth whereupon rests the entire superstructure of the proceedings. Any order passed in a case, vitiated by the absence of jurisdiction, will be a nullity. As their Lordships of the Judicial Committee held in the case of *Yusofalli Mulla Noorbhoy v. King*, 76 Ind App 159 = (AIR 1949 PC 264) that even an order of acquittal passed in a case without jurisdiction would not be binding even if it is not appealed against and set aside. Sir John Beaumont delivering the judgment of the Judicial Committee observed that "but if the orders were a nullity there was nothing to appeal against". Chapter XV of the Code of Criminal Procedure deals with the jurisdiction of the criminal courts in enquiries and trials. Section 177 of the Code of Criminal Procedure apparently adopts the Common Law of England that all crimes are local and justiciable only by the local courts within whose jurisdiction they are committed. The Lord Chancellor, Lord Halsbury delivering the judgment of the Judicial Committee in the case of *Muhammad Yusuf-Ud-Din v. Queen-Empress*, (1898) ILR 25 Cal 20 (PC) observed at page 30 that: "It is important to observe this because crime is in its essential nature local". The General Rule of *Lex fori* as contained in Section 177 of the Code of Criminal Procedure is modified by the exceptions or alternatives provided for in the following sections under Chapter XV of the Code of Criminal Procedure. In the Full Bench case of *Charu Chandra Majumdar v. Emperor* reported in ILR 44 Cal 595 = (AIR 1917 Cal 137) (FB), Sir Asutosh Mukherjee observed at page 621 that "section 177 formulates the general principle that the ordinary place of enquiry and trial is the court within the local limits of whose jurisdiction the offence is committed . . . Sections 179-84 embody provisions in the nature of exceptions or alternatives to Section 177". For properly appreciating the point raised, it will be pertinent to refer to Sec. 181(2) of the Code of Criminal Procedure which is as follows: "The offence may be tried by the court within whose jurisdiction — (i) any part of the property was received by the accused, or (ii) was retained by him, or (iii) the offence was committed." There was at one stage a cloud raised over the interpretation of the abovementioned provision by the conflicting decisions of the different High Courts, as also of other courts but the same has

since been lifted by a series of recent decisions and I would refer only to a few of those to avoid repetition. The starting point of one school of thought appears to be the case of *Reg v. Davison and Gordon* decided by Baron Alderson and Coleridge J. as reported in (1855) 7 Cox C. C. 158. Baron Alderson observed therein at pp. 162-163 that "where there is no evidence of fraudulent embezzlement except the non-accounting the venue may be laid in the place where the non-accounting occurred, because the jury may presume that there the fraudulent misappropriation was made, but this cannot apply where there is distinct evidence of the misappropriation elsewhere". The aforesaid case was discussed at great length in a Division Bench decision of this court reported in AIR 1942 Cal 575 by Mr. Justice Blagden, who ultimately observed that the learned Baron "was dealing with the Common Law of England which at that date almost wholly regulated English criminal procedure, and our law of procedure is codified," and that "there is no justification for holding that the English law is the law of Bengal." I agree with the said observations of Mr. Justice Blagden and I hold that the above-mentioned observations of the Lord Baron were made in a different context while dealing with the statutory offence of embezzlement and that our law of procedure being codified, the English law on the point should not be taken as a precedent for interpreting the relevant Indian law. There are also some cases of the different High Courts in India supporting this other school that the failure to render account at a particular place provides an alternative venue for a trial of the case therein and to avoid repetition a reference may be made to some of these cases. In the case of *Gunananda Dhone v. Lala Santi Prokash Nanley*, decided by Mr. Justice Suhrawardy and Mr. Justice Mukerji and reported in 29 Cal WN 432 = (AIR 1925 Cal 613), Mr. Justice Mukerji delivering the judgment of the court observed at page 437 that "where the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situate, may inquire into and try the offence under the provisions of Section 181, sub-section (2), Cr. P. C.". The next case is the case of *Paul De Flonder v. Emperor* reported in 35 Cal WN 809 = (AIR 1931 Cal 528) decided by Mr. Justice Lort-Williams and Mr. Justice S. K. Ghose. Mr. Justice Lort-Williams delivering the judgment of the court approved of the decision in the case of *G. N. Pascal v. Raj Kishore Mathur* reported in AIR

1931 Cal 521 and dissented from the decisions reported in 29 Cal WN 432 and in 26 Cal WN 175 = (AIR 1922 Cal 46(1)) and observed at page 815 of (35 Cal WN) = (at page 531 of AIR) that : "If there is no evidence to show where the misappropriation was committed other than the fact of non-accounting then the venue may be laid in the place where the accused failed to account, because that is where the offence was committed within the meaning of Section 181 (2) — *R. v. Davison and Gordon*, (1855) 7 Cox C. C. 158.(6)"

The next case on the point is the case of *Prokash Chandra Sircar v. Mohim Chand Haldar* reported in AIR 1934 Cal 392 wherein Mr. Justice Mukherji and Mr. Justice S. K. Ghose held that where there is no definite allegation of misappropriation having been committed, in any particular place, in respect of a sum which forms the subject-matter of a case, but the allegation is merely of non-accounting in respect of the sum, failure to account may itself be taken as evidence of intention to misappropriate and the offence of misappropriation is deemed to have been committed at the place at which the accused ought to have rendered the accounts. In the case of *Sheo Shankar v. Mohan Sarup* reported in AIR 1921 All 12 (FB), the Full Bench of the Allahabad High Court held that where the duty to account was at a certain place and the misappropriation is made at another place, the offence can be tried at the place where account was to be given. In a more recent decision in the case of *S. Arunachala Goundan v. K. S. Akhileshwara Ayyar*, reported in AIR 1952 Mad 158 Mr. Justice Ramaswami held that where the charge is of non-accounting and there is no specific allegation of misappropriation in any particular place the venue of the trial will be the place where the accounting has got to be done and has not been done. The view taken in the abovementioned group of cases has been negated in another group of cases and the position in law, as held in the latter group of cases is now well settled. A reference in this context may be made to the case of *In re; Jivandas Savchand* reported in AIR 1930 Bom 490 (FB), wherein Chief Justice Beaumont after considering the various decisions of the different High Courts observed at page 495 that "the jurisdiction to try an offence of criminal misappropriation or criminal breach of trust is governed by Section 181, sub-section (2), and not by Section 179 But where the offence is completed at one place, the further liability to render accounts at another place and failure in rendering such false accounts at the second place does not confer jurisdiction under Section 179 upon the Magistrate at

the latter place since the offence is already completed at the former place". A reference again may be made to the case of *Daityari Tripatty v. Subodh Chandra Chowdhury*, reported in AIR 1942 Cal 575. Mr. Justice Blagden, delivering the judgment of the court after considering different decisions by the various High Courts including the Full Bench decision of the Bombay High Court reported in AIR 1930 Bom 490 (FB) observed at page 577 that "neither failure to account for breach of contract, however dishonest, is actually and in itself the offence which S. 405, Penal Code defines, but merely evidence of that offence." In a latter decision of this Court in the case of *Debendranath Sen v. Rajendra Chandra Roy*, reported in AIR 1955 Cal 498, Mr. Justice S. R. Dasgupta (as his Lordship then was) and Mr. Justice Mullick approved of the decisions by the Bombay Full Bench as also by Mr. Justice Lodge and Mr. Justice Blagden of the Calcutta High Court, Mr. Justice S. R. Dasgupta, delivering the judgment of the court, observed at pages 498-499 that "on consideration of the said provisions of the criminal procedure it appears to us that the offence of criminal misappropriation or criminal breach of trust can be inquired into or tried by a court within the local limits of whose jurisdiction any part of the property was received or retained or the offence was committed." I respectfully agree with the said observations and I hold that an offence of criminal breach of trust is not triable at a place where neither the factum of entrustment nor the positive act of conversion had taken place, because an offence of criminal breach of trust always consists in an act and not in an omission. A further reference in this connection may be made to the decision of the Supreme Court in the case of *State of Madhya Pradesh v. K. P. Ghiara*, reported in AIR 1957 SC 196. It was observed therein by Mr. Justice Govinda Menon, delivering the judgment of the court, that "the venue of enquiry or trial of a case like the present is primarily to be determined by the averments contained in the complaint or charge-sheet and unless the facts there are positively disproved, ordinarily the court, where the charge-sheet or complaint is filed, has to proceed with it, except where action has to be taken under Section 202 of the Criminal Procedure Code." I respectfully agree with the same and I have taken into my view the averments made in the petition of complaint and the evidence for the purpose of the said consideration. I will now proceed to consider the further contention raised by Mr. J. P. Mitter, in reply, that in any event, in view of the evidence on the record, a charge of conspiracy to commit the of-

fence of criminal breach of trust has been made out between the present petitioner and the co-accused, Mr. J. P. Koszarek and as such because of the said charge of conspiracy, the jurisdiction for trying the case will be before the learned Chief Presidency Magistrate, Calcutta. I find, however, on ultimate analysis that the said contention is not tenable and the reasons for the same can be catalogued hereunder. In the first instance it will appear from the petition of complaint that the charge against the petitioner Sri B. Pattanayak is only under the substantive offence of Sec. 406, I. P. C. and no conspiracy is alleged so far as he is concerned. The allegation of conspiracy in paragraph 9 is to be read along with that made in paragraph 11 of the said complaint and the same amounts to, at the highest, a conspiracy regarding abetment. In this context, it would be pertinent to refer to the expression 'conspiracy' as it occurs in Section 107 of the Indian Penal Code, defining the abetment of a thing, for a proper interpretation. Offences created by Sections 109 and 120B I. P. C. are quite distinct. As was held by Mr. Justice Mudholkar delivering the judgment of the court in the case of the *State of Andhra Pradesh v. Kandimalla Subbiah*, reported in AIR 1961 SC 1241 that there is no analogy between Section 120B and Section 109 I. P. C. There may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Conspiracy to commit an offence is itself an offence and a person can be separately charged with in respect to such conspiracy. I respectfully agree with the said observations and I hold that an offence created by Sections 109 and 120B I. P. C. are quite distinct and accordingly the statements made in the petition of complaint do not make out a case of a conspiracy under Section 120B I. P. C. The next point that cannot be overlooked is that even after the judicial enquiry and the evidence adduced therein, the learned enquiring Magistrate did not recommend any process against Mr. Koszarek under Section 406/114 I. P. C. and the complainant also did not come up against the same so far as Mr. Koszarek is concerned or even against Sri B. Pattanayak because he was not summoned under Section 120B I. P. C. It is pertinent again to refer to the application dated the 4th November, 1967, filed on behalf of the complainant after the principal witnesses were examined, praying that Mr. Koszarek may be summoned under Section 120B /406 I. P. C. and the order that was passed therein rejecting it. The Court was not moved against the said order of rejection nor was any prayer made under Section 227 of the Code

of Criminal Procedure for adding a charge against Sri Pattanayak under Section 120B read with Section 406 I. P. C. The sanction that was prayed for is under Section 196A of the Code of Criminal Procedure but no application is there for adding a charge against Sri Pattanayak. On the 27-3-1968 again, when a second application in that behalf was filed praying for a process against Mr. Koszarek for being tried along with Sri Pattanayak, and an order was passed thereupon, there is significantly no prayer made for adding such a charge under Section 227 of the Code of Criminal Procedure. It is material again to note that on the 24th April, 1968, when the application for a process against Mr. Koszarek was rejected, the complainant moved against a part of the said order viz., the refusal to summon Mr. Koszarek and did not move against any refusal to add a charge against Sri Pattanayak under S. 120B/406, I. P. C. In the other Rule again, against Mr. Koszarek and others, Sri Pattanayak was not made a party. In short, at no stage was any prayer made against Sri Pattanayak under Section 120B, I. P. C. or any prayer for the addition of such a charge under Section 227 Cr. P. C. I find also no offence of conspiracy in the evidence, either oral or documentary and the learned Chief Presidency Magistrate, Calcutta is right in holding that it is non est. P. W. 1 does not refer to any allegation of conspiracy and P. W. 4 follows suit. The documents proved again do not make out any conspiracy. The facts referred to therein are in course of usual business and do not constitute any overt acts, germane to the issue of a conspiracy. Ext. 'K' was sworn at Bombay and the Kalinga Air Lines besides having its head office at Cuttack, has, amongst others, an office at Bombay. I hold therefore that this ancillary contention of Mr. Mitter is not only belated but is also unwarranted and untenable on merits and that on the ground of a purported conspiracy between Mr. Koszarek and Sri Pattanayak, the court of the learned Chief Presidency Magistrate, Calcutta cannot be held to have the requisite jurisdiction. On a perusal therefore of the petition of complaint and the averments made therein as also on an appraisal of the evidence on record, and on a consideration of the submissions made by the learned counsel appearing on behalf of the respective parties, I ultimately hold that the venue of the trial of the instant case is not the Court of the learned Chief Presidency Magistrate, Calcutta and accordingly the proceedings pending there are vitiated by the absence of any jurisdiction. The stage also at which this objection to jurisdiction has been taken, is the proper stage. A reference in this con-

text may be made to the observations of Mr. Justice Jagannadhas, delivering the judgment of the Court, in the case of H. N. Rishbud v. State of Delhi, reported in 1955 SCA 258 at p. 269=(AIR 1955 SC 196 at p. 204) that "when the attention of the court is called to such an illegality at a very early stage, it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under Section 537, Cr. P. C., of making out that such an error has in fact occasioned a failure of justice." The first contention raised by Mr. Dutt relating to jurisdiction accordingly succeeds.

6. The only other point that abides determination is the ancillary ground viz., the concept of liberal consideration or a broad approach to issues involved, as pinpointed by Mr. J. P. Mitter. The learned counsel has contended that the spirit of law enjoins some remedy for the claims of unsophisticated persons, bona fide aggrieved, and the same should not be brushed aside on hypertechanical grounds. The complainant in a criminal case, according to Mr. Mitter, is as much a part of the proceedings as the accused is and his interests should not be equated at a lower level. The said submission is true to a degree but cannot overstep the bounds of the principles laid down by law, enjoining a benefit of doubt to be given to the accused and not to the prosecution, apart from the presumptions of innocence and the standard of proof required. The point, however, need not be weighed in golden scales as it ultimately does not arise out of the facts and circumstances of the present case. The point involved here is not of a liberal consideration but one of a proper construction of the law, relating to jurisdiction which transgressed, must render the proceedings into a nullity. I have given my anxious consideration to the submissions of Mr. Mitter, but I am unable to overlook the non-conformance made to the mandatory provisions of law, relating to jurisdiction vitiating the entire proceedings. Mr. Mitter has ultimately pressed his case on the grounds of justice. There appears to be however no chemistry of justice when in the context of the Judicial Reforms in England, Bentham posed the question: "Does justice require less precision than chemistry?" It could only be answered on the footing that "the precision attainable in the one case, is of a nature which the other does not admit." Justice may not be as precise as chemistry but nonetheless it must be in accordance with law and as has been observed by Francis Bacon "Judges ought to re-

member that their office is *ius dicere* and *ius dare*; to interpret law, not to make law or give law." Applying the said yardstick to the facts of this case and in conformance to the provisions of the law relating to jurisdiction, as incorporated in Section 181(2) of the Code of Criminal Procedure, I hold ultimately that the present proceedings under Section 406 I. P. C. are vitiated by the absence of jurisdiction.

7. In view of the findings arrived at on the first point, it is not necessary for me to enter any further into the merits of the case and determine the other points raised and I accordingly refrain from doing so. I however make it quite clear that I make no observations as to the merits of the case, relating to the charge under Section 406, I. P. C. Before I part with the case, I must also observe that both Mr. Ajit Kumar Dutt and Mr. J. P. Mitter, the learned Counsel appearing on behalf of the respective parties, placed their cases very ably and assisted this court to come to a proper decision.

8. In the result, I make the Rule absolute; and I quash the impugned order dated the 24th April, 1968 passed by Sri K. J. Sengupta, Chief Presidency Magistrate, Calcutta, as also the relative proceedings, being case No. C/1023 of 1967, pending before the learned Magistrate, as without jurisdiction.

Rule made absolute.

AIR 1970 CALCUTTA 118 (V 57 C 16)

D. BASU AND AJAY K. BASU, JJ.

Puranlal Lakhnupal, Appellant v. Dr. P. C. Ghosh and others, Respondents.

A. F. O. O. No. 49 of 1968, D/- 16-6-1969.

(A) Constitution of India, Art. 226 — Writ of quo warranto — Issue of — Not issued if respondent ceases to hold office except on resignation after rule nisi.

As a general rule quo warranto to question a person's title to office will not be granted after he has ceased to hold that office. To this general proposition an exception has, however, been engrafted by judicial decisions that resignation after rule nisi has been issued is no answer to the rule. Apart from this exception on the ground of resignation, there is no other contingency under which a writ of quo warranto would issue in a case where the respondent has ceased to hold the office, the title to which is challenged. (1813) 2 M & S. 75 and (1866) 2 QB 55 Ref. (Para 2)

(B) Constitution of India, Art. 226 — Quo warranto — Writ cannot be used to

quash acts done by usurper or for refund of his salary.

A writ of quo warranto cannot be used to quash acts already done by a usurper. Quo warranto is addressed to prevent a continued exercise of authority unlawfully asserted, not to correct what already has been done under it or to vindicate private rights. (1932) 289 US 479, Rel. on. (Para 3)

So far as the right of a person to ask for refund of salaries from a usurper to a public office is concerned, that also is not to be determined in a proceeding for quo warranto. If such an action is maintainable as a consequence of a writ of quo warranto having been issued, that has to be determined independently, on its merits, in an appropriate subsequent proceeding. (Para 3)

(C) Constitution of India, Art. 226 — Petition for writ under — Reliefs other than those prayed for — When can be granted.

It is true that in some cases, owing to subsequent contingencies arising, the court has modified the relief specifically prayed for by a petitioner, under Art. 226 to make such order as might be proper in the changed circumstances. But that does not apply ab initio at the time of issuing the Rule and not at least in a case where the cause of action which had brought the petitioner to the court no longer subsists. AIR 1962 SC 1161, Ref. to. (Para 4)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 1161 (V 49)=

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| ILR (1962) 2 All 674, Satya Narain v. Dist. Engineer | 4 |
| (1932) 289 US 479=77 L Ed. 1331, Johnson v. Manhattan R. Co. | 3 |
| (1866) 2 QB 55=15 LT 242, R. v. Blizard | 2 |
| (1813) 2 M & S 75 = 105 ER 310, R. v. Warlow | 2 |

A. P. Chatterjee with Rathin Bhattacharyya, for Appellant; R. C. Deb with D. Gupta, for Union of India; S. C. Bose, for Respondents Nos. 1 to 12.

D. BASU, J. :— This appeal is against the order passed by B. C. Mitra, J. dated February 6, 1968 by which the petition brought by the appellant under Art. 226 of the Constitution was dismissed in limine. In that petition, the petitioner challenged the title of respondents 1 to 11 to constitute and to act as the Council of Ministers for the State of West Bengal headed by respondent No. 1, P. C. Ghosh as the Chief Minister, and asked for a writ of quo warranto "quashing the warrant of their appointment dated November 21, 1967 and December 4, 1967 in respect of the various members of the Council of Ministers." The main ground upon which this petition was founded was that

the Governor had no power under Art. 164 of the Constitution of India to dismiss the previous Council of Ministers, on the ground that they had ceased to lose the support of the majority of the Legislative Assembly of this State, — as a result of which, vacancy was created for the appointment of respondents 1 to 11 as the succeeding Council of Ministers. This application was contested by the respondents and the Union of India also intervened with leave of the Court. The Court rejected the application on the findings, *inter alia*, that the dismissal of a Council of Ministers was in the discretion of the Governor with which the Court could not interfere and that the charge of mala fides which was brought in the instant application against the Governor was not substantiated. Since the disposal of that application on February 6, 1968, the Council of Ministers consisting of respondents 1 to 11 have ceased to hold their office by reason of the intervention of the President's Proclamation under Art. 356 of the Constitution dated February 20, 1968, so that at the hearing of this appeal, respondents 1 to 11 do not occupy the office of members of the Council of Ministers for the State of West Bengal from which they were sought to be ousted by the petition in question.

2. So far as the writ of quo warranto is concerned, it is well established that though the immediate object of a writ of quo warranto is to inquire into and determine the authority of a person holding a public office, the relief that can be granted by the Court on such a writ is the ouster of the person proved to be a usurper from the public office in question and that, accordingly, relief by way of quo warranto can be available only so long as the respondent is in actual possession and user of the office in question. As a general rule, therefore, quo warranto to question a person's title to office will not be granted after he has ceased to hold that office (vide Shortt on Informations, p. 146). To this general proposition an exception has, however, been engrafted by judicial decisions that resignation after rule nisi has been issued is no answer to the rule. The obvious reason for this is that a person cannot avoid a decision in a pending proceeding by a unilateral act and the very fact of resignation presupposes that there was an office in which he was acting and, therefore, the real question as to title to so act should be heard (vide *R. v. Warlow*, (1813) 2 M & S 75; *R. v. Blizard*, (1866) LR 2 QB 55 at p. 58). Apart from this exception on the ground of resignation, there is no other contingency under which a writ of quo warranto would issue in a case where the respondent has ceased to hold the office, the title to which is challenged.

3. On behalf of the appellant, however, it has been argued by Mr. Chatterjee that though the respondents might have ceased to hold their office, there might be other questions consequential upon the fact of their holding the office, prior to the termination thereof, which may still be left, for example, the validity of acts done by them while in office or their obligation to refund the salaries which they might have drawn while in office. But so far as a petition for quo warranto is concerned, it has been established that no such relief can be available in a proceeding for quo warranto. Thus, a writ of quo warranto cannot be used to quash acts already done by a usurper. Quo warranto is addressed to prevent a continued exercise of authority unlawfully asserted, not to correct what already has been done under it or to vindicate private rights (vide *Johnson v. Manhattan R. Co.*, (1932) 289 US 479 at p. 502; 74 Corpus Juris Secundum Art. 49). So far as the right of a person to ask for refund of salaries from a usurper to a public office is concerned, that also is not to be determined in a proceeding for quo warranto. If such an action is maintainable as a consequence of a writ of quo warranto having been issued, that has to be determined independently, on its merits, in an appropriate subsequent proceeding which may subsequently be brought by the petitioner or some other person, after establishing his right to maintain such action.

4. Apart from the above general proposition, it has been rightly pointed out on behalf of the respondents that the appeal is not against an order discharging a Rule but rejecting an application refusing to issue a Rule Nisi. Today, after the respondents have ceased to hold their office, how can a Rule be issued asking them to show cause why they should not be ousted from that office? This is a proposition which does not depend upon legal niceties. Eventually it was argued by Mr. Chatterjee that even though a writ of quo warranto might not be appropriate in the circumstances of this case, the Court might grant some other appropriate relief under the residuary prayer clause, namely, to make 'such further or other order or orders as the Court may deem fit and proper'. It is true that in some cases, owing to subsequent contingencies arising, the Court has modified the relief specifically prayed for by a petitioner under Article 226 of the Constitution to make such order as might be proper in the changed circumstances (e.g. in *Satya Narain v. Dist. Engineer*, AIR 1962 SC 1161). But that does not apply *ab initio* at the time of issuing the Rule and, not at least in a case where the cause of action which had

brought the petitioner to the Court no longer subsists.

5. Having given our anxious consideration to all the questions involved in this appeal, we are unable to hold that there is before this Court any live controversy which has to be disposed of in appeal.

6. In this view, this appeal is dismissed but without any order as to costs.

7. If the question as to the validity of the Governor's order in a future case of dismissal of ministry takes place, *prima facie* that will be determined by the Court on its own merits irrespective of what has happened in the instant case.

8. A question was raised as to the right of the appellant to file an affidavit before this Court today. It was urged by Mr. Deb on behalf of the Union of India that the appellant had no right to file any affidavit at the appellate stage without leave of the Court. Mr. Chatterjee maintained that he had made certain averments only to show that the general questions involved in the petition were not dead but they were having their repercussions even now. The objection to the affidavit, it appears, is due to the averments in paragraph 2 of the affidavit to the effect that the respondents 1 to 11 drew their salary etc. illegally and that the acts done by them during their holding the office were all without authority of law. As I have already stated, the two points raised in paragraph 2 of the affidavit are not relevant to a proceeding for quo warranto and that the merits of such points would, if pursued, have to be determined in appropriate proceedings. No fresh orders upon this affidavit are, therefore, called for in this appeal, and it is, therefore, rejected.

9. AJAY K. BASU, J. :— I agree.

Appeal dismissed.

AIR 1970 CALCUTTA 120 (V 57 C 17)

BAGCHI, J.

Corporation of Calcutta, Appellant v. Calcutta Wholesale Consumers Co-operative Society Ltd. and others, Respondents.

Criminal Appeal No. 215 of 1968, D/- 6-6-1969.

(A) Prevention of Food Adulteration Act (1954), S. 20(1) — Complaint was held to be neither by the Corporation nor person authorised by 'local authority' — (Municipalities — Calcutta Municipal Act (33 of 1951), Ss. 585 and 30 — Complaint to Magistrate about an offence — Complaint to be signed by the Commissioner — Rubber stamp impression of signature

not enough) — (Criminal P. C. (1898), Ss. 190(1)(a) and 200(a) — Complaint not properly authorised — Magistrate cannot take cognizance of).

In a case the complaint to a Magistrate for an offence under S. 16(1)(a)(i) read with S. 7 of the Prevention of Food Adulteration Act was filed by one Dr. R. Chandra, Food Inspector under the direction and with the consent of the Health Officer, Corporation of Calcutta. The cause title read "Complainant Corporation of Calcutta through Dr. R. Chandra Food Inspector." Dr. Chandra was a Food Inspector appointed under S. 9 of the Act for the whole of the City of Calcutta and in the body of the complaint he described himself as the 'Complainant above named'. The petition of complaint contained at the bottom signatures of District Health Officer I and Health Officer with words 'Approved' and 'consented'. There was also a facsimile impression of signature of the Commissioner.

Held, that the complaint, if it should be treated as one by the Corporation, it was not according to law and if it should be treated as one by the Food Inspector, then it should be held as one without authorisation. Hence, in either case, the Magistrate could not have taken cognizance of the complaint. (Para 3)

If the Calcutta Corporation is the complainant, then under S. 585 of the Calcutta Municipal Act read with S. 30 of the Act it is the Commissioner who alone for and on behalf of the Calcutta Corporation can present a petition of complaint for violation of any law under the Calcutta Municipal Act and the rules, regulations and bye-laws made thereunder. The Commissioner is required to subscribe his own signature on a petition of complaint presented before a Municipal Magistrate for and on behalf of the Calcutta Corporation asking the Magistrate to take cognizance of an offence against the violator of the law under the Calcutta Municipal Act and the rules and regulations framed thereunder. Facsimile rubber stamp impression of the signature of the Commissioner on a petition of complaint is not a valid petition of complaint upon which the Magistrate can take cognizance under Section 200(a) read with Section 190(1)(a) of Criminal P. C. Therefore, this complaint was not a complaint according to law and upon that complaint the learned Magistrate had no jurisdiction to take cognizance.

(Para 3)

If it is a complaint by Dr. Chandra who is a Food Inspector appointed by the State Government for the entire area of Calcutta Corporation, he was not authorised either by the Calcutta Corporation, or by the State Government to present

the petition of complaint. Again, Dr. Chandra did not subscribe his signature at the bottom of the petition of complaint, but he described himself as the "complainant abovenamed" meaning Dr. Chandra, the complainant. The Health Officer is not 'local authority' to authorise him. So, the petition of complaint filed by Dr. Chandra was an unauthorised petition and was not in conformity with the provisions of S. 20(1) of the Prevention of Food Adulteration Act, 1954. (1968) 73 Cal WN 786, Foll. (Para 3)

(B) Prevention of Food Adulteration Act (1954), Ss. 2, 13 and 23 — 'Matar dal' — Analyst treating it as a pulse and reporting the sample to be adulterated — Court taking it also to be 'food grain' — Accused acquitted for non-performance of additional tests under A. 18.06(i) and (ii) — Decision, held, could not be assailed — Absence of evidence about it being 'food grain', held, immaterial. AIR 1965 Ker 123 (FB), Foll. (Paras 5 & 6)

(C) Evidence Act (1872), Ss. 3, 5 and 101 — Appreciation of evidence — Criminal Trial—Material on record justifying finding in favour of accused — Court, held, could act on it though accused had not taken it as a specific ground of defence — (Criminal P. C. (1898), Section 367) — (Prevention of Food Adulteration Act-1954), S. 16(1) and (7) — 'Matar dal' — Analyst testing it only for 'pulse' — Court also treating it as 'food grain' — Absence of additional tests could result in acquittal — Fact that accused had not pleaded it in defence, held, immaterial). (Para 6)

Cases Referred: Chronological Paras
(1968) Cri Ref. No. 1 of 1967, D/-
23-12-1968=73 Cal WN 786, Cor-
poration of Calcutta v. Biva Bati
Basu 3

(1965) AIR 1965 Ker 123 (V 52)=
1965-1 Cri LJ 446 (FB), P. Govinda
Pillai v. G. N. Padmanabha Pillai 5
Sunil Kumar Basu, for Appellant; Dilip
Kumar Dutt, for Respondents.

JUDGMENT:— This is an appeal on taking special leave under Section 417(3) of the Code of Criminal Procedure at the instance of the Calcutta Corporation against the order of the acquittal passed by the Municipal Magistrate, Calcutta acquitting the respondent of an offence punishable under Section 16(1)(a) (i) read with Section 7 of the Food Adulteration Act, 1954. The accused respondent No. 1 is the Calcutta Wholesale Consumers Co-operative Society Ltd. (Retail Section) which is the main accused. Timir Haran Sen Gupta, Executive Officer and Deputy Registrar of the organisation is the accused no. 2 and Niswanath Bhattacharjee, Sales-in-charge and seller of the organisation is the accused no. 3. From the records it ap-

pears that the complainant Corporation of Calcutta presented through Dr. R. Chandra, Food Inspector, a petition against the accused respondents before the Court of the Third Presidency Magistrate of the First Class specially empowered to take cognizance under Sec. 190 (1) (a) of the Code of Criminal Procedure (Cause Title of the petition of complaint). A Presidency Magistrate is not a Magistrate of the First Class. He is a Magistrate of no class, but he is a Magistrate sui juris as Presidency Magistrate. Under the fifth column in the petition of complaint the relevant portion runs as follows:—

"The humble petition of Dr. R. Chandra Food Inspector, appointed by the State Government under S. 9 of the P. F. A. Act for the whole of Calcutta, complainant above-named."

The relevant allegation in paragraph (1) of the complaint is as follows:—

"That on 15-9-1965 the complainant inspected the shop of accused No. 1 of which accused No. 2 is Executive & Deputy Registrar and accused No. 3 is sales-in-charge and seller situated at 21 Chittaranjan Avenue and found an article of food namely Matar Dal stored, exposed for sale. Sample was purchased from accused no. 3 of the said food bearing F. I. serial No. 005348 after due observance of all the legal formalities and one part of the said sample was made over to the accused No. 3 another part was sent to the Public Analyst being Lab. Regd. No. 896 and the remaining part is with the complainant for future reference. The Public Analyst opined that the said food is adulterated and unfit for human consumption as per report of analysis in the Scheduled form being Report No. S/65/106, a true copy of the same is attached herewith. The original will be produced during the trial."

Paragraph (2) reads as follows:—

"That your petitioner duly submitted the record of his inspection of the present case to the Health Officer, Corporation of Calcutta and under his direction and with his consent, the present complaint is filed in court.

In the circumstances, the complainant prays that your honour will be pleased to issue summons against the accused persons named above for offence under Section 16(1)(a)(i) of the P. F. A. Act, 1954 read with Section 7 of the said Act and to try the said accused persons in accordance with law."

The accused persons were summoned by the learned Magistrate. Evidence was gone into. The learned Magistrate upon considering the report of the analyst observed as follows:—

"It appears from the Analyst's report (Ex. 6) that the tests as prescribed in standard A. 18.06(i) & (iii) under Ap-

pendix B of P. F. A. Rules for foodgrains meant for human consumption have not been performed by the Public Analyst in the present case. Matar dal is obviously a food grain and these tests shall apply in its case. Hence the analysis of the sample is incomplete and as such the Public Analyst's opinion is unacceptable.

In this view of the matter the accused persons are found not guilty under Section 16(1)(a)(i)/7 of P. F. A. Act 1954 and accordingly acquitted and set at liberty forthwith."

2. Before I go into the merits of the appeal, I should point out that the petition of complaint was filed by the Food Inspector as complainant under the direction and with the consent of the Health Officer of the Calcutta Corporation. Section 20(1) of the Prevention of Food Adulteration Act, 1954 reads as follows:—

"No prosecution for an offence under this Act shall be instituted except by, or with the written consent of, the State Government or a local authority or a person authorised in this behalf by the State Government or a local authority;

Provided that a prosecution for an offence under this Act may be instituted by a purchaser referred to in Section 12, if he produces in court a copy of the report of the public analyst along with the complaint."

3. It is clear from the petition of complaint that the complainant is the Food Inspector but the cause title of the petition of complaint shows that it is the Calcutta Corporation. The Food Inspector was not authorised by the Calcutta Corporation, a local authority, but was authorised by the Health Officer of the Calcutta Corporation. Under Section 20(1) of the Prevention of Food Adulteration Act, 1954 any person authorised by a local authority may file a petition of complaint for prosecution of an offence under the Act. In the present case, the petition of complaint was filed by Dr. R. Chandra, the Food Inspector under the direction and with the consent of the Health Officer of the Calcutta Corporation. The Health Officer of the Calcutta Corporation is not a local authority. The complainant Dr. R. Chandra is the Food Inspector appointed by the State Government under Section 9 of the Prevention of Food Adulteration Act for the whole of Calcutta and he describes himself in paragraph 5 of the petition of complaint as "complainant abovenamed", but the cause title of the petition of complaint reads: "Complainant Corporation of Calcutta through Dr. R. Chandra, Food Inspector". The petition of complaint, therefore, bristles with rigmorolic statements. Who is the complainant?; Calcutta Corporation, Dr. R. Chandra, Food Inspector or the two signatories and one having his facsimilie

rubber stamp impression at the bottom of the reverse page of the petition of complaint. The petition of complaint contains on the reverse side at the bottom the following:—

APPROVED

Illegible.

D. H. O. No. 1. Health Officer

Then a facsimilie impression — "Illegible.

CONSENTED

Illegible.

Commissioner".

Now if the Calcutta Corporation is the complainant then under Section 585 of the Calcutta Municipal Act read with Section 30 of the Act it is the Commissioner who alone for and on behalf of the Calcutta Corporation can present a petition of complaint for violation of any law under the Calcutta Municipal Act and the rules, regulations and bye-laws made thereunder. In a Division Bench judgment (unreported) Criminal Reference No. 1 of 1967 under Section 432 Cr. P. C., Corporation of Calcutta v. Biva Bati Basu, judgment delivered on December 23, 1968 (Cal); it has been held that the Commissioner is required to subscribe his own signature on a petition of complaint presented before a Municipal Magistrate for and on behalf of the Calcutta Corporation asking the Magistrate to take cognizance of an offence against the violator of the law under the Calcutta Municipal Act and the rules and regulations framed thereunder. Facsimilie rubber stamp impression of the signature of the Commissioner on petition of complaint is not a valid petition of complaint upon which the Magistrate can take cognizance under Section 200(a) read with Section 190(1)(a) of the Code of Criminal Procedure. The Health Officer is a consenting party and D. H. O. I is the approving party and the Commissioner is a party without any statement as to what part he had taken while his facsimilie rubber stamp impression was set forth above the typed word "Commissioner" on the petition of complaint. If the facsimilie rubber stamp impression of the Commissioner was affixed purporting to be a complainant on behalf of the Calcutta Corporation then this complaint was not a complaint according to law and upon that complaint the learned Magistrate had no jurisdiction to take cognizance. Again, if it is a complaint by Dr. Chandra who is a Food Inspector appointed by the State Government for the entire area of Calcutta Corporation, he was not authorised either by the Calcutta Corporation or by the State Government to present the petition of complaint. The beauty of the thing is that Dr. R. Chandra did not subscribe his signature at the bottom of the petition of complaint, but he described himself in paragraph 5 of the petition of complaint as the "complainant above-named", meaning Dr. Chandra, the complainant. So,

the petition of complaint filed by Dr. Chandra was an unauthorised petition and was not in conformity with the provisions of Section 20(1) of the Prevention of Food Adulteration Act, 1954.

4. Mr. Bose, learned counsel for the appellant, at the close of his argument placed before me a true copy of the resolution of the Calcutta Corporation. But that resolution in the facts of the present case, does not help Mr. Bose. The complainant is Dr. Chandra. He filed the petition of complaint under the direction and with the consent of the Health Officer, but the resolution says that it is the Health Officer who is to file a petition of complaint. He cannot authorise or consent to the filing of the petition of complaint by the Food Inspector. Therefore, the resolution cannot cure the most glaring illegality in the petition of complaint as presented before the learned Magistrate. The learned Magistrate, therefore, in view of Section 20 (1) of the Prevention of Food Adulteration Act, 1954 had no jurisdiction to take cognizance of the offence upon the petition of complaint that was filed by the complainant Dr. R. Chandra, Food Inspector appointed by the State Government of the entire area of the Calcutta Corporation.

5. Mr. Bose contended that there was no evidence that matar dal was a "food grain" and that matar dal was a pulse and that the analyst's report relating to matar dal as a pulse should have been accepted by the learned Magistrate when matar dal, a pulse, could not be a "food grain". Mr. Bose further submitted that there was no evidence that matar dal was a "food grain". He, however, placed a decision before me of the Full Bench of the Kerala High Court in the case *P. Govinda Pillai v. V. G. N. Padamanabha Pillai*, 1965 (1) Cr. LJ 446=(AIR 1965 Ker 123) and relied upon paragraph 5 of the decision. In the course of his argument Mr. Bose finding that paragraph 5 of the said judgment would not support his contention submitted that he would not rely on that paragraph. That paragraph 5 is very much illuminating. There the question was whether Khasari dal was an article of food. In that case no evidence was adduced to prove that Khasari dal was a pulse and as such an article of food. Their Lordships of the Full Bench observed that no evidence was required to establish that Khasari dal was a pulse and that it was an article of food but their Lordships referring to *Modi*, observed that Khasari dal was a variety of pulse. So, Mr. Bose's contention that without evidence the learned Magistrate was not to have held that matar dal was a "food grain" is clearly negated by the observations of their Lordships of the Full Bench in paragraph

5 of the report. That is why Mr. Bose at one time of his argument submitted that he was not relying on paragraph 5 of the report, but paragraph 5 of the report lays down what I have already observed. Here the learned Magistrate who is presumed to have the common knowledge of human affairs and of the world considered matar dal a food grain, and therefore, held that the analyst ought to have tested the sample of matar dal according to the standard laid down in the rules, being no. A 18.06 standard in the rules made under the Prevention of Food Adulteration Act, 1954 and that such test having had not been made by the analyst, matar dal, a food grain, could not be held to be adulterated since there was no evidence of the analyst that he carried out the test laid down by the standard A 18.06(i) and (ii). Mr. Bose submitted for the appellant that the learned Magistrate's finding that matar dal was a "food grain" was not only based on no evidence but was inherently unacceptable since matar dal was "pulse" and that the standard of test regarding pulse had been made by the analyst and that no exception to the analyst's test regarding pulse could be taken by the accused. Mr. Bose submitted drawing my attention to the meaning of the word "grain" in Oxford Dictionary that grain means a full grain, but here the question is whether pulse is a "food grain". If unbroken pulse is pulse then a broken pulse grain is also "pulse". If a broken pulse is "pulse" then a broken pulse, being an article of food, is a "food grain." Food grain is a generic term and pulse is a species of such "food grain". The analyst was to have carried two tests following two standards, standard for testing pulse and standard for testing "food grain". If he would have done so, there could have been no room for taking any exception. But in my view, pulse as a broken matar dal falls within the generic expression "food grain." Therefore, the additional test as under A 18.06(i) and (ii) should have been carried out by the analyst. This having not been done the learned Magistrate was justified in holding that the prosecution failed to establish its case beyond reasonable doubt against the opposite parties.

6. Mr. Bose submitted that it was not the case in the defence of the accused that matar dal was a food grain, and therefore the learned Magistrate was not justified to hold that matar dal was a food grain. I am sorry I cannot accept the rationality of this argument. The accused is to plead nothing in defence. If the materials on the record justify a finding in favour of the accused no matter whether the accused made a statement of a specified type or not, the court can be justified in finding the

guilty even though he did not take specific ground of defence at the trial. The learned Magistrate, as I have already observed, had not considered other evidence. So Mr. Bose wanted me to go through the entire evidence and to come to a finding that the learned Magistrate was wrong in acquitting the accused respondent. The moot question is whether matar dal is a "food grain". The learned Magistrate found that it is a "food grain" and I find that it is a "food grain"; and because it is a food grain, the analyst ought to have carried out the tests as under A.18.06(i), (ii) of the rules. He having had not done, so, and the prosecution in the petition of complaint relied only on the analyst's report, so there could be no room for doubt that the prosecution failed to establish its own case on the materials appearing in the analyst's report beyond reasonable doubt. Accordingly, I find that the learned Magistrate rightly acquitted the accused respondent of the offences charged.

7. The appeal is, accordingly dismissed and the order of acquittal passed by the learned Magistrate is upheld. I should observe that the learned Magistrate had no jurisdiction to entertain the petition of complaint.

Appeal dismissed.

AIR 1970 CALCUTTA 124 (V 57 C 18)

S. P. MITRA AND K. L. ROY, JJ.

Commissioner of Income-tax, West Bengal-II Applicant v. A. N. Chowdhury Respondent.

Income-tax Ref. No 17 of 1966 D/- 3-6-1968.

(A) Income-tax Act (1922), S. 16(3)(b) — Applies to transfers by way of trust — It cannot be contended that a trustee receives income on behalf of the beneficiary and not on his own account. Hence Section 16 (3) (b) does apply to cases of transfers by way of trust. AIR 1931 PC 196 & AIR 1957 SC 887 & AIR 1963 SC 433, Rel. on. (Paras 10 to 13)

(B) Income-tax Act (1922), S. 16 (3) (b) — Income arising to wife or child indirectly by transfer effected by husband — Cl. (b) does not apply — Income-tax Act (1961), Section 64.

While in Section 16 (3) (a), the expression "directly or indirectly" has been repeatedly used the expression, strangely enough, has been omitted in Section 16(3) (b). This omission cannot be without significance. The position is the same even under the Act of 1961. Hence indirect income does not attract Section 16 (3)(b).

A executed a transfer to his brother B for the benefit of latter's wife and child and on the same day B transferred to A properties having more or less the same value for the benefit of A's wife and child.

Held : although it is possible that the manner in which the two transfers were executed meant that the wives of the two brothers were indirectly receiving income by virtue of the transfers effected by their husbands, still such income could not be clubbed in the hands of the husband under S. 16(3)(b). (Paras 15 & 16)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 433 (V 50)=

1962-44 ITR 876, Commr. of Income Tax, Bombay v. Manilal Dhanji 12
(1957) AIR 1957 SC 887 (V 44)=
1958-33 ITR 472, W. O. Holdsworth v. State of Uttar Pradesh 10
(1931) AIR 1931 PC 196 (V 18)=
58 Ind App. 279, Rani Chhatra Kumari Devi v. Mohan Bikram Shah 9

Mukherjee with B. Gupta, for Applicant; J. C. Pal with A. K. Matilal, for Respondent.

S. P. MITRA, J.:— This is a Reference under Section 66(1) of the Indian Income-tax Act, 1922. The assessment years are 1958-59 and 1959-60, the corresponding previous years being the Bengali years ended on the 13th April 1958 and the 13th April 1959. On April 24, 1957, the respondent executed a deed of trust conveying certain stocks and debentures as well as his interest in landed properties valued in all at Rs. 4,98,000/- to his brother J. N. Chowdhury who was to hold such properties in trust for the benefit of J. N. Chowdhury's wife and 2 daughters, one married and the other a minor. On the same day J. N. Chowdhury created a similar trust involving assets and properties of the same nature and value as covered by the respondent's trust, appointing the respondent as the trustee for the benefit of the respondent's wife and his major son.

2. In the assessments for the aforesaid two years, the Income-tax Officer observed that these mutual transfers were made with a view to avoid the income from the assets and properties concerned being taxed in the hands of the transferors. According to the Income-tax Officer, the result of these transfers was that neither the respondent nor his brother had lost anything by such transfer and looked at from the point of view of mutuality of the transactions the assessee could be treated to have purchased certain assets from his brother for the benefit of his own wife and son and instead of paying in cash for the properties he had paid in kind. For these reasons, the Income-tax Officer applied the provisions of Section 16(3) of the 1922 Act and in-

cluded the income from the assets given in trust to the respondent's brother in the assessment of the respondent.

3. Before the Appellate Assistant Commissioner, the respondent contended that the provisions of Section 16(3) applied only to the case of transfer of assets by an individual, directly or indirectly, to his wife or minor children. But since in the present case the assets had been transferred to a trust of which the trustee was the assessee's brother and the beneficiaries were the wife and children of the assessee's brother, the provisions of Section 16(3) had no application. The Appellate Assistant Commissioner was of the view that as between the two brothers, the cross-transactions had to be looked at as a whole and taking into account, the fact that the date of the trust deeds was the same and the trust properties were of identical nature and value, the wife and the son of the respondent derived the same benefit as the wife and the children of his brother. The Appellate Assistant Commissioner said that one transfer had obviously constituted the consideration for the other. He held that the arrangement made by the two brothers by executing the two trust deeds constituted one disposition with the result that in effect the respondent had merely transferred his own assets to his wife and son. The Appellate Assistant Commissioner's conclusion was that barring the income of the trust which was receiveable by the major son of the respondent, the rest was assessable in the hands of the respondent in terms of the provisions of Section 16(3)(b) of the Act.

4. Before the Tribunal the respondent's Counsel submitted that whereas the Income-tax Officer had invoked generally the provisions of Section 16(3) of the Act, the Appellate Assistant Commissioner in the concluding part of his order had made a specific mention of Section 16(3)(b). The departmental representative also accepted the position that it was only under Section 16(3)(b) that the income of trust properties could be included in the assessment of the respondent. In these circumstances, the respondent's Counsel restricted his arguments to two points only. Firstly, according to Counsel for the respondent, Section 16(3)(b) does not contemplate the case of a trust; it speaks of inclusion of income of third parties to whom assets and properties had been transferred by the assessee without adequate consideration for the benefit of the latter's wife and minor children; but as a result of transfer under a deed of trust, the trustee is never the owner of the income receiveable from the trust properties; he merely collects such income in a representative capacity. Secondly, assuming that the provisions of Section 16(3)(b)

cover the case of a transfer by trust, it could only affect the case of a transfer which resulted in direct benefit to the transferor's wife and/or minor children; but since in the present case the respondent's transfer effected by the trust deed dated the 24th April, 1957 was meant for the benefit of the wife and children of the transferor's brother, the provisions of Section 16(3)(b) were inapplicable as significantly the phrase "directly or indirectly" which was so conspicuous in all the sub-clauses under Section 16(3)(a) has been omitted in Section 16(3)(b) by the Legislature. The Tribunal found that the income of the properties given in trust by the respondent to his brother for the benefit of the latter's wife and children could not be assessed in the hands of the respondent under Section 16(3)(b).

5. The following questions of law have been referred to us for our opinion:—

(1) Whether the Tribunal was right in holding that the provisions of Section 16(3)(b) of the Indian Income-tax Act, 1922, were not applicable to the cases of transfers of property by way of Trust?

(2) If the answer to question no. 1 be in the negative, whether, on the facts and in the circumstances of this case, income of the properties given in trust by the assessee to his brother for the benefit of the latter's wife and minor child was chargeable to tax in the hands of the assessee under Section 16(3)(b) of the Indian Income-tax Act, 1922?

6. The relevant provisions of Section 16(3)(b) of the Act are as follows:—

"In computing the total income of any individual for the purpose of assessment, there shall be included —

(b) so much of the income of any person as arises from assets transferred otherwise than for adequate consideration to the person by such individual for the benefit of his wife or a minor child or both."

7. Mr. Pal learned Counsel for the respondent, has argued that the language of Section 16(3)(b) apparently envisages a case of trust: but on closer examination it does not include the case of a trustee inasmuch as the income that has to be assessed is not the income of the trustee at all. It is the income of the beneficiaries which the trustee received on their behalf. Learned Counsel refers to Section 41 of the Act which, he says, lays down the general rules of assessment of properties in the hands of all kinds of trustees. Counsel for the respondent contends that sub-section (1) of Section 41 shows that the trustee receives income on behalf of the beneficiaries and is made liable as a special case; the assessment that is made on the trustee is not in respect of his total income but of the shares of the

beneficiaries who are ultimately entitled to the income. Moreover, sub-section (2) of Section 41 makes the beneficiaries liable to be directly assessed. According to Mr. Pal, these provisions show that not only are the beneficiaries interested in the income, they are entitled to the income in praesenti and, as such the trustee merely receives the income on their behalf. Mr. Pal also referred to some of the provisions of the Trust Act in support of his argument.

8. We are unable to accept these contentions. Firstly, under Section 16(3)(b) the income that is assessed is an income which arises from what is transferred by the individual concerned for the benefit of his wife or minor child or both. A trustee receives this income, meets certain outgoings and then distributes the income amongst the beneficiaries. Legally, the income is the income of the trustee and the trustee by reason of obligations imposed on him has to disburse or distribute this income (after providing for outgoings) amongst certain beneficiaries in accordance with the provisions of the Trust. This is an income, in other words, which arises to the trustee out of the trust property which has been transferred to him. When we read Section 16(3)(b) in the light of these principles it is clear to us that this sub-clause does envisage the case of a trust. In any event, the argument which learned Counsel for the respondent has advanced cannot any longer be entertained by this Court. In this connection, it would be useful to refer to a judgment of the Privy Council and two judgments of the Supreme Court which we propose to do.

9. In *Rani Chhatra Kumari Devi v. Mohan Bikram Shah*, 58 Ind App 279 at p. 297=(AIR 1931 PC 196 at p. 202) their Lordships of the Judicial Committee observed:—

"The Indian law does not recognise legal and equitable estates: By that law, therefore, there can be but one 'owner', and where the property is vested in a trustee, the 'owner' must, their Lordships think, be the trustee."

10. In *W.O. Holdsworth v. State of Uttar Pradesh*, 1958-33 ITR 472=(AIR 1957 SC 887) the Supreme Court at p. 480 (of SCR)=(at p. 891 of AIR), has observed:—

"The trustee is the legal owner of the trust property and the property vests in him as such. He no doubt holds the trust property for the benefit of the beneficiaries but he does not hold it on their behalf. The expressions 'for the benefit of' and 'on behalf of' are not synonymous with each other. They convey different meanings. The former connotes a benefit which is enjoyed by another thus bringing in a relationship as

between a trustee and a beneficiary or a cesti que trust, the latter connotes an agency which brings about a relationship as between principal and agent between the parties, one of whom is acting on behalf of another."

11. In view of this pronouncement by the Supreme Court, the argument that in construing Section 16(3)(b) it should be borne in mind that the trustee receives income not on his own account but on behalf of the beneficiary, is altogether untenable.

12. The argument appears to be more untenable by reason of the Supreme Court's observations in *Commissioner of Income-tax, Bombay v. Manilal Dhanji* (1962) 44 ITR 876 = (AIR 1963 SC 433). At page 882 (of ITR)=(at pp. 436-437 of AIR) Their Lordships observe:

" On a closer scrutiny, however, it seems to us that clause (b) must be read in the context of the scheme of Section 16 and the two clauses (a) and (b) of sub-section (3) thereof must be read together. So read, the only reasonable interpretation appears to be the one which the High Court accepted, namely, that the scheme of the section requires that an assessee can only be taxed on the income from a trust fund for the benefit of his minor child, provided that in the year of account the minor child derives some benefit under the trust deed either he receives income, or the income accrues to him, or he has a beneficial interest in the income in the relevant year of account"

Again at page 884 (of ITR)=(at p. 437 of AIR) the Supreme Court says:

" The obvious intention of the legislature in enacting clause (b) was to see that the provisions of clause (a) were not defeated by the assessee creating a trust and in order to deal with that mischief it enacted clause (b). Instead of the expression 'so much of the income of a wife or minor child' the expression used in Cl. (b) is 'so much of the income of any person or association of persons, etc.'. Obviously, when a trust is created the income is income in the hands of the trustees. But the underlying principle in the two clauses (a) and (b) appears to be the same, namely, there must be income of the wife or minor child under clause (a) and there must be the same benefit derived by the wife or minor child in the year of account under clause (b)"

13. These observations of S. K. Das, J. speaking on behalf of the Supreme Court, in our view, set the controversy at rest and, without any hesitation, we overrule the contention of Mr. Pal that Cl. (b) of Section 16 (3) of the Indian Income-tax Act, 1922, does not apply to cases of trust.

14. We now proceed to deal with the second question referred to us.

15. In the instant case we find that the assessee appointed his brother as the trustee and the trustee was to hold the properties not for the benefit of the assessee's wife or any minor child of the assessee but for the benefit of the assessee's brother's wife and children. In view of these terms of the Deed of Trust it cannot be said that the income that the trustee had derived could be included in computing the total income of the assessee. These terms do not come within the scope of Section 16(3)(b). Our view is further confirmed when we compare the provisions of Section 16(3)(b) with those of Section 16(3)(a). In Section 16(3)(a) the expression 'directly or indirectly' has been repeatedly used. In other words, whether the wife or minor child receives the income directly or indirectly, Section 16(3)(a) would be attracted. But strangely enough, this expression has been omitted in Section 16(3)(b). And, to us, the omission cannot be without significance. It is possible, as learned counsel for the Commissioner has contended, that the manner in which the two Deeds of Trust were executed on the same day by the two brothers in respect of properties having more or less the same value meant that the wife or minor child of the assessee was indirectly deriving the income. But this indirect income does not attract Section 16(3)(b). We have further to observe that even in the Income-tax Act of 1961 no change of language has been effected so far as this aspect of the matter is concerned (vide Section 64 of the Income-tax Act, 1961).

16. In view of the difference therefore, in language, that exists between Sec. 16(3)(a) and Section 16(3)(b), we have to hold, on the facts of this case, that the income of the assessee's brother's wife and minor child was not chargeable to tax in the hands of the assessee. Our answers to the questions aforesaid are as follows:

1. The Tribunal erred in holding that the provisions of Section 16(3)(b) of the Indian Income-tax Act, 1922, were not applicable to the cases of transfers of property by way of Trust.

2. On the facts and in the circumstances of this case, the income of the properties given in Trust by the assessee to his brother for the benefit of the latter's wife and minor child was not chargeable to tax in the hands of the assessee under Section 16(3)(b) of the Indian Income-tax Act, 1922.

17. There would be no order as to costs.

18. We are delivering this judgment in supersession of the judgment that was delivered on the 20th May, 1968.

19. K. L. ROY, J. :— I agree.

Answered accordingly.

AIR 1970 CALCUTTA 127 (V 57 C 19)

B. C. MITRA, J.

Bhanu Dutta and others, Petitioners v. The State and others, Respondents.

Civil Revn. No. 558 (W) of 1967. D/- 30-7-1969.

(A) Municipalities — Bengal Municipal Act (15 of 1932), Ss. 6(1)(b), 7 — Howrah Municipal Act (17 of 1965), S. 8 — Provisions of Ss. 6 and 7 are mandatory — They cannot be ignored simply because by Howrah Municipal Act, 1965, Legislature has chosen to incorporate two different areas into one Municipal Corporation — There being no repugnancy between provisions of two statutes doctrine of implied repeal cannot be invoked — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Implied repeal).

The provisions in Ss. 6 and 7 of the Bengal Municipal Act have created rights and imposed obligations which are mandatory in nature and it cannot be said that these provisions can be ignored, overlooked or not complied with because in the Howrah Municipal Act, 1965, the legislature has chosen to incorporate two different areas of the Municipalities into one Municipal Corporation.

(Para 6)

The doctrine of implied repeal in the rule of construction of statutory provisions which are repugnant to each other, cannot be invoked in construing the provisions of the Bengal Municipal Act and the Howrah Municipal Act, as there is no repugnancy in the provisions of the two statutes. But even the doctrine of implied repeal does not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. It is only where the co-existence of the two sets of provisions in two statutes would be destructive of the object for which the latter was passed that the earlier would stand repealed by the latter. But in this case the provisions in the Bengal Municipal Act regarding publication of the notification under S. 6(1) and the filing of objections under Section 7 is not destructive of the purpose of the latter Act, namely, the Howrah Municipal Act, which is the creation of a Municipal Corporation of Howrah including therein the areas previously included in what were known as the Municipality of Howrah and the Municipality of Bally.

(Para 7)

In the Howrah Municipal Act, there is no provision similar to matters dealt with in Section 6 of the Bengal Municipal Act. S. 6 of that Act is in Part II, Chapter II, which is headed "The creation of Municipalities". There is no corresponding

subject dealt with in the Howrah Municipal Act and therefore, S. 8 of the Howrah Municipal Act cannot have the effect of repealing S. 6 of the Bengal Municipal Act. (Para 9)

(B) Municipalities — Bengal Municipal Act (15 of 1932), S. 6(1) (b) — Word 'may' — It is mandatory in nature. (Para 10)

(C) Municipalities — Bengal Municipal Act (15 of 1932), S. 6(1) — 'By such other means' — They are in addition to publication of notification prescribed under section. (Para 11)

(D) Municipalities — Bengal Municipal Act (15 of 1932), S. 6 — Howrah Municipal Act (17 of 1965) — Withdrawing certain Municipality from operation of Bengal Municipal Act — In absence of clear statutory provision in Howrah Municipal Act dispensing compliance with requirements of Bengal Municipal Act, it could not be contended that State Government is at liberty to dispense with compliance with provisions of S. 6 of Bengal Act. (Para 14)

Nani Coomar Chakraborty and Madhusudan Banerjee, for Petitioners; S. K. Roy Choudhury, for Commrs. of Howrah Municipality; Amar Prasad Chakraborty, for other Respondents; S. K. Acharya, Advocate General and Paritosh Mukherjee, for the State.

ORDER:— In this application the petitioners asked for appropriate writs directing the respondents to cancel, withdraw, rescind or set aside the finally published electoral rolls for the election of the Corporation of Howrah held on May 21, 1967 and also for a Writ of Prohibition prohibiting the respondents from holding the said election on May 21, 1967.

2. The petitioners are citizens of what previously was known as Bally Municipality. The areas within the Bally Municipality were included in the area of Howrah Municipality and the two areas together have been incorporated in the Municipal Corporation of Howrah, by the Howrah Municipal Act, 1965.

3. The petitioners took various points in this application. Mr. Nani Coomar Chakraborty learned Advocate appearing for the petitioners, however, pressed only one point, to which I shall presently refer although he did not give up the other contentions raised by him in this matter.

4. The point pressed by Mr. Chakraborty was that the State Government did not issue the notification contemplated by Section 6(1)(b) of the Bengal Municipal Act, 1932. Under this provision "the State Government may, by notification and by such other means as it may determine, declare its intention", amongst others to withdraw any Municipality from the

operation of the Bengal Municipal Act, 1932. It was submitted that the Bally Municipality was a statutory body under the said Act, and therefore, if it was intended that this statutory body was to be withdrawn from the operation of the Bengal Municipal Act, the State Government should have declared its intention by a notification and by other means. No such notification, it was argued, was published by the State Government, and therefore, the Bally Municipality as a Statutory Body under the said Act could not be deprived of its statutory character. The Statute had prescribed a manner and a mode by which a Municipality, it was argued, could be withdrawn from the operation of the Act; and if it was intended that the Act should no more apply to the Bally Municipality, the requirement of the Act for withdrawal of the Municipality from the operation of the Act should have been complied with. In this case, that was not done, but the areas comprised in the Bally Municipality have been included by the Howrah Municipal Act, 1965, into a Municipal Corporation known as the Municipal Corporation of Howrah. It was argued that no doubt that the legislature had the power to include two different areas into one Municipal Corporation, but if one of the two areas was included within a Municipality, before inclusion of the two different areas into one Municipal Corporation, a notification under Section 6(1)(b) of the Bengal Municipal Act must be published.

5. The learned Advocate General appearing on behalf of the respondent no. 1 in this Rule and also in C. R. 682 (w)/67 and C. R. 794 (w)/67 which were taken up for hearing together, submitted that under Section 8 of the Howrah Municipal Act, 1965, "all laws relating to matters provided for in this Act, and in force in Howrah, immediately before the date of the commencement of the corresponding provisions of this Act read with the Calcutta Act shall, on and from that date, stand repealed". It was argued that having regard to this provision under Section 8 of the Howrah Municipal Act, it was not necessary for the State Government to comply with Section 6 (1) (b) of the Bengal Municipal Act, 1932. It was next contended that under the Bengal Municipal Act, the State Government in issuing the notification exercised a delegated authority and acted as a delegate of the legislature; but since the legislature itself had decided by the Howrah Municipal Act to amalgamate the area of the Bally Municipality with the areas of Howrah Municipality and to incorporate the two areas together into one Municipal Corporation, the exercise of superior power by the State Legislature overrides the statutory requirements relating to issue of notification by the Executive

Sohan Lal Bahety v. Province of Bengal, AIR 1946 Cal 524. Although the case relates to an award under Section 19 of the Defence of India Act, 1939 and was decided on 11th June 1946, the judgment of Bombay High Court in Hirji Virji's case which was delivered on 11th August 1944 and was reported in AIR 1945 Bom 348 was not brought to the notice of the learned Judge at all and the counsel's arguments in the case had also proceeded mainly on the basis that temporary requisition of land under the provisions of Section 19 of the Defence of India Act was not "acquisition of land" for the purposes of Section 8 of the Court-fees Act. The points raised in the Bombay case were neither raised nor considered in this case.

18. As regards the true nature of the award made under Section 19, the view taken by the learned Judge was the same as in Bombay case and it was held that the award was neither a decree nor an order having the force of a decree.

19. The next case referred to by Mr. Chawla is Satya Charan Sur v. State of West Bengal, AIR 1959 Cal 609. The case relates to an award under Section 7 of the Requisitioning and Acquisition of Immovable Property Act, 1952 and expressly dissents from the decision in Hirji Virji's case, AIR 1945 Bom 348 and relies upon the judgment of Lodge J. in Sohan Lal Bahety's case, AIR 1946 Cal 524.

20. While holding that the award is not a decree nor is it an order having the force of the decree and also that the award is by an arbitrator who is merely a persona designata and not a Court the learned Judge goes on to add:—

"With very great respect, I dissent from the judgment of Wadia, J. Section 8 of the Court-fees Act does not use the expression "order" simpliciter but uses the expression "order relating to compensation 'under any Act' for the time being in force." Underlined (here in ' ') by myself.

That being so, there is no reason why the expression "order" in Section 8 of the Court-fees Act must be treated as an order under Section 2 (14), Civil P. C."

21. The Bench decision in Kanwar Jagat Bahadur Singh, AIR 1957 Punj 32 does not seem to have been brought to the notice of the learned Judge at all.

22. The other case cited by Mr. Chawla is Srunguri Lakshminarayana Rao v. Revenue Divisional Officer Kakinada, AIR 1968 Andh Pra 348. It is a Bench decision of Andhra Pradesh High Court which follows the view of Banerjee J. In Satya Charan's case, AIR 1959 Cal 609 and expressly dissents from the decisions of the Punjab and Bombay High Courts.

23. It appears to me that the reason which weighed with Banerjee J. in Satya

Charan's case, AIR 1959 Cal 609 and with Manohar Pershad, C. J. and Mohamed Mirza J. in Srunguri Lakshminarayana Rao's case, AIR 1968 Andh Pra 348 about Section 8 of the Court-fees Act not having used the expression "order" simpliciter but having instead used the expression "order relating to compensation under any Act for the time being in force" as being decisive of the matter in favour of the application of Section 8 to an appeal from the award, is fallacious. In a fiscal statute like the Court-fees Act what really matters is the charging provision of the Act under which a particular document would fall before it can be said what stamp it should bear. There is no denying the fact that the Court-fees Act is an enactment dealing with revenue and therefore, no amount is leviable unless it clearly falls under the provisions of the Court-fees Act. Section 4 of the Court-fees Act prohibits the filing of any document in a High Court unless it is stamped with a fee chargeable within the 1st Schedule or II Schedule of the Act. This section makes it clear that a document is to be charged with fees in accordance with Schedules I and II of the Act.

24. In other words, the charging provisions are Sections 3 and 4 read with Schedules I and II. If there were no Schedules, Sections 7 and 8 themselves would be of no assistance to the State, as both of them are merely computing sections. It is under the provisions of the various Articles of the Schedules that the amount has to be determined.

25. Before a document can be filed in the High Court it must bear the court-fee chargeable within the first Schedule or Second Schedule of the Act. If it is a memorandum of appeal, it must either be an appeal from a decree or an order having the force of a decree or an order which is neither one nor the other. If it is neither an appeal from a decree nor an order having the force of a decree then it can only fall under Schedule II, Article 11. It does not make the slightest difference whether it is an order under one Act or another nor does it make any difference whether it is an order relating to compensation or some other matter.

26. Apart from Sch. II, Art. 11 there is no other provision either in Sch. I or Sch. II which covers an order relating to compensation no matter under which Act such an order may be.

27. Section 8 no doubt provides for mode of computation of court-fee on an order relating to compensation but before any question of computation of court-fee can arise the order itself must fit in the strait-jacket of one or the other provision of Sch. I or II and this can only be if it is held that Section 8 is confined to orders as

understood in the Civil P. C. and where any document does not fall within a decree or an order having the force of a decree it should be held to be covered by Art. 11 of Sch. II.

28. The last case cited by Mr. Chawla is a Full Bench decision of Punjab High Court in Daryodh Singh v. Union of India, 1966-68 Punj LR (D) 299 (FB). The case has no bearing on the question arising for consideration in the present case as the question in that case was whether a memorandum of appeal under Section 54 of the Land Acquisition Act in which the only dispute is as to the apportionment of compensation inter se the various claimants and not as to its quantum, has to be stamped with a court-fee stamp in accordance with the provisions of Section 8 read with Sch. I, Art. 1 (ad valorem basis) or with a fixed court-fee stamp under Art. 11, Sch. II of the Court-fees Act. It is well settled that an order made under the Land Acquisition Act, is deemed to be a decree and an appeal against that order is therefore, an appeal from a decree.

29. The view of Section 8 taken by Wadia, J. also found favour with a Division Bench of Nagpur High Court in Crown v. Chandrabhanlal, AIR 1957 Nag 8. There is however, no discussion on the point in the judgment.

30. On a careful consideration of the cases cited at the Bar, I express my respectful dissent from the decisions of Calcutta High Court in AIR 1946 Cal 524 and AIR 1959 Cal 609 and with the decision of High Court of Andhra Pradesh in AIR 1968 Andh Pra 348 and would prefer to follow the decision of Wadia, J., in AIR 1945 Bom 348 and the Bench decision of the Punjab High Court in AIR 1957 Punj 32.

31. The Preliminary Objection raised by Mr. Chawla is therefore, overruled and it is held that the memorandum of appeal in the present case is properly stamped in accordance with Art. 11 of Sch. II.

32. This brings me to the merits of the controversy in appeal. The main contention urged by the learned counsel for the appellant is that the compensation awarded to the appellant has been determined on the basis of the market-value of the acquired land on 1-9-1939 with an addition of 40 per cent but the said provision is ultra vires the legislature. The appellant had addressed the same argument before the arbitrator on the basis of a Bench decision of the Punjab High Court in Than Singh v. Union of India, AIR 1955 Punj 55, but it was rejected on the ground that under Art. 31-B of the Constitution which was inserted by the Constitution (Fourth Amendment) Act, 1955, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions

thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any rights conferred by, any provision of Part III of the Constitution, and notwithstanding any judgment, decree or order of any Court or Tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 being one of the Acts mentioned in the said Schedule, the constitutional mandate therefore, is that the provisos in question "shall be deemed never to have become void" and "shall notwithstanding any judgment to the contrary continue in force". The arbitrator therefore, held that the provisos continued to remain valid in spite of the aforementioned judgment of the Punjab High Court.

33. The argument of the learned counsel for the appellant however, is that the view of law taken by the arbitrator is erroneous in that the Act being a pre-Constitution Act both the provisos to Cl. (e) of sub-section (1) of Section 7 of the Act are ultra vires Section 299 of the Government of India Act, 1935 and are therefore, liable to be ignored. The Act was passed by the Central Legislature in September 1948 when the powers, authority and jurisdiction of the Legislature were governed by the Government of India Act, 1935. Section 299 (2) of the Act was in the following terms:—

"(2) Neither the Federal or a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which and the manner, in which it is to be determined".

34. Any law passed during the time when sub-section (2) of Section 299 of the said Act was in force, which does not provide for payment of compensation for the property acquired has obviously to be struck down.

35. In support of his argument, the learned counsel relies upon a decision of R. S. Narula, J. in Barkat Ram v. Union of India, AIR 1966 Punj 507 where this very provision was struck down.

36. The question as to how far a provision like the one contained in the two provisos to Cl. (e) of sub-section (1), Section 7, was violative of Art. 31 (2) of the Constitution and was not saved by Article 31 (5) had come up for consideration

before the Supreme Court in the State of West Bengal v. Mrs. Bela Banerjee, 1954 SCR 558 = (AIR 1954 SC 170). The case before their Lordships was one under the West Bengal Land Development and Planning Act, 1948 which had been passed primarily for the settlement of immigrants who had migrated into West Bengal due to communal disturbances in East Bengal and provided for the acquisition and development of land for public purposes including the purpose aforesaid. The Act provided that compensation of land acquired thereunder shall not exceed the market-value of land as on December 31, 1946. This provision was struck down by the Supreme Court on the ground that the fixing of market value on December 31, 1946 as the ceiling of compensation without reference to the value of the land at the time of acquisition was arbitrary and could not be regarded as due compliance in letter and spirit with the requirement of Art. 31 (2). It was further held that Art. 31 (2) requires that the principles which should govern the determination of the amount to be given to the owner of the property must ensure that what is determined as payable must be "compensation" that is, a just equivalent of what the owner has been deprived of.

37. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected is a justiciable issue to be adjudicated by the Court.

38. The Supreme Court's judgment in Bela Banerjee's case, 1954-5 SCR 558 = (AIR 1954 SC 170) along with some other judicial decisions interpreting Arts. 14, 19 and 31 led to the enactment of the Constitution (Fourth Amendment) Act, 1955. One of the important amendments made by the aforesaid Act purported to withdraw the question of adequacy of compensation under Art. 31 (2) from the field of judicial determination, leaving it exclusively with the Legislature. In *P. Vajravelu Mudaliar v. Special Duty Collector, Madras*, (1965) 1 SCR 614 = (AIR 1965 SC 1017) their Lordships gave the same meaning to the expression "compensation" occurring in Art. 31 (2) as given to it in Bela Banerjee's case, 1954-5 SCR 558 = (AIR 1954 SC 170) in spite of the amendment of Art. 31 (2) in the year 1955 as stated above. Their Lordships also held that if the compensation payable for the property acquired is illusory or if the principles prescribed for ascertaining such compensation are not relevant to the value of the property at or about the time of its acquisition or if the principles are so designed and so arbitrary that they do not provide for compensation at all, it can be said that the Legislature made the law in fraud of its

powers and in such a case the question of compensation is justiciable.

39. This decision was later followed in *Union of India v. Metal Corporation of India*, 1967-1 SCR 255 = (AIR 1967 SC 637) and *Union of India v. Kamalabai Harjivandas Parekh*, AIR 1968 SC 377.

40. Besides the cases mentioned above, there is the case of *N. B. Jeejeebhoy v. Assistant Collector, Thana*, (1965) 1 SCR 636 = (AIR 1965 SC 1096) which along with the case of *Kamalabai Harjivandas Parekh*, AIR 1968 SC 377 is almost directly in point so far as the present case is concerned. In the first case, the appellant's lands were acquired for the purpose of a housing scheme pursuant to a notification issued under Section 4 of the Land Acquisition Act 1894, in May 1948. Notifications under Section 6 of the Act were issued in July and August 1949 and possession of the lands was taken under Section 17 in December 1949. In the course of proceedings for the ascertainment of compensation payable to the appellants both the Land Acquisition Officer and the District Court, to which the matter was referred, awarded compensation in accordance with the provisions of the Land Acquisition (Bombay Amendment) Act, 1948 i.e. on the basis of the value of the lands as on January 1, 1948 and not upon the value on the date on which the notification under Section 4 had been issued.

41. On appeal, it was held by the High Court of Bombay that though the Bombay Amending Act was hit by Article 14, it was saved by Art. 31-A and that under Section 299 of the Government of India Act, 1935 which governed the statute, the compensation for compulsory acquisition did not necessarily mean equivalent in value to what the owner had been deprived of.

42. On a further appeal to the Supreme Court it was held that ascertainment of compensation on the basis of the value of the lands acquired as on 1st January 1948, and not as on the date on which the notification under Section 4, Land Acquisition Act, 1894 was issued, in the absence of any relevant circumstance requiring the fixing of an anterior date, was arbitrary. It was further held that the provisions of Art. 31 (2) of the Constitution and Section 299 (2) of the Government of India Act, 1935 relating to compensation were *pari materia* with each other and in the context of the payment or ascertainment of compensation there was no distinction between the two provisions justifying a different interpretation of each and for giving a more restricted meaning to Section 299 (2).

43. It was also held that the Bombay Amending Act being void at the inception was not an "existing law" within the

meaning of Art. 31 (5) or Art. 31-A at the date of commencement of the Constitution and could not therefore, be saved by either of these provisions. It is true that if a particular statute attracts Art. 31-A (1) (a) it cannot be invalidated on the ground that it does not comply with the provisions of Article 31 (2) of the Constitution namely, that the Act has not fixed the amount of compensation. But Article 31-A cannot have any bearing in the context of an Act which had no legal existence at the time the Constitution came into force. It does not purport to revive laws which were void at the time they were made.

44. The second case is under the Requisitioning and Acquisition of Immovable Property Act, 1952. The attack in that case was directed against Clause (3) (b) of section which compelled the arbitrator to measure the price for acquisition arrived at under Clause (a) with twice the amount of money which the requisitioned property would have fetched if it had been sold on the date of requisition and to ignore the excess of the price computed in terms of Clause (a) over that in terms of Clause (b). It was held that the basis provided by Clause (b) had nothing to do with just equivalent of the land on the date of acquisition nor was there any principle for such a basis. Clause (3) (b) was therefore, struck down as not satisfying the requirements of Article 31 (2) of the Constitution.

45. Judged in the light of the above cases, there can be no doubt that the measure of compensation adopted in the two provisos to Clause (e) of sub-section (1) of Section 7, of the Resettlement of Displaced Persons (Land Acquisition) Act, 1948 can by no means be described as a just equivalent. As has been observed by their Lordships of the Supreme Court in Kamalabai's case, AIR 1968 SC 377, "It is common knowledge that all over India there has been a spiralling of land prices after the conclusion of the last world war although the inflation has been greater in urban areas, specially round about the big cities than in the mofussil. Land values in post-war India are many times the corresponding values before the conclusion of the last war."

46. To fix the market-value as on 1-1-1939 with an addition of 40 per cent and compel the arbitrator to adopt that as against the actual market-value of the acquired property when the notification under Section 4 was issued on 1-1-1949, is clearly contrary to the provisions of Section 299 (2) of the Government of India Act, 1935. Both these provisos must therefore, be held to be ultra vires Section 299 (2) and are therefore, deemed to have never been on the Statute Book. The impugned provisos being void

ab initio cannot be brought within the definition of "existing law" as contained in Article 366 (10) of the Constitution. Not being an existing law, they are not saved by Article 31 (5) of the Constitution nor Clause (6) of Article 31 is applicable to the Act as it was admittedly enacted more than 18 months before the commencement of the Constitution. The inclusion of the Act in the Ninth Schedule also does not save the impugned provision from being declared void or from having become void because the attack against the validity of the impugned provision is not directed on the ground of its being inconsistent with or taking away or abridging any of the fundamental rights contained in Part III of the Constitution. The attack is exclusively aimed on the ground that it is ultra vires Section 299 (2) of the Government of India Act, 1935 and is not saved as existing law after the coming into force of the Constitution.

47. The result of the foregoing discussion is that I would accept the appeal and set aside the award of the arbitrator dated 28-9-1960 and direct that the appropriate authority will now issue a proper notification re-appointing Mr. K. S. Sidhu or any other competent and qualified officer as arbitrator under Section 7 (1) (b) of the Act to take evidence of both the parties afresh and make an award for the compensation to which the appellant may be found to be entitled in accordance with law. The appellant will also have his costs in this Court from the respondent.

48. OM PARKASH J.:— I agree.

Appeal allowed.

AIR 1970 DELHI 52 (V 57 C 9)

HARDAYAL HARDY AND
S. N. ANDLEY JJ.

Daljit Singh Sadhu Singh, Petitioner v. Union of India through Secy. Ministry of Home Affairs, New Delhi and others, Respondents.

C. W. No. 251 of 1968, D/-21-4-1969.

(A) Constitution of India, Art. 311 (1) — Temporary or quasi-permanent appointment earlier to appointment to substantive post — Latter appointment is to be taken into consideration for purpose of Cl. (1) of Art. 311. (Para 10)

(B) Constitution of India, Art. 311 — Mala fides — Mere delay, though of a long period, between suspension and dismissal, is not sufficient to impute mala fides. (Para 11)

(C) Constitution of India, Art. 311 (2) — Documents material to defence of government servant — Denial of such documents

HM/JM/D516/69/RSK/D

ments amounts to denial of reasonable opportunity. (Para 11)

(D) Constitution of India, Art. 311 (2) (as amended by the Constitution (15th Amendment) Act 1963) — Amendment is not retrospective — Demand for recalling witnesses and their cross-examination made long before amendment — Cross-examination cannot be denied by resorting to amendment. (Para 15)

Cases Referred: Chronological Paras
(1967) 1967 Ser LR 759 (SC), Tirolok
Nath Case 14

(1961) AIR 1961 SC 1623 (V 48) =
1961 Jab LJ 702, State of M. P. v.
Chintaman Sadashiv Waisham-
payan 14

Frank Anthony with C. L. Talwar, for
Petitioner; Brijbans Kishore with J. P.
Gupta, for Respondents.

ORDER:— The petitioner has filed this writ to quash the order dated October 20, 1967 dismissing him after a departmental inquiry. He was appointed as a temporary Lower Division Clerk in the then Federal Public Service Commission on June 10, 1942. On, June 20, 1952, he was given a quasi permanent status as a III Division Clerk with effect from March 17, 1949. This order was issued by D. C. Das, Secretary, Union Public Service Commission. By an order dated December 1, 1958 passed by the Deputy Secretary to the Government of India in the Ministry of Home Affairs, the petitioner was appointed substantively to Grade II of the Central Secretariat Clerical Service with effect from May 1, 1954.

2. The petitioner was suspended on June 2, 1959 and a charge-sheet dated September 9, 1960 was served on him on October 12, 1960. At this time, the petitioner was working as a Cashier in the office of the Union Public Service Commission and he was charged with grave misconduct on the allegation that "during the period from May, 1958 to June 1959 after drawing, on a number of occasions, Government money ostensibly for the purpose of obtaining Bank Drafts", he did not deposit the money in the Reserve Bank of India promptly and "habitually and improperly retained the Government money and made untrue entries in the Cash Book with intent to conceal the improper retention of Government money".

3. On November 4, 1960, the petitioner wrote a letter to the Deputy Secretary to the Government of India in the Ministry of Home Affairs stating that he wanted to inspect and have extracts from documents, lists whereof were forwarded with the letter. The first list was headed "List of documents to be inspected" and enumerated seven documents, details of which it is not necessary to mention. The second list was headed "List of documents copies of which may kindly be supplied". This list

comprised of four items and the last item was "copies of the statements given by Shri S. S. Duggal, Shri E. N. Ramamurti and others, in regard to the case against me." It appears that in response to this request, the Government, by its memorandum dated November 30, 1960 informed the petitioner to contact the Superintendent of Police, Special Police Establishment, New Delhi, who was to afford him facilities to inspect the "relevant documents and to take extracts therefrom". A copy of this memorandum was endorsed to the Special Police Establishment. The documents mentioned in the two lists attached to the petitioner's letter dated November 4, 1960 were not detailed in this memorandum. It appears that the petitioner did take an inspection in the office of the Inspector General of Police, Special Police Establishment, because there is a letter dated December 12, 1960 from the Deputy Inspector General of Police, SPE, to the Government by which the Government was informed that the petitioner had inspected the "relevant documents" on December 2, 1960. In this letter also the details of the documents of which inspection was given to the petitioner are not given.

4. It may here be stated that the main complaint of the petitioner is that he was given neither copies of the statements of S. S. Duggal and E. N. Ramamurti which they had made before the Special Police Establishment in the criminal investigation nor was he given inspection of these statements.

5. On December 20, 1960 the petitioner filed his written statement to the charges. He made a request that the then Drawing and Disbursing Officer, E. N. Ramamurti and the old Drawing and Disbursing Officer S. S. Duggal be called as witnesses in the inquiry. No specific complaint was made in this letter either about the non-furnishing of copies of the statements of these two officers or about inspection of these statements not having been permitted by the Special Police Establishment. The inquiry commenced on April 26, 1961 and, amongst others the aforesaid S. S. Duggal and E. N. Ramamurti were produced as witnesses by the Department but there was no cross-examination by the petitioner on the basis that these two officers had, in their statements, before the Special Police Establishment, admitted that whatever was done by the petitioner was under their directions and orders. The petitioner filed written arguments before the Inquiry Officer from which it appears that his defence was that he was not guilty of the charge because the disbursements made by him of Government money were under the orders of the Drawing and disbursing Officers. In the written arguments also, the petitioner did not complain about the failure of the Govern-

ment to furnish him copies of the aforesaid statements of these two officers or the failure or refusal of the Special Police Establishment to allow him inspection thereof.

6. The Inquiry Officer gave his report on December 20, 1961. In his report, the Inquiry Officer, *inter alia*, observed:—

"I agree with Daljit Singh to the extent that the D. D. O. must not have been quite unaware of so many irregularities occurring in his section. With the surprise checks and the monthly checks there should have been some detection. But at this stage I am not looking into the responsibilities of the D. D. O. nor have I before me any charge against D. D. O. to be examined. I will, therefore, not comment on his share of the responsibility in this transaction. But I can say that whatever his share may be and even if it is the whole share, Daljit Singh's responsibility as Cashier does not diminish because of the responsibility of the D. D. O. and without a doubt Daljit Singh is responsible for all these misappropriations."

... ..

"Nothing has been put forward in evidence to show that any of these misappropriations have been diverted by Daljit Singh to his personal use. When there were so many irregularities, it would have been possible to get some evidence of such misuse of money if really Daljit Singh had been using the money to his private purpose. I am, therefore, inclined to think that Daljit Singh has indulged into this irregular practice rather freely in negligence and over-confidence and used the monies for payment of bills of the Government in an over-lapping manner. The misappropriation seems to me to have arisen more out of confused way of handling the accounts and methods of payment than out of dishonest motives."

The above observations show that the petitioner was pleading justification on the basis of the orders of the Drawing and Disbursing Officers and he was not found guilty of utilising Government property to his private purpose but only of negligence and over-confidence and using the monies for payment of bills of the Government "in an over-lapping manner" rather than out of dishonest motives.

7. The notice to show cause against his proposed dismissal was issued on January 30, 1962. Thereupon, the petitioner wrote to the Government on February 23, 1962 complaining that in spite of his request contained in his letter dated November 4, 1960, most of the documents mentioned therein had neither been shown to him nor had any copies been supplied. He, therefore, requested that the documents listed in this letter may be allowed to be inspected and extracted. One of the items listed was in relation to the statements of S. S. Duggal and E. N. Ramamurti afore-

said. Reminders were issued by the petitioner on 4th and 5th April, 1962 and it was only on April 12, 1962 that copies of these statements were supplied to the petitioner. Various other letters were written by the petitioner to the Government requesting for inspection of other documents and these requests were granted partially by letter of the Government dated October 3, 1962. Then by his letter dated November 7, 1962, the petitioner requested that he may be afforded the opportunity of cross-examining the concerned officials with reference to the documents which had since been disclosed. No reply was sent to the respondent until March 23, 1964 when, relying upon the amendment of Art. 311 (2) of the Constitution which had been brought in by the Constitution (15th Amendment) Act, 1963, the request of the petitioner for cross-examination of the officials was turned down and the petitioner was called upon to file his written representation on the basis of the evidence adduced at the inquiry. The petitioner filed his representation to the show-cause notice on April 21, 1964 and repeated his grievance that copies or inspection of the two statements of S. S. Duggal and E. N. Ramamurti, amongst other documents, had not been furnished to him and that he should be allowed to cross-examine the concerned officials. It was after 3½ years on October 20, 1967, by which time S. S. Duggal had retired, that the Deputy Secretary, Union Public Service Commission, passed the order of dismissal against the petitioner.

8. Against his dismissal, the petitioner filed an appeal to the Secretary, Union Public Service Commission on November 30, 1967 and repeated his aforesaid grievance about inspection and copies. Surprisingly, this appeal is still under consideration and has not been disposed of. The present petition was filed in March, 1968.

9. It will thus be seen that this Grade II Clerk who is the petitioner was given the show-cause notice on January 30, 1962; his request for further cross-examination was not decided until two years later on March 23, 1964 and the order of his dismissal was not passed until 3½ years still later on October 20, 1967 by which time S. S. Duggal had retired and it is this delay, which appears to us to be unreasonable, which has given rise to the argument that the withholding of the order of dismissal was deliberate and *mala fide* to protect S. S. Duggal. The other points raised by the petitioner are that the petitioner had been appointed as a quasi permanent III Division Clerk by an order issued by the Secretary, Union Public Service Commission who, according to the petitioner, was the appointing authority, while the order of his dismissal was passed by the Deputy Secretary, Union Public Service Commis-

sion; the petitioner had not been afforded a reasonable opportunity to defend himself because, inter alia, neither inspection nor copies of the statements of S. S. Duggal and E. N. Ramamurti had been furnished before or during the inquiry thereby disabling the petitioner to prove his case that he was merely obeying the orders and directions of a superior officer and that, even after copies of the statements of the aforesaid persons had been given to him after the show-cause notice, he was not allowed the opportunity of cross-examining the aforesaid two persons.

10. We do not find any substance in the petitioner's contention that he had been dismissed by an authority subordinate to that by which he was appointed and that thereby Cl. (1) of Art. 311 of the Constitution had been violated. "Quasi-permanent service" means temporary service commencing from the date on which a declaration made under Rule 3 takes effect and consists of periods of duty and leave (other than extraordinary leave) after that date (vide Rule 2 (b) Central Civil Services (Temporary Service) Rules, 1965). "Appointing authority" has been defined by Rule 2 (a) of the Central Civil Service (Classification, Control and Appeal) Rules, 1965 as under:—

"'Appointing authority' in relation to a Government servant means—

(i) the authority empowered to make appointments to the Services of which the Government servant is for the time being a member or to the grade of the Service in which the Government servant is for the time being included or

(ii) the authority empowered to make appointments to the post which the Government servant for the time being holds, or

(iii) the authority which appointed the Government servant to such Service, grade or post, as the case may be, or

(iv) where the Government servant having been a permanent member of any other Service or having substantively held any other permanent post, has been in continuous employment of the Government, the authority which appointed him to that Service or to any grade in that Service or to that post, whichever authority is the highest authority."

For the purpose of Cl. (1) of Art. 311, the post which the Government servant holds is to be taken into consideration. The post which the petitioner held substantively was in class III of the Central Secretariat Clerical Service and to this post he was appointed by the Deputy Secretary to the Government of India in the Ministry of Home Affairs as appears from Schedule II, Central Civil Service (Classification, Control and Appeal) Rules, 1965—Part III—Central Civil Services, Class III and it is therein provided that this Deputy Sec-

retary will also be authority competent to impose penalties. The temporary or quasi-permanent appointment of the petitioner earlier to his appointment to the substantive post cannot be taken into consideration for the purpose of Cl. (1) of Art. 311. The order of dismissal having been passed by the Deputy Secretary was perfectly legal and valid and in compliance with this constitutional provision. The dismissal of the petitioner cannot, therefore, be challenged on this ground.

11. Mala fides is imputed to the respondents merely on the ground that almost 8½ years have elapsed between the petitioner's suspension and his dismissal. Although the petitioner has been kept in suspense over this long period, mere delay cannot induce us to give a finding of mala fides against the respondents and we do not find any substance in this ground also.

12. Then it is contended that reasonable opportunity was not afforded to the petitioner either before or during the enquiry in that he was not given inspection or copies of the documents mentioned in his letter dated November 4, 1960 and even after service of the show-cause notice in that he was not allowed to cross-examine the concerned officials including S. S. Duggal and E. N. Ramamurti, after he had been furnished copies of these statements on his demand. The respondents admit that copies of the statements of S. S. Duggal and E. N. Ramamurti were not given to the petitioner but they contend that the petitioner was allowed to and did inspect all relevant documents with the Special Police Establishment before the enquiry and, therefore, the mere non-supply of copies cannot amount to a denial of reasonable opportunity. The petitioner counters this by saying that the Special Police Establishment did not allow him even to inspect the documents that he wanted to inspect as per the annexures to his letter dated November 4, 1960 including the statements made by S. S. Duggal and E. N. Ramamurti. The letter dated November 30, 1960 from the Government to the petitioner which was endorsed to the Special Police Establishment only requests for facilities to inspect "relevant documents". The documents mentioned in the annexures to petitioner's letter dated November 4, 1960 are not detailed in this letter of the Government. The Deputy Inspector General of Police, SPE, in his letter dated December 12, 1960 to the Government merely states that the petitioner has inspected the "relevant documents". It is clear from the petitioner's letters dated February 23, 1962; April 4, 1962 and April 5, 1962, mentioned earlier, that the petitioner had complained that he was not afforded inspection or allowed to make extracts from the statements of S. S. Duggal and E. N. Ramamurti at any stage before or during the

inquiry. This statement was not denied by the respondents by any letter. In fact it appears from a statement made in petitioner's letter dated November 7, 1962 that copies of these two statements were given to him only on April 12, 1962. In these circumstances, we are unable to accept the stand of the respondents that inspection of these two statements had been taken by the petitioner in the Special Police Establishment prior to the inquiry and these two statements are included in the expression "relevant documents".

13. That these two statements were material to the defence of the petitioner cannot be doubted because, according to the petitioner, S. S. Duggal and E. N. Ramamurti stated before the Special Police Establishment that the petitioner had made all disbursements under the orders and directions of the Drawing and Disbursing Officers.

14. In the case reported in AIR 1961 SC 1623 in re: State of Madhya Pradesh v. Chintaman Sadashiva Waishampayan, the Supreme Court has observed:—

"Stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witness examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. The right to cross-examine the witnesses who give evidence against him is a very valuable right, and if it appears that effective exercise of this right has been prevented by the enquiry officer by not giving to the officer relevant documents to which he is entitled, that inevitably would mean that the enquiry had not been held in accordance with rules of natural justice."

In the case of Tirlok Nath (1967) 1 Ser. L. R. 759 (SC), the Supreme Court has held that if the public servant so requires for his defence, he has to be furnished with copies of all the relevant documents, that is, documents sought to be relied on by the Inquiry Officer or required by the public servant for his defence. The right to cross-examine means to cross-examine effectively. In the absence of the copies of these two statements, the petitioner could not confront S. S. Duggal and E. N. Ramamurti when they appeared as witnesses against him in the inquiry with their statements made to the Special Police Establishment. The fact that he in fact did not put any question in cross-examination is of no consequence because, in the absence of the copies, it would certainly have been risky for him to do so. In our view, it is clear that the omis-

sion to allow the petitioner inspection of these two statements or to permit him to take extracts thereof certainly amounted to a denial of a reasonable opportunity.

15. Then it is contended on behalf of the petitioner that this opportunity was denied to him again after the show-cause notice when the copies had been supplied to him at his request by not permitting him to cross-examine these two witnesses at that stage. The respondents contend that when that stage had arrived, clause (2) of Article 311 had been amended by the Constitution (15th Amendment) Act, 1963 and as a result of that amendment, the petitioner had a right of making representation on the penalty proposed but only on the basis of the evidence adduced during such inquiry. The fact remains that the demand for cross-examination was made long before the amendment of Cl. (2) of Art. 311 when he had a right to have witnesses recalled for further cross-examination even on evidence which was made available to him and to produce fresh documents in his defence. The 15th Amendment is not retrospective and the mere fact that the order of dismissal was passed after this amendment had come into force would not entitle the respondents to have recourse to it as an answer to the petitioner's grievance. At the time of the show-cause notice, the petitioner had the right to cross-examine these two witnesses and to produce documents and by refusing to do so, the Government denied him a reasonable opportunity even at the second stage after the show-cause notice. Accordingly, we are of the opinion that the inquiry is vitiated by non-compliance with the principles of natural justice and so is the order of dismissal.

16. In the result, the petition is allowed and the order of dismissal dated October 20, 1967 is hereby quashed. The petitioner will have his costs of this petition. Counsel's fee is assessed at Rs. 200.

Petition allowed.

AIR 1970 DELHI 56 (V 57 C 10)

I. D. DUA C. J.

Uma Datt, Appellant v. R. K. Sardana and another, Respondents.

Ex. Second Appeal No. 4 of 1969 (treated as Cr. R. 236 of 1969), D/-28-4-1969, against order of Addl. Dist. J., Delhi, D/- 17-10-1968).

(A) Civil P. C. (1908), Ss. 2 (2), 47, 104 and 115, O. 21, R. 90 and O. 43, R. 1 (i) — Order on objections by judgment debtor under O. 21, R. 90 — No second appeal lies against order—Appeal can be treated as a revision under S. 115 if no injustice results.

HM/JM/D519/69/TVN/D

By virtue of Section 104 of Civil P. C. read with O. 43, R. 1, CL. (i), no second appeal against an order made in execution proceedings on objections raised by the judgment debtor under O. 21, R. 90 would be competent. Though the auction purchaser is covered by Section 47 as amended, Section 2 (2) excludes from the definition of a 'decree' any adjudication from which an appeal lies as an appeal from an order. The order of executing Court being appealable as an 'order', it cannot be considered as a 'decree'. Though the second appeal is thus incompetent, if there be no objection to the appeal being treated as a revision under Section 115 and if no injustice results to any party, then it can be so treated. (Paras 1 and 2)

(B) Civil P. C. (1908), O. 21, R. 90 — Sale is not to be set aside unless irregularity or fraud is shown to have resulted in substantial injury to judgment debtor — Normally mere inadequacy of price, no ground to set aside sale. (Para 3)

(C) Civil P. C. (1908), O. 21, R. 90, 66, 67, 54 and 68 (Punjab Amendment) — Failure to take possible objections before sale — Fatal to the relief under O. 21, R. 90.

According to the amendment made by the Punjab High Court to R. 90 of O. 21, Civil P. C., no sale is to be set aside on any ground which the applicant could have put forward before the sale was conducted. Objections as to non-compliance of Rr. 66, 67 read with Rr. 54 and 68 of O. 21 are such as could be taken prior to sale. (Para 3)

Bikramjit Nayar, for Appellant; Bakshi Man Singh, for Respondent.

JUDGMENT:— This appeal purporting to be filed under Section 47 of the Code of Civil Procedure, arises out of an order made in execution proceedings on objections raised by the judgment-debtor under O. 21, R. 90 of the said Code. It is obvious that by virtue of Section 104 read with O. 43, R. 1, CL. (i) of the said Code, no second appeal would be competent. The auction purchaser is of course covered by Section 47 as amended, but Section 2 (2) of the Civil P. C. excludes from the definition of a "decree" any adjudication from which an appeal lies as an appeal from an order. The order of the executing Court was appealable as an "order" and, therefore, could not be considered as a "decree".

2. Faced with this difficulty, the learned counsel for the appellant desired this appeal to be treated as a revision. There being no objection to it and no injustice caused to anyone in treating this appeal as a revision under Section 115 of the Code, I am treating it as a revision.

3. Turning now to O. 21, R. 90 of the Code, it is obvious that no sale can be set aside on the ground of irregularity or fraud unless, upon facts proved, the Court is satisfied that the applicant has sustain-

ed substantial injury by reason of such irregularity or fraud. The only grievance which Shri Bikramjit Nayar has ventilated before me is that the sale has been held before the expiry of 30 days from the date on which the copy of the proclamation was affixed on the court-house of the Judge ordering the sale as contemplated by R. 68 of O. 21.

The other two grievances are that the Court has violated the provisions of O. 21, R. 66 and of O. 21, R. 67 read with R. 54 of Civil P. C. All these three grievances, if established—of which I am far from convinced—are, in my opinion, mere irregularities which, in order to enable the judgment-debtor to avoid the sale, must lead to substantial injury. Here, injury means loss which is wrongful. The substantial injury is stated to lie in the property having fetched lesser price than its market value. But assuming the price to be inadequate (and it may be remembered that at Court sales, normally, the property fetches lower than open market price), it must be shown to have been caused as a result of the alleged irregularity. It is well settled that the irregularity and the substantial injury must be correlated with each other as cause and effect, which is, quite clearly, not established in the present case. Injury cannot be inferred from proof of irregularity and mere inadequacy of price is, normally speaking, no ground by itself for setting aside the sale. In the absence of cogent material to the contrary, price fetched at Court sale may well be presumed to be adequate.

Still another fatal objection to the present appellant's grievance is that according to the amendment made by the Punjab High Court to R. 90 of O. 21, Civil P. C., no sale is to be set aside on any ground which the applicant could have put forward before the sale was conducted. It is impossible to argue that in the present case, the judgment-debtor (appellant in this Court and objector in the executing Court) could not have raised this objection before the sale was actually conducted. In any event, there is no such serious infirmity as would justify interference on revision, and indeed even interference on second appeal is somewhat difficult in view of Section 100, Civil P. C. The appeal converted as a revision is, therefore, completely misconceived. Indeed, all these objection proceedings are, in my view, a futile attempt on the part of the judgment-debtor to postpone the evil day, and, if possible, to save the property which could be effectively done only if he had paid the amount at the proper time. Offer by the appellant in this Court now to pay the amount due is highly belated. This revision thus fails and is dismissed with costs.

Petition dismissed.

AIR 1970 DELHI 58 (V 57 C 11)

S. K. KAPUR J.

The Official Liquidator, Peoples Insurance Co. Ltd., Petitioner, Decree-holder v. Mangal Singh and others, Respondents Judgment-Debtors.

Ex. A. No. 8 of 1967 in C. O. No. 7 of 1957, D/-15-5-1969.

Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 8 — Compensation determined — A debt can be attached in execution — (Civil P. C. (1908), O. 21, R. 46). AIR 1958 Punj 436, Dissented from.

Unlike position under the Land Acquisition Act the amount of compensation determined under the Displaced Persons (Compensation and Rehabilitation) Act becomes, by virtue of Section 8, a debt due to the displaced person and can be attached in execution of a decree. The fact that a discretion is left with the authority concerned to pay it in one or other of the modes prescribed cannot effect the position and it remains property notwithstanding the discretion as to the mode of payment. AIR 1960 Punj 474 and AIR 1962 Bom 121 and AIR 1965 Punj 52, Rel. on; AIR 1958 Punj 436, Dissented from; AIR 1938 Lah 533 and (1901) 2 KB 199, Distinguished. (Para 4)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 Punj 52 (V 52) = ILR (1964) 2 Punj 330, Harnam Singh v. D. K. Puri | 3 |
| (1962) AIR 1962 Bom 121 (V 49) = ILR (1962) Bom 94, K. B. Co-op. Credit Bank v. N. S. Verma | 3, 4 |
| (1960) AIR 1960 Punj 474 (V 47) = 62 Pun LR 348, Shri Thakar Dass v. The Chief Settlement Commr. New Delhi | 3 |
| (1958) AIR 1958 Punj 436 (V 45) = ILR (1958) Punj 1099, Tirath Ram Lal Chand v. Mehar Chand Jagan Nath | 2 |
| (1938) AIR 1938 Lah 533 (V 25) = ILR (1938) Lah 548, Sundar Das v. Secy. of State | 2, 4 |
| (1901) (1901) 2 KB 199 = 70 LJKB 632, Spence v. Coleman | 2, 4 |
| K. K. Raizada, for Petitioner; G. S. Vohra, for Respondents. | |

ORDER:— This is an application for execution filed by the Official Liquidator, Peoples Insurance Company Limited (in liquidation) and the decree-holder claims a sum of Rs. 31,400 against the estate of late S. Sardul Singh Caveeshar, now represented by his son Major K. S. Caveeshar, on the basis of the order dated 30th August, 1965, passed by the Punjab

High Court in Letters Patent Appeal No. 114 of 1962, whereby S. Sardul Singh Caveeshar was settled on the list of contributories of Peoples Insurance Company Limited (in liquidation) (hereinafter referred to as 'the company') and a sum of Rs. 31,400 determined as payable by the contributory. The company made an application for attachment before judgment under Order 38, Rule 5, Civil Procedure Code (Petition L. M. No. 66 of 1957) on or about 14th May, 1957, and an order was made attaching the compensation payable to S. Sardul Singh Caveeshar under the Displaced Persons (Compensation and Rehabilitation) Act, 1954. On 16th August, 1967, Jagjit Singh, J., while issuing notice on the execution petition to Major K. S. Caveeshar, ordered that "the Chief Settlement Commissioner, New Delhi, be requested to remit the amount to the Court which has fallen due under the attached claim". Various objections were taken on behalf of Major K. S. Caveeshar to the execution application and on pleadings of the parties as many as ten issues were framed. It is necessary only to refer to issue No. 1 as the learned counsel for Major K. S. Caveeshar confined his arguments only to that and did not touch any other issue. The said first issue reads:—

"Can the Official Liquidator proceed against the claims, which have been verified in the name of Shri Sardul Singh Caveeshar?"

The position as to the claim has been disclosed by Shri Radha Krishan (DHW 1), a Settlement Officer since 25th August, 1962. He said that the total claim verified in favour of late S. Sardul Singh Caveeshar was Rs. 5,63,596; that after adjusting the payment already made, a sum of Rs. 82,844 was payable to S. Sardul Singh Caveeshar; that because of the death of S. Sardul Singh Caveeshar the amount was payable to his estate

"but in view of the directions of this Court we have taken no steps for making payment to anyone. We will have to bring the legal representatives of the deceased on record under Section 9 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, before making the payment. There is now no other impediment in making the payment except (1) bringing the legal representatives under Section 9 on record; and (2) verifying whether or not late Sh. Sardul Singh Caveeshar made any other commitment with respect to his claim by way of association before the receipt of the order of attachment from this Court"; and that the Department had no objection to the attachment "but we have to verify the net amount due to Shri Sardul Singh Caveeshar's estate after meeting the com-

mitments, if any, made by him before the receipt of the attachment order."

2. The only point raised by Mr. Vohra, the learned counsel for Major K. S. Caveeshar, was that the compensation payable to a displaced person, not being a property, could not be attached. Section 8 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, deals with the form and manner of payment of compensation. This section provides that

"a displaced person shall be paid out of the compensation pool the amount of net compensation determined under subsection (3) of Section 7 as being payable to him and subject to any rules that may be made under this Act, the Settlement Commissioner or any other officer or authority authorised by the Chief Settlement Commissioner in this behalf may make such payment in any one of the following forms or partly in one and partly in any other form, namely....."

The section then sets out the various forms in which the payment may be made, such as, in cash or in Government bonds or by sale to the displaced person of any property from the compensation pool and setting off the purchase money against the compensation payable to him. Section 14 provides for the constitution of a compensation pool and also about what the compensation pool shall consist of. Section 15 exempts the property in compensation pool from processes of Courts and provides—

"No property which forms part of the compensation pool and which is vested in the Central Government under the provisions of this Act shall be liable to be proceeded against for any claim in any manner whatsoever in execution of any decree or order or by other process of any Court or other authority."

Mr. Vohra argued that the effect of these provisions was to render the compensation payable to a displaced person immune from any attachment. He said that till the mode of payment had been determined under Section 8, there was no debt due to a displaced person that could be attached. Reliance was placed by Mr. Vohra on *Tirath Ram Lal Chand v. Mehar Chand Jagan Nath*, AIR 1958 Punj 436, in which K. L. Gosain, J., decided—

"It cannot, therefore, be said at this stage whether the Government will pay any amount at all in cash nor can it be said as to what form the compensation will ultimately take. At the moment, therefore, the Government cannot be deemed to have become the debtor qua any particular sum payable by it nor can the claimants be deemed to be creditors qua the said amount. Till the Government make a tender of any cash amount the money lying in the compensation pool remains part of that pool and is in my

opinion exempt from attachment under the provisions of Section 15 of the aforesaid Act."

Gosain, J., relied on *Sunder Das v. Secretary of State*, AIR 1938 Lah 533 and *Spence v. Coleman*, (1901) 2 KB 199. Mr. Vohra also depended on these two decisions.

3. Mr. Raizada, the learned counsel for the decree-holder, on the other hand, referred to *Shri Thakar Dass v. Chief Settlement Commr.*, New Delhi, 1960-62 Pun LR 348 = (AIR 1960 Punj 474); *K. B. Co-operative Credit Bank v. N. S. Verma*, AIR 1962 Bom 121 and *Harnam Singh v. D. K. Puri*, AIR 1965 Punj 52. In *Thakar Dass's* case, 62 Pun LR 348 = (AIR 1960 Punj 474) the judgment of Gosain, J., does not appear to have been placed before Mahajan, J. Mahajan J., decided that after the determination of the amount of compensation there is no option left to the Department but to pay the same. The manner of payment has no doubt been left to the discretion of the authority concerned but it cannot be withheld and, therefore, "the right to receive compensation is certainly property as creditor's right to recover a debt is property". The compensation due was consequently held to vest in the Official Receiver by operation of law. In *Harnam Singh's* case, AIR 1965 Punj 52 a Division Bench of the Punjab High Court dissented from the view taken by Gosain, J., and approved that of the Bombay High Court in *K. B. Co-operative Credit Bank's* case, AIR 1962 Bom 121.

The view of Mahajan, J., was also approved. In *K. B. Co-operative Credit Bank's* case, AIR 1962 Bom 121 Patel, J., held:

"Reading Sections 7 and 8, it is clear that once the amount of net compensation payable to the displaced person is determined, the Government is bound to make the payment in accordance with the provisions of Section 8. How it will discharge the payment is no doubt within the discretion of the officer concerned, but the amount must be paid and there cannot be any evasion of the payment. It is, therefore, clear that the Legislature intended that once the amount payable was determined, it became a debt payable to the displaced person. Ordinarily a debt is payable in money and not in kind. The Legislature made an exception to this ordinary rule and provided that it could be discharged in one or more of the several modes provided in Section 8. Nonetheless, in view of the obligatory nature of the duty to make the payment, it must be regarded as a debt."

4. Now it remains to consider the decisions relied upon by Mr. Vohra. In *Sunder Das's* case, AIR 1938 Lah 533 the Lahore High Court decided that the compensation money awarded under the Land Acquisition Act could not be attached by a cre-

ditor until the amount was tendered under Section 31 of the Land Acquisition Act because money in the hands of the Collector belonged to the Government until the tender was made. As observed by Patel, J. in *K. B. Co-operative Credit Bank's case*, AIR 1962 Bom 121 it is not possible to ascertain from the statement of facts as to whether possession had been taken by the Collector in the acquisition proceedings. Under Section 48 of the Land Acquisition Act, it is open to the Government, except in the case provided for in Section 36, to withdraw from the acquisition of any land of which possession has not been taken. In any case, even if Section 31 be susceptible to the construction placed by the Lahore High Court, it bears no analogy to the provisions of the Act under consideration. The determining factor always is whether there is a debt due to the person whose property is sought to be attached. The ratio of the Lahore High Court decision also is the same, which appears from the following observation:—

"The Land Acquisition Act is a complete Code in itself, and until the tender is made, the person whose land has been acquired, does not become a creditor or the Collector a debtor."

That position does not obtain under the Displaced Persons (Compensation and Rehabilitation) Act. The amount of compensation determined, and which has been determined in this case, becomes, by virtue of Section 8, a debt due to the displaced person. The fact that a discretion is left with the authority concerned to pay it in one or other of the modes prescribed cannot affect the position and it remains property notwithstanding the discretion as to the mode of payment. The case of (1901) 2 KB 199 is also distinguishable on the same ground. There also the Court decided on the construction of the relevant provisions of law that there was no debt due to the judgment-debtor. Patel, J. in the Bombay case has distinguished *Spence's case*, (1901) 2 KB 199 and I am in respectful agreement with the same. In my opinion, therefore, there is no force in Mr. Vohra's contention and the compensation payable to the estate of late S. Sardul Singh Caveeshar is a property capable of attachment.

5. That leaves the question of mode of realisation. The discretion as to the mode of payment vests in the authorities concerned. I would, therefore, appoint the Official Liquidator as Receiver to realise the payment, to the extent due to the company, from the authorities under the Displaced Persons (Compensation and Rehabilitation) Act in the same manner as it would have been paid to S. Sardul Singh Caveeshar. The Receiver being the Official Liquidator will not be entitled to any extra remuneration for this work.

6. The execution application is, therefore, allowed but with no order as to costs. Execution application allowed.

AIR 1970 DELHI 60 (V 57 C 12)

I. D. DUA C. J. AND
V. S. DESHPANDE J.

Fedders Lloyd Corporation (Pvt.) Ltd.,
Petitioner v. Lt. Governor, Delhi through
Under Secy. (Labour), Delhi and others,
Respondents.

C. W. No. 100 of 1969, D/- 28-5-1969.

(A) Industrial Disputes Act (1947), Sections 8, 7 — Vacancy — Vacancy has to be permanent one — Presiding officer going on leave — Office is not demitted during leave — Held notification appointing another person as presiding officer of same labour Court during leave of its Presiding Officer could not be regarded as one under S. 8 — Further held that since notification did not constitute new labour Court it could not be considered as one under S. 7 also. (Paras 7, 8)

(B) Industrial Disputes Act (1947), Sections 10, 2 (k) — Reference under S. 10 — Demand by workmen must be raised first on Management and rejected by them before industrial dispute can be said to arise and exist — Making of such demand to Conciliation Officer and its communication by him to Management who reject the same is not sufficient to constitute industrial dispute: AIR 1968 SC 529, Foll. (Para 13)

(C) Industrial Disputes Act (1947) (as amended by Act 35 of 1965), S. 2-A — Relevant provisions in the Act referring to "workmen" would have to be construed as including "workman" so that S. 2-A is harmonised with rest of provisions of the Act — Section 2-A cannot be said to be repealed by any older provision in the Act — It is also not ultra vires the Parliament — Parliament had power to enact it either under Entry 22 of Concurrent List or under Entry 97 of Union List read with Art. 248 of Constitution. (Para 14)

(D) Civil P. C. (1908), Pre. — Interpretation of Statutes — Implied repeal — It can only be of an older provision by a later provision. (Para 14)

(E) Industrial Disputes Act (1947), Section 2 (k) — Word "non-employment" — It would include retrenchment as well as refusal to reinstate. AIR 1949 FC 111 (114, 115) & (1965) 2 Lab LJ 268 (276, 277) (Gui), Rel. on. (Para 15)

Cases Referred: Chronological Paras
(1969) AIR 1969 Raj 95 (V 56) =
1968-2 Lab LJ 682, Goodyear
(India) Ltd. v. Industrial Tribunal
Rajasthan, Jaipur

- (1969) L. P. A. No. 65 of 1968, D/-
18-3-1969 (Delhi) 5, 13
- (1968) AIR 1968 SC 453 (V 55) =
1968-2 SCJ 253, Alok Kumar v.
Dr. S. N. Sharma 7
- (1968) AIR 1968 SC 529 (V 55) =
1968 Lab IC 526, Sindhu Resettle-
ment-Corporation v. Industrial
Tribunal, Gujarat 5, 12, 13
- (1968) C. W. No. 1061 of 1967, D/-
14-8-1968 (Delhi), Toshniwal Bros.
Pvt. Ltd. v. Lt. Governor,
Delhi 5, 13
- (1965) 1965-2 Lab LJ 268 (Guj),
Sindhu Resettlement Corpn. v.
Industrial Tribunal 13, 15
- (1952) AIR 1952 Pat 56 (V 39) =
1952-1 Lab LJ 493, Standard Coal
Co. v. S. P. Verma 13
- (1951) AIR 1951 SC 230 (V 38) =
1951 SCR 380, United Commercial
Bank v. Their Workmen 7
- (1951) AIR 1951 Mad 616 (V 38) =
1949-2 Mad LJ 789, Kandan Textile
Ltd. v. Industrial Tribunal, Madras 13
- (1949) AIR 1949 FC 111 (V 36) =
1949 Lab LJ 245, Western India
Automobile Association v. Industrial
Tribunal, Bombay 15
- S. N. Bhandari with Y. K. Mathur, for
Petitioner.

ORDER:— This writ petition is directed against the order of the Delhi Administration passed on the 28th November, 1968 under Sections 10 (1) (c) and 12 (5) of the Industrial Disputes Act, 1947, (herein-after called 'the Act'), copy of which being annexure 'A' to the writ petition, referring to the Labour Court at Delhi, presided over by Shri R. K. Baweja, the following industrial dispute:

"Whether the non-employment of Shri Ajab Singh is unjustified and/or illegal and if so, to what relief is he entitled?"

2. The undisputed facts leading to the above reference are as follows: Respondent No. 3 Ajab Singh was employed by the petitioner company as Security Officer from 22-11-1961 till 4-7-1967, when he is said to have expressed his inability to work and resigned. He was, therefore, relieved of his duties on 4-7-1967. On 31-8-1967 ex gratia payment was made to respondent No. 3 on the basis of compensation generally paid to workers who are retrenched from service. Respondent No. 3 accepted the payment and gave receipt in full and final settlement of all his claims. On 18-11-1967, respondent No. 3 requested for a service certificate which was issued by the petitioner-company, a copy being at annexure 'C' to the written statement. The petitioner-company has stated therein that respondent No. 3 had resigned from service and he has endorsed thereon that he received the certificate with thanks. Respondent No. 3 did not thereafter make any demand on the peti-

tioner-company directly. He, however, appears to have written to the Labour Commissioner Delhi a letter, as per annexure 'D' to the written statement, on 10-1-1968 stating that an industrial dispute existed between him and the petitioner-company and it was expedient that the matters specified in the enclosed statement should be referred to industrial adjudication. In the attached statement, it was stated that respondent No. 3's services were terminated by way of retrenchment by the petitioner-company and that the said retrenchment was wrongful and arbitrary. It was prayed that the said retrenchment should be set aside and respondent No. 3 should be reinstated in the service.

3. The petitioner came to know of the above only when a notice was received by it on 12-1-1968 from the Conciliation Officer, Delhi, calling upon the petitioner-company to appear before the Conciliation Officer on 17-1-1968. The petitioner company resisted the claim of respondent No. 3 during the conciliation proceedings on the ground that there was no industrial dispute between the parties which could be referred to industrial adjudication. Nevertheless, the Delhi Administration made order of reference reproduced above. This order of reference was challenged by the petitioner-company on the following grounds:—

- (1) The reference to the Labour Court presided over by Shri R. K. Baweja was invalid inasmuch as Shri Baweja was on leave from 26th November, 1968 to the 1st of January, 1969 and during this period Shri Desh Deepak was appointed as the presiding officer of the Labour Court by an order dated 12-12-1968 at annexure 'B' to the writ petition;
- (2) Respondent No. 3 did not raise any dispute with the petitioner-company and hence respondent No. 1 Lt. Governor of Delhi, was not competent to refer the dispute to the Labour Court;
- (3) The dispute, if any, between individual workman, like respondent No. 3 and the petitioner-company, is not an industrial dispute and cannot be referred to adjudication. Section 2-A of the Industrial Disputes Act, 1947 authorising such reference is bad and ultra vires; and
- (4) The terms of the reference are so vague that no adjudication can take place on the basis of it.

4. In resisting the writ petition, respondent No. 3 reiterated that he did not resign but was retrenched from service and was paid retrenchment compensation. He also stated that he had requested the petitioner-company several times to reinstate him in service and that it was after

the refusal to do so that he approached the Conciliation Officer. He averred that his retrenchment was illegal as Security Officers, who were junior to him were retained in service. He supported the order of reference as being valid.

5. It is the second contention urged by the petitioner which made this reference to the Division Bench necessary as certain High Court decisions and a general observation of a learned single Judge of this Court in the *Management of Toshniwal Bros. Pvt. Ltd. v. Lt. Governor, Delhi*, C. W. No. 1061 of 1967, D/-14-8-1968 (Delhi) and of the Letters Patent Bench consisting of two of us in L. P. A. No. 65 of 1968, D/- 18-3-1969 (Delhi) had to be re-examined in the light of the *Sindhu Resettlement Corporation v. Industrial Tribunal Gujarat*, AIR 1968 SC 529. We, therefore, proceed to consider the pros and cons of the above mentioned contentions of the petitioner-company below.

6. Reading the order dated 28-11-1968 with the order dated 12-12-1968, it is clear that the Labour Court is presided over by Shri R. K. Baweja and that he does not cease to be the presiding officer of the Labour Court during the period of his leave. This is why the reference of the dispute has been made to the Labour Court presided over by Shri R. K. Baweja on 28-11-1968, though he had proceeded on leave from 26-11-1968 to 1st of January, 1969. Under sub-section (3) of Section 20 of the Act, the proceeding before the Labour Court is deemed to have commenced on the date of the reference. This, however, is a commencement in the eye of law only. Physically, the order of reference may not reach the Labour Court on the same day and the parties to the dispute would not be before the Labour Court from the same date. This does not, however, prevent the pendency of the dispute before the Labour Court beginning from the date of the reference. Under Rule 10-B (1) of the Industrial Disputes (Central) Rules, 1957 (hereinafter called 'the Rules'), the workmen have to file with the Labour Court a statement of their demands included in the order of reference within two weeks after receiving the order of reference. Under Rule 10-B (2) the opposite party has to file a reply within the next two weeks. Under Rule 10-B (3) the Labour Court shall ordinarily fix the date for the first hearing of the dispute within six weeks of the date on which the dispute was referred to it for adjudication, provided that for reasons to be recorded in writing, it can fix a later date for the first hearing of the dispute. The statements in the present case, could, therefore, be filed in the Labour Court presided over by Shri R. K. Baweja and he could have fixed the date for hearing of the case on his return from leave in com-

pliance with the above provisions of law. The reference was properly made to him and he was in a position to adjudicate upon the same.

7. The only disturbing element in the situation is the order dated 12-12-1968 by which Shri Desh Deepak is appointed as the presiding officer of the same Labour Court from 26-11-1968 to 1-1-1969, vice Shri R. K. Baweja on leave. Under Section 7 (1), the appropriate Government may constitute one or more Labour Courts. The Labour Court presided over by Shri Baweja is one such Labour Court. Under Section 7 (2) a Labour Court shall consist of one person only to be appointed by the appropriate Government. It is, thus, clear that at one time one Labour Court can be presided over only by one person. Therefore, Shri Baweja and Shri Desh Deepak cannot be said to be simultaneously presiding over this Labour Court between 26-11-1968 and 1-1-1969. The intention of the Government that Shri Baweja continues to preside over this Labour Court during the period of leave is clear from the fact that on 28-11-1968 the Government referred the dispute to the Labour Court at present presided over by Shri R. K. Baweja. The appointment of Shri Desh Deepak is purported to be made under Section 8 of the Act. Section 8, however, refers to the filling of vacancies. It distinguishes a vacancy from a temporary absence. The absence of Shri Baweja on leave from actually doing the work of a Labour Court must be regarded as a temporary absence, inasmuch as the absence was not only for a short period, but after the leave Shri Baweja was to resume work and during the leave also he was to continue to remain to be the presiding officer of the Labour Court. In *United Commercial Bank v. Their Workmen*, AIR 1951 SC 230 paragraphs (7) to (10), Kania C. J., speaking for the majority of the Court discussed when a vacancy can be said to arise within the meaning of Section 8 and when it does not arise due to a temporary absence of a member of the Tribunal. The absence of Shri Chandrashekar Iyer J. in that case could not be considered to be temporary firstly because he was appointed a whole time member of another Tribunal and secondly, initially it was not known how long he would continue to do the other duty. In *Alok Kumar v. Dr. S. N. Sharma*, AIR 1968 SC 453, the Supreme Court pointed out that a High Court Judge appointed to do another whole time work could not act as a High Court Judge so long as the other work lasted. In the *United Commercial Bank's case*, AIR 1951 SC 230 therefore, a vacancy within the meaning of Section 8 had arisen. In the present case, on the other hand, Shri Baweja was merely on leave and it is well known that a leave is merely a period of

rest and recreation, but the office is not demitted during leave. The reason for the insertion of the words "other than a temporary absence" after the word "vacancy" in Section 8 by the amending Act 36 of 1956 was to clarify that a vacancy must be a permanent one and is not caused by the temporary absence of the presiding officer. The amendment, thus, seems to have given effect to the view of the Supreme Court expressed in the United Commercial Bank's case, AIR 1951 SC 230. For, when a vacancy is filled under Section 8 of the Act proceeding is continued from the stage at which the vacancy is filled. The intention obviously is to make a permanent arrangement necessitated by the occurrence of a permanent vacancy. It is obvious that there was no "vacancy" within the meaning of Section 8 caused by the going on leave of Shri R. K. Baweja for a period of 34 days. The appointment of Shri Deepak as a presiding officer of the same Labour Court for these 34 days could not then be regarded as being made under Section 8 though the Government Notification dated 12-12-1968 purports to do so.

8. We further consider whether the notification dated 12-12-1968 could be construed to be one under Section 7 assuming that the mention of Section 8 therein was wrong. A notification under Section 7 would have to be for the constitution of another Labour Court, inasmuch as the Labour Court presided over by Shri Baweja still continued. The notification dated 12-12-1968 does not constitute a new Labour Court presided over by Shri Desh Deepak and cannot, therefore, be upheld under Section 7 also.

9. We appreciate the desire of the Government to make some provision for the performance of the work of the Labour Court during the temporary absence of leave of its presiding officer, but the method adopted by the Government in the present case to achieve this purpose does not seem to be the right one. It is for the Government to consider if at all the object could have been achieved in some other way such as by the Constitution of a separate Labour Court presided over by Shri Desh Deepak under Section 7 of the Act for the specified period and then by making an order under Section 33-B that the cases before the second Court should after these 34 days be transferred to the Court of Shri Baweja.

10. The notification dated 12-12-1968 being unsupportable either under Sec. 8 or Section 7 of the Act, the appointment of Shri Desh Deepak seems to be invalid. However, from 1-1-1969 Shri Baweja came back from leave and is actually presiding over the Labour Court. This reference which was made to him by name can be adjudicated upon by him. If during his

leave any initial handling of this reference, such as issuing of notices to the parties was made by Shri Desh Deepak, it does not affect the jurisdiction of Shri Baweja to adjudicate on this reference. Even if the petitioner-company were to ignore whatever steps were taken by Shri Desh Deepak, all that would happen is that Shri Baweja may have to issue notices again to the petitioner-company. Fundamentally, the jurisdiction of Shri Baweja to adjudicate on the reference is not affected by the order of the Government dated 12-12-1968.

11. Under Section 10 (1) of the Act, the appropriate Government is empowered to make a reference if it is of the opinion that an industrial dispute either exists or is apprehended. The reference at annexure 'A' to the petition is of an existing industrial dispute. We are not, therefore, concerned in this case with any apprehended dispute. The question is whether an industrial dispute existed before it was referred to the Labour Court. Section 2 (k) of the Act defining an "industrial dispute" refers to a dispute or difference. This means that one party asserts something, which is denied by the other or that the demand of one party is refused by the other. Preamble of the Act says that the Act makes provision for the investigation and settlement of Industrial Disputes. Chapter II of the Act constitutes certain authorities to compose any material difference of opinion or to settle industrial disputes between the employers and the employees. Such authorities include Conciliation Officers as well as the Labour Courts. In Chapter III of the Act, Section 10 deals with the reference of the disputes by the appropriate Government for settlement to the authorities under the Act and Section 10-A deals with voluntary reference of the disputes by the parties to arbitration. Chapter IV has laid down the procedure, powers and duties of the authorities in dealing with industrial disputes. From the scheme of the Act, therefore, it is clear that an industrial dispute must exist or must be apprehended before it can be referred by the appropriate Government under Section 10 (1) to the authorities mentioned therein. Section 12 which deals with the duties of the Conciliation Officer pre-supposes that an industrial dispute exists or is apprehended before the Conciliation Officer can deal with it thereunder. It does not contemplate that an Industrial dispute can arise for the first time during the proceedings before the Conciliation Officer. When the parties are unable to settle the dispute between themselves, an application is made under sub-section (2) of Section 10 of the Act for reference of the dispute to an authority under the Act by the appropriate Government. The contents of such an application are to include, according to

R. 3 (e) of the Rules, the efforts made by the parties themselves to adjust the dispute. This would also show that a dispute must exist between the parties before an approach is made to the appropriate Government for reference of the dispute to adjudication. The application made by respondent No. 3 in the present case is at annexure 'D' of the writ petition. It begins by saying that an industrial dispute exists between the parties. But the particulars of the dispute given in accordance with the requirements of Rule 3 are significantly silent about any demand made by respondent No. 3 against the petitioner-company. It does not say that any effort was made by respondent No. 3 to settle any dispute with the petitioner-company. The inference that arises is that no demand whatever was made by respondent No. 3 on the petitioner-company before he applied under Section 10 (2) to the appropriate Government, for such reference of the dispute for adjudication. Respondent No. 3 has not placed any documentary evidence on the record that he made demand on the petitioner-company before making the application under Section 10 (2). The referring Judge, therefore, called for the proceedings before the Conciliation Officer and found that the same application under Section 10 (2) was before the Conciliation Officer. The claim of respondent No. 3 was sent by the Conciliation Officer to the management for comments, but no comments were received in writing. The matter was, however, orally discussed and the management conveyed to the Conciliation Officer their defence on merits. As there was no possibility of settlement, the Conciliation proceedings were closed and a report was made by the Conciliation Officer to the Government. Under Section 12 (5) of the Act on a consideration of this report, the Government was satisfied that there was a case for reference to the Labour Court and accordingly the reference at annexure 'A' to the petition was made.

12. The petitioner-company relies upon the Supreme Court decision in AIR 1968 SC 529, for the proposition that the reference is incompetent as no industrial dispute existed between the parties prior to the reference. In that case the demand on the management related only to retrenchment compensation and not to reinstatement. The Supreme Court, therefore, observed in paragraph (4) of the judgment as follows:—

"Since no such dispute about reinstatement was raised by either of the respondents before the management of the appellant, it is clear that the State Government was not competent to refer a question of reinstatement as an industrial dispute for adjudication by the Tribunal. The dispute that the State Government could have referred competently was the

dispute relating to payment of retrenchment compensation by the appellant to respondent No. 3 which had been refused. No doubt, the order of the State Government making the reference mentions that the Government had considered the report submitted by the Conciliation Officer under sub-section (4) of Section 12 of the Industrial Disputes Act, in respect of the dispute between the appellant and workmen employed under it, over the demand mentioned in the Schedule appended to that order; and, in the Schedule, the Government mentioned that the dispute was that of reinstatement of respondent No. 3 in the service of the appellant and payment of his wages from 21st February, 1958. It was urged by Mr. Gopalakrishnan on behalf of the respondents that this Court cannot examine whether the Government, in forming its opinion that an industrial dispute exists, came to its view correctly or incorrectly on the material before it. This proposition is, no doubt, correct, but the aspect that is being examined is entirely different. It may be that the Conciliation Officer reported to the Government that an industrial dispute did exist relating to the reinstatement of respondent No. 3 and payment of wages to him from 21st February, 1958, but when the dispute came up for adjudication before the Tribunal the evidence produced clearly showed that no such dispute had ever been raised by either respondent with the management of the appellant. If no dispute at all was raised by the respondents, with the management, any request sent by them to the Government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, as defined, must be a dispute between employers and employees, employers and workmen, and workmen and workmen. A mere demand to a Government, without a dispute being raised by the workmen with their employer, cannot become an industrial dispute. Consequently, the material before the Tribunal clearly showed that no such industrial dispute, as was purported to be referred by the State Government to the Tribunal, had ever existed between the appellant Corporation and the respondents and the State Government, in making a reference, obviously committed an error in basing its opinion on material which was not relevant to the formation of opinion. The Government had to come to an opinion that an industrial dispute did exist and that opinion could only be formed on the basis that there was a dispute between the appellant and the respondent relating to reinstatement. Such material could not possibly exist when, as early as March and July, 1958, respondent No. 3 and respondent No. 2 respectively had confined their demands to the management to retrench-

ment compensation only and did not make any demand for reinstatement. On these facts, it is clear that the reference made by the Government was not competent. The only reference that the Government could have made had to be related to payment of retrenchment compensation which was the only subject-matter of dispute between the appellant and the respondents."

13. In our anxiety to understand precisely what the Supreme Court meant I studied the whole of their decision and also the Gujarat High Court decision reported in (1965) 2 Lab LJ 268 (Guj.) which was reversed by the Supreme Court. At page 271 of the report of the Gujarat High Court Judgment it is stated that respondent No. 3 had made a complaint to his Union, respondent No. 2, who thereupon presented the demand to the Corporation for the reinstatement of respondent No. 3. But the Supreme Court has held that the evidence before the Tribunal clearly showed that no such demand was made by the workmen concerned or by the Union on the Management of the Sindhu Resettlement Corporation and I feel bound to accept this later position. The Supreme Court has also clarified that even if the Conciliation Officer found that an industrial dispute existed and so reported to the Government, this could not be regarded as the existence of the industrial dispute which has to be founded upon a demand by the workmen on the employers. If this is the ratio of the Supreme Court decision, it cannot be said that an industrial dispute existed in the present case as no demand was made by respondent No. 3 on the petitioner-company before he made an application under Section 10 (2) for reference. In that event the fact that the demand of respondent No. 3 was forwarded by the Conciliation Officer to the petitioner-company and was not accepted by the latter would not constitute an industrial dispute. The observation in *Standard Coal Company v. S. P. Verma*, AIR 1952 Pat 56, in paragraph (15), that

"where workers may consider it wholly useless to make a demand on the management and prefer to move the appropriate machinery set up by the Government for the redress of their grievances it will be an industrial dispute"

may not be correct if it is opposed to the above Supreme Court decision. In *Goodyear (India) Limited v. Industrial Tribunal Rajasthan, Jaipur*, (1968) 2 Lab LJ 682 at p. 698 = (AIR 1969 Raj 95 at p. 105) Mehta J., purported to distinguish the decision of the Supreme Court in AIR 1968 SC 529 referred to above, on the ground that in the case before him the employee had made an application to the Conciliation Officer challenging the termi-

nation of his services and requesting for reinstatement and the employer opposed the reinstatement. The learned Judge did not consider that in the Supreme Court case also the application to the Conciliation Officer had been made. In accordance with the usual procedure the comments of the employer on the said application might have been called for by the Conciliation Officer and at this stage the employer may have opposed the demand for reinstatement. Nevertheless, the Supreme Court held that no industrial dispute regarding reinstatement existed. We have re-examined our decision in LPA 65 of 1968 (Delhi) referred to above, dismissing the appeal against the decision of Kapur J. in that case in C. W. No. 1061 of 1968, D/- 14-8-1968 (Delhi). We find that in that case a demand by some workmen including all the workmen of the subordinate staff had at first been made on the Management and was refused by the Management. That dispute was not referred to industrial adjudication, inasmuch as it had not been supported by a substantial number of workmen, but later the same industrial dispute in respect of the subordinate staff only was referred to industrial adjudication as between the management and the subordinate staff only. The subordinate staff did not repeat their demands to the management again before the reference was made. But the demand of the subordinate staff was included in the first demand made by them and some others on the Management. In that case, therefore, an industrial dispute between the subordinate staff and the management had come into existence before the said industrial dispute was referred to adjudication by the management. It is not quite clear if the following observation of Mack, J. in *Kandan Textile Ltd. v. Industrial Tribunal, Madras*, AIR 1951 Mad 616 paragraph 26, takes the view that a demand not directly made on the Management could be made on the Labour Commissioner and would still constitute an industrial dispute. The observation is as follows:—

"This may have been in law an industrial dispute brought as it was to the notice of the Government by one of its responsible officers, which would have justified a reference to a Tribunal of a dispute of very limited scope."

We are of the view that the decision of the Supreme Court in AIR 1968 SC 529 referred to above, has finally established the proposition that a demand by the workmen must be raised first on the Management and rejected by them before an industrial dispute can be said to arise and exist and that the making of such a demand to the Conciliation Officer and its communication by him to the Management, who reject the same is not sufficient to constitute an industrial dispute. The

decisions and dicta of some of the High Courts to the contrary can no longer be considered good law.

14. It is clear that Section 2-A enables the Government to refer to adjudication an industrial dispute between an individual workman and his employer. The previous view that an industrial dispute must be between the employer on the one side and the workmen collectively on the other side or at any rate the dispute of an individual workman must be sponsored collectively by the other workmen to constitute an industrial dispute is to that extent superseded by legislation. It is true that the insertion of Section 2-A in the Act was not accompanied by consequential changes in the Act to make it clear that even a dispute between a single workman and the employer can constitute an industrial dispute. But the relevant provisions in the Act referring to "workmen" would henceforth have to be construed as including "workman", so that Section 2-A is harmonised with the rest of the provisions of the Act. At any rate Section 2-A being a later provision is in no danger of being impliedly repealed by the older provisions. The implied repeal can only be of an older provision by a later provision. Further, the expression "industrial dispute" as used in Entry 29 of the Concurrent Legislative List in the Government of India Act, 1935 was not based on any judicial decisions construing the said expression as relating only to a dispute between the workmen collectively and their employer. It cannot be said, therefore, that the use of the said expression in the Act necessarily meant a dispute between the employer and the workmen collectively. Entry 22 of the Concurrent List of the Constitution, therefore, did not use the said expression as being restricted to disputes of workmen collectively. Parliament was, therefore, competent to enact Section 2-A under Entry 22 of the Concurrent List of the Constitution. Even if it is assumed for the sake of argument that entry 22 of the Concurrent List was not wide enough to include the dispute of an individual workman with his employer, Parliament could legislate about such an individual dispute under the residuary entry 97 of the Union List read with Article 248 of the Constitution, on the ground that the subject fell outside the Concurrent List and the State List of the Constitution and the Parliament had therefore, unrestricted power to legislate upon it. This contention has therefore, no substance.

15. The claim of respondent No. 3 in annexure 'D' is for the setting aside of the retrenchment and for the reinstatement. According to his learned counsel it is covered by Items 3 and 6 of the Second Schedules and item 10 of the Third Schedule of the Act. The learned counsel

for the petitioner, however, contends that the word "non-employment" used in the reference is vague. This argument overlooks the fact that the very definition of "industrial dispute" in Section 2 (k) of the Act says that the dispute or difference which is connected with "the employment or non-employment" is an industrial dispute. The word "non-employment" would, therefore, include retrenchment as well as refusal to reinstate, which is the grievance of respondent No. 3. We are fortified in this view by the decision of the Federal Court in *Western India Automobile Association v. Industrial Tribunal, Bombay*, 1949 Lab LJ 245 at pp. 248 and 249 = (AIR 1949 FC 111 at pp. 114, 115) and the Gujarat High Court decision in *Sindhu Resettlement Corporation v. Industrial Tribunal*, (1965) 2 Lab LJ 268 at pp. 276 and 277 (Guj) which was not reversed by the Supreme Court on this point.

16. For the above reasons, we quash and set aside the order of reference dated 28-11-1968, copy of which is at annexure 'A' to the writ petition, and direct the Labour Court, Delhi, presided over by Shri R. K. Bawaja not to entertain the same. We make no order as to costs.
Petition allowed.

AIR 1970 DELHI 66 (V 57 C 13)

T. V. R. TATACHARI J.

S. Harnam Singh and others, Petitioners v. Lieutenant Governor, Delhi and another, Respondents.

Civil Writ Petn. No. 560 of 1967, D/- 29-5-1969.

(A) Requisitioning and Acquisition of Immoveable Property Act (1952), S. 3 (1) and Cl. (a) of first proviso to sub-s. (2) — Property used by owner for commercial purpose is not excepted under the proviso — Premises used by owner for commercial purpose — Order, requisitioning premises for accommodating Government servant cannot be quashed. (Para 12)

(B) Requisitioning and Acquisition of Immoveable Property Act (1952), S. 3 — Notice of requisition — Claim by owners that they were bona fide using premises as residence for themselves and their families on date on which notice was served — Burden is on owners to prove requirements of Cl. (a) of 1st proviso to sub-section (2) of S. 3 — Mere fact that rations were drawn on the card issued in favour of the owner does not necessarily establish by itself that the owners were actually residing in the premises at the material time. (Para 14)

(C) Constitution of India, Art. 226 — Error apparent on face of record — Errors in appreciation of documentary evidence

or errors in drawing inferences cannot be said to be errors of law, and can be corrected only by a Court by sitting as a Court of appeal and not under Art. 226. AIR 1960 SC 1168, Foll. (Para 19)

Cases Referred: Chronological Paras
(1960) AIR 1960 SC 1168 (V 47),

Kaushalya Devi v. Bachittar Singh

19

Shiv Charan Singh, for Petitioners; Brij Bansh Kishore, for Respondents.

ORDER:— This writ petition has been filed by S. Harnam Singh and his four sons, namely, Nirmal Singh, Ishar Singh, Harminder Singh and Jagjit Singh (petitioners 1 to 5), against the Lt. Governor, Delhi (respondent No. 1) and Shri B. N. Tandon, Collector, Delhi (respondent No. 2), praying for the issuance of a writ of certiorari quashing an order of respondent No. 1, dated 12-5-1967, and an order of respondent No. 2, dated 13-9-1966.

2. The petitioners constitute a Joint Hindu Family, and Harnam Singh (petitioner No. 1) is the 'Karta' of the said joint family. The petitioners are the owners of house property No. 9760/XVI/IC/36, Rohtak Road, New Delhi. On 15-7-1966, the petitioners Nos. 2, 4 and 5 were served with a notice (Annexure 1) by respondent No. 2 under Section 3 of the Requisitioning and Acquisition of Immovable Property Act (No. 30 of 1952) requiring them to show cause why a portion of the said property described in the schedule to the notice should not be requisitioned for the public purpose, namely, of accommodating Government servants. The portion of the property sought to be requisitioned was described in the schedule to the notice as under:—

"Two flats (two rooms each) on the ground floor, two mianis, one garage and a 'miani' above it, and one room on the first floor."

3. On 25-7-1966, the petitioners sent a reply stating that they were the owners in occupation of the portion of the property sought to be requisitioned, while the other portions of the property were in the occupation of tenants. The petitioners appeared before respondent No. 2 and submitted certain documentary evidence in support of their contention. According to the petitioners, they brought to the notice of the respondent No. 2 that one garage, a miani above it, and one room on the first floor of the house in question formed a workshop, store and office respectively of Messrs. Hirdustan Electric and Manufacturing Company of which the petitioner No. 1 was the sole proprietor. They produced certain documents to show the existence and the functioning of the workshop, and contended that the portion which was wholly used for a commercial purpose could not be requisitioned for residential purpose. As for the other por-

tion of the premises sought to be requisitioned, the petitioners stated in the writ petition that they brought to the notice of respondent No. 2 that they were occupying the same as residence for themselves and the members of their family, and that they had no other residential accommodation at Delhi. According to them, they produced documentary evidence before the Collector in support of their contention.

4. Respondent No. 2 passed an order (Annexure II), dated 13-9-1966, rejecting the contentions of the petitioners, and directing that the aforesaid portion of the premises be requisitioned. Annexure 'A' filed by respondent No. 2 along with his written statement in opposition to the present writ petition contains the reasons for which the Collector passed the order (Annexure II), dated 13-9-1966, requisitioning the portion of the premises in question. It was stated therein that information was received from the Director of Public Relations, Delhi Administration, Delhi, that the portion of the premises in question owned by the petitioners was lying vacant and was considered suitable for providing residential accommodation to the officers of the Administration, that as the said portion of the premises was required for a public purpose being the purpose of the Union, a notice under Section 3 (1) of the Act 30 of 1952 was issued and served on the owners of the premises on 15-7-1966, that a telephonic message was received from some one who did not like to disclose his identity to the effect that after the receipt of the requisitioning notice the landlords (petitioners herein) had started moving into the house, that thereupon the Sub-Divisional Magistrate of the Ilaka was deputed to inspect the spot on the same evening, that after inspection, the Sub-Divisional Magistrate had reported that he saw four bullock carts standing outside the house unloading household articles, that some of the packages were lying in the verandah and inside the rooms still unpacked, and that a few neighbours who were questioned by the Magistrate informed him that the ground floor had been lying unoccupied till then, that the landlords, through their counsel, in reply to the notice of requisition, objected to the proposed requisition on the ground that the premises were under their bona fide use, that the landlords were given a personal hearing by the Collector on 18-8-1966, that the landlords (petitioners herein) pleaded that the premises were in their bona fide personal use and submitted a ration card, milk card and electricity bills, etc., that the Collector did not find any substance in their statements or in the documents filed by them, and was satisfied that the portion of the premises in question was actually lying vacant and was occupied only after the issue of the requisitioning

notice with a view to defeat the requisitioning proceedings, and that, therefore, he passed the impugned order requisitioning the portion of the premises in question.

5. Shri Shiv Charan Singh stated that on the date on which the Collector passed the order, the documents filed before him by the petitioners were returned to the petitioners.

6. Against that order, the petitioners filed an appeal before respondent No. 1 under Section 10 of the Requisitioning and Acquisition of Immoveable Property Act (30 of 1952). In that appeal, they contended before respondent No. 1 that the portion of the premises used for commercial purpose could not be requisitioned for accommodating Government servants, that the other portion of the house could not be requisitioned as it was being used by them as their residence, and that in any event the property should not be requisitioned and they should not be dispossessed without providing them with an alternative accommodation. They also contended that the report of the Sub-Divisional Magistrate could not be taken into consideration against the petitioners. When the appeal came up before the Lt. Governor, the petitioners filed the documents which they had filed before the Collector and which were returned to them on the date on which the order of the Collector was passed. By an order (Annexure III), dated 12-5-1967, respondent No. 1 dismissed the appeal.

7. In his order (Annexure III), dated 12-5-1967, the Lt. Governor stated that the petitioners herein produced before him a ration card, milk-card, telephone bills, Air tickets, and a pass book of a Bank in support of their contention that they were in actual possession of the portion of the premises in question on 15-7-1966. On an examination of the said documents, the Lt. Governor came to the conclusion that the said documents did not show that the portion of the premises in question was in the occupation of the petitioners when it was requisitioned. He accordingly held that the petitioners were unable to substantiate their contention that the portion of the premises in question was in their occupation at the time when it was requisitioned on 15-7-1966. He also noted that it appeared to him that an attempt was made by the petitioners to occupy the house after the requisition proceedings had started. In that view, the Lt. Governor dismissed the appeal.

8. The petitioners thereupon filed the present writ petition praying that the appellate order (Annexure III), dated 12-5-1967, and the order of the Collector (Annexure II), dated 13-9-1966, may be quashed.

9. Shri Shiv Charan Singh, the learned counsel for the petitioners, contended

that the orders of the Lt. Governor and the Collector were quite contrary to the documentary evidence produced by the petitioners to show that they were in occupation of a portion of the premises sought to be requisitioned, that the two orders were vitiated by errors apparent on the face of the record, and that they were, therefore, liable to be quashed.

10. Before dealing with the said contention, it is necessary to refer to the provisions in Section 3 of the Requisitioning and Acquisition of Immoveable Property Act (No. 30 of 1952), which runs as under:

"3. Power to requisition Immoveable property—

(1) Where the competent authority is of opinion that any property is needed or likely to be needed for any public purpose, being a purpose of the Union, and that the property should be requisitioned, the competent authority,—

(a) shall call upon the owner or any other person who may be in possession of the property by notice in writing (specifying therein the purpose of the requisition) to show cause, within fifteen days of the date of the service of such notice on him, why the property should not be requisitioned; and

(b) may, by order, direct that neither the owner of the property nor any other person shall, without permission of the competent authority, dispose of, or structurally alter, the property or let it out to a tenant until the expiry of such period, not exceeding two months, as may be specified in the order.

(2) If, after considering the cause, if any, shown by any person interested in the property or in possession thereof, the competent authority is satisfied that it is necessary or expedient so to do, it may, by order in writing, requisition the property and may make such orders as appear to it to be necessary or expedient in connection with the requisitioning;

Provided that no property or part thereof—

(a) which is bona fide used by the owner thereof as the residence of himself or his family, or

(b) which is exclusively used either for religious worship by the public or as a school, hospital, public library or an orphanage or for the purpose or accommodation of persons connected with the management of such place of worship or such school, hospital, library or orphanage, shall be requisitioned:

Provided further that where the requisitioned property consists of premises which are being used as a residence by a tenant for not less than two months immediately preceding the date of the service of notice under sub-section (1), the competent authority shall provide such

tenant with alternative accommodation which, in its opinion, is suitable."

11. Sub-section (1) of Sec. 3 empowers the competent authority to call upon the owner or any other person who may be in possession of the property to show cause why the property should not be requisitioned. Sub-section (2) provides that the competent authority, after considering the cause, if any, shown by any person interested in the property or in possession thereof may, if it is satisfied that it is necessary or expedient to requisition the property, requisition the property by an order in writing. The first proviso to sub-section (2), however, provides, *inter alia*, that no property or part thereof which is bona fide used by the owner thereof as the residence of himself or his family shall be requisitioned. The second proviso to sub-section (2) provides that where the requisitioned property consists of premises which are being used as a residence by a tenant, the competent authority should provide such tenant with suitable alternative accommodation. We are concerned in this writ petition only with clause (a) of the first proviso. According to this clause, if the premises sought to be requisitioned is bona fide used by the owner thereof as the residence of himself or his family, it cannot be requisitioned. Therefore, the question for consideration before the Collector was as to whether the petitioners were bona fide using the portion of the premises sought to be requisitioned as the residence of themselves or their family on 15-7-1966 when the notice under S. 3 of the Act was served upon them.

12. In support of his contention that the two impugned orders are liable to be quashed, Shri Shiv Charan Singh submitted firstly that the notice of requisition was itself illegal for the reasons:—

- (a) that the portion of the premises which was being used for commercial purpose could not be requisitioned for residential purpose; and
- (b) that the other portion of the premises sought to be requisitioned was in the use of the owners (Petitioners) as the residence of themselves and their families, and was, therefore, excepted from the provisions in Section 3 (1) of the Act by virtue of the provision in Cl. (a) of the first proviso to sub-section (2) of S. 3 of the Act.

The first reason mentioned above is obviously incorrect. Under sub-section (1) of Section 3, the competent authority can requisition "any property", and clause (a) of the 1st proviso to sub-section (2) excepts property used bona fide by its owner or his family only "as residence". Property used by the owner for commercial purpose is not excepted under the provisos to sub-section (2).

13. The second reason mentioned above would be correct if, in fact, the petitioners were bona fide using the portion of the premises as residence for themselves and their families on 15-7-1966, the date on which the notice under Section 3 was served on the petitioners. As the provision in Cl. (a) of the 1st proviso to sub-section (2) is an exception to the general provision in sub-section (1) of S. 3, the burden of proving the requirements of Cl. (a) rests on the owner of the property who claims the benefit of the exception provided by the clause. It is, therefore, for the petitioners to establish that the portion of the premises which is claimed by them to fall within the exception was being bona fide used by them and their families on 15-7-1966. The petitioners sought to prove the same by producing certain documents before the Collector and the Lt. Governor. The said documents were considered by the Collector and the Lt. Governor who, however, held that the said documents did not establish the claim of the petitioners. The main documents were:—

- (1) Ration Card;
- (2) Milk Card;
- (3) Telephone bills;
- (4) Electricity and water bills; and
- (5) Pass book of a bank.

14. Shri Shiv Charan Singh argued that the Collector did not refer to and consider the said documents in detail, and that his order was, therefore, vitiated. It is true that the Collector did not separately refer to and deal with each of the documents. However, he did refer to them all together and expressed his view that he did not find any substance in the contention of the petitioners based on the said documents. He did take them into consideration in coming to a conclusion and passing the order, dated 6-9-1966. The Lt. Governor, however, dealt with each of the documents and stated how they did not support the contention of the petitioners. As regards the ration card, the Lt. Governor observed that it did not bear any date of issue. Shri Shiv Charan Singh pointed out that the ration card did bear the date of issue, namely, 20-12-1965. It is true that the observation of the Lt. Governor was not correct. But, the said error does not really help the petitioners. The date of issue of the ration card was 20-12-1965 and the duration of the ration card was for 52 weeks, i.e. one year from the date of issue. The various columns on the ration card for the 52 weeks were crossed in ink and Shri Shiv Charan Singh argued that the ration card shows that it was utilised by the family of the petitioners for one year from 20-12-1965 to 20-12-1966, and that, therefore, they should be held to have been residing in the premises in question during the said period.

The argument is no doubt attractive. But, the mere fact that rations were drawn on the card does not necessarily establish by itself that the petitioners were actually residing in the premises during that period. The ration card cannot, therefore, be regarded as evidence which shows the occupation of the premises in question by the petitioners on 15-7-1966.

15. As regards the milk card, the Lt. Governor pointed out that it was for the year 1966, but it did not show any issue of milk on the basis of that card. The comment of the Lt. Governor is quite justified as the card produced by the petitioners does not show any issue of milk on the basis of the card.

16. As regards the telephone bills which were marked as Exhibits D-1, D-2 and D-3 before the Lt. Governor, the Lt. Governor commented that they pertained to the years 1962 and 1966. Exhibit D-1, is a telephone trunk call bill for a call made on 21-10-1962. Exhibit D-2 is a similar bill for two trunk calls made on 1-11-1966 and 15-11-1966. Exhibit D-3 is also a similar bill for about 5 calls made in October, 1966. Thus, the said telephone bills also cannot be regarded as evidence which shows the occupation of the Premises in question by the petitioners on or about 15-7-1966. The electricity bills relied upon by the petitioners were marked as exhibits D-4 and D-5 in the appeal before the Lt. Governor. They pertain to July, 1961 and April, 1967. The said bills again do not establish that the petitioners were in occupation of the premises in question when the notice of requisition was issued.

17. The Pass Book of the bank relied upon by the petitioners was one issued by the New Bank of India Limited, Delhi, in the name of M/s. Hindustan Electric Manufacturing Company, and as pointed out by the Lt. Governor, it shows that there were no transactions after August, 1961. Thus, the Pass Book also is not of any assistance to the petitioners.

18. On an examination of the above documents, the Lt. Governor held that the petitioners were unable to substantiate their contention that the premises was within their occupation as residence at the time when it was requisitioned. The documents bear out the conclusion of the Lt. Governor. If really the petitioners were in occupation of the portion of the premises in question on 15-7-1966 as their residence, they could have easily produced reliable documentary evidence such as electricity and water bills for the periods immediately before and after 15-7-1966 and also oral evidence of their neighbours. In the circumstances, it cannot be said that the Collector and the Lt. Governor were not justified in coming to the conclusion which they did.

19. As held by the Supreme Court in *Kaushalya Devi v. Bachitar Singh*, AIR 1960 SC 1168, a finding based on no evidence is an error of law apparent on the record, but errors in appreciation of documentary evidence or errors in drawing inferences cannot be said to be errors of law, and can be corrected only by a Court sitting as a Court of appeal and not under Art. 226 of the Constitution. It follows from the above discussion that there is no valid ground for interference with the findings of the Collector and the Lt. Governor under Art. 226 of the Constitution.

20. It appears from the records that—

- (1) Two air tickets from Bombay to Delhi in the names of N. S. Chawla and I. S. Chawla (Nirmal Singh and Ishar Singh);
- (2) Municipal Corporation Licence No. 6767, dated 22-11-1962, regarding IC/36, Rohtak Road;
- (3) Import licence from April to September, 1961;
- (4) Certification of registration valid with effect from 26-12-1960 for local sales tax regarding IC/36, Rohtak Road;
- (5) Certificate of registration for Central sales tax Re: IC/36, Rohtak Road; and
- (6) Electoral Roll, 1965 for Karol Bagh Parliamentary Constituency,

were also produced before the Lt. Governor. They were not referred to by the Lt. Governor presumably because they were not relied upon by the petitioners. Shri Shiv Charan Singh frankly stated, and in my opinion rightly, that they all do not directly show that the petitioners were in occupation of the portion of premises in question as their residence on or about 15-7-1966.

21. Shri Shiv Charan Singh advanced another argument that the Collector relied upon the report of the Sub-Divisional Magistrate which the petitioners were not shown or given an opportunity to explain or adduce evidence in rebuttal thereof. It is true that the report of the Sub-Divisional Magistrate as to what he observed on 15-7-1966 was referred to in the order of the Collector and also in the order of the Lt. Governor. But a reading of the said orders shows that they referred to the same not as a piece of evidence against the petitioners, but only as one of the facts in the case. In any case, the Collector and the Lt. Governor considered the documents relied upon by the petitioners in support of their main contention that they were using the portion of the premises sought to be requisitioned as a residence of themselves and their families, and came to a conclusion against the petitioners. In the circumstances, the orders of the Collector and the Lt. Governor cannot be regarded to have been vitiated

by their reference to the report made by the Sub-Divisional Magistrate.

22. For the foregoing reasons, I hold that no valid ground has been made out for interference with the impugned orders of the Collector and the Lt. Governor, under Art. 226 of the Constitution. The writ petition, therefore, fails and is dismissed. In the circumstances, I make no order as to costs.

Petition dismissed.

AIR 1970 DELHI 71 (V 57 C 14)

H. R. KHANNA AND
T. V. R. TATACHARI JJ.

Nanak Singh, Petitioner v. Union of India and others, Respondents.

Civil Writ Petn. No. 331 of 1968, D/-24-4-1969.

(A) Constitution of India, Article 16 (1) — Railway Establishment Code, Vol. II, R. 2046 — Posts of Senior Accountants and Inspectors of Station Accounts are not similar — Different age of retirement prescribed for two posts — No violation of Article.

The Senior Accountants and Senior Inspectors of Station Accounts are not similarly situated. It is true that there is some similarity between the two posts in certain respects, viz. the scale of pay and promotion to the next higher grade of Class II Service (Assistant Accounts Officer). But the functions and duties of the two posts are basically different, in that the functions and duties of a Senior Accountant are essentially of a clerical nature, while the functions and duties of a Senior Inspector of Station Accounts mainly involve inspection and supervision. It cannot, therefore, be said that Senior Inspectors of Station Accounts and Senior Accountants are similarly situated, and consequently the difference in the treatment by the Railway Board in the matter of age of retirement of the incumbents in the two posts cannot be held to be violative of the provision in Article 16 (1) of the Constitution of India.

(Para 10)

(B) Civil Services — Railway Establishment Code, Vol. II, R. 2046 (2) (a) and (b) — Expression "Ministerial servant" — Meaning — Inspector of Station Accounts is not one — Declaration by Railway Board — Effect — Subsequent cancellation — No violation of Art. 311 (2) — (Constitution of India, Art. 311 (2)).

A senior Inspector of Station Accounts is not a ministerial servant and as such his retirement from service is governed by R. 2046 (2) (a) i.e. 58 years and he cannot get the benefit of R. 2046 (2) (b) under

which the age of retirement is 60 years.

(Para 8)

The term "ministerial servant" is defined in R. 2003 of the Railway Establishment Code. According to the first part of the definition, in order that an employee of the Railway can claim to be a 'ministerial servant', his duties have to be "entirely clerical." The duties of a Senior Inspector of Station Accounts are not "entirely clerical" because his duties include inspection also; therefore he is not a ministerial servant under the first part. The second part of the definition however, provides that any other class of servants may be specially defined as 'ministerial servants' by a general or special order of a competent authority viz. the Railway Board under R. 2303 (5).

(Para 5)

The declaration of a class of the Railway employees as "Ministerial servants" as envisaged by the second part of the definition in Rule 2003 (17) is a matter of policy, and it is entirely for the Railway Board to formulate its policy. It is also open to the Railway Board to change its policy from time to time, and when it does so change its policy and cancels its earlier declaration, it only exercises the power vested in it without reference to any particular individual. Further, the power of the Board to declare certain classes of Railway employees as "Ministerial" is by virtue of the power conferred upon it by Rule 156 of the Railway Establishment Code, Volume I, to make rules of general application to Railway servants under its control, read with R. 2003 (5) and Serial No. 1 in Appendix 32 in the Code, Volume II. Therefore, when in exercise of the said power the Board either makes a declaration or cancels an earlier declaration affecting a class of employees in general, no question of giving a notice to the employees to show cause against the proposed action of the Board arises, nor any question of violation of principles of natural justice or the provisions of Art. 311 (2) is involved.

(Para 8)

Wazir Chand Chopra, for Petitioner;
R. B. Nanak Chand, for Respondents.

T. V. R. TATACHARI J.:— The petitioner, Nanak Singh, has filed this writ petition under Art. 226 of the Constitution of India, praying for the issuance of a writ of mandamus, directing the respondents to forebear from giving effect to their order to retire the petitioner with effect from 24-4-1968, and further directing them to retain the petitioner in service till he attains the age of 60 years, or for the issuance of a writ of certiorari quashing the aforesaid impugned order.

2. The petitioner was born on 24-4-1910. He was appointed as a Clerk, Grade II, in the Audit Department of the Northern Western Railway on 4-8-1927. Later, the Audit & Accounts Departments were

separated, and as a consequence thereof he was transferred to the Accounts Department of the aforesaid Railway. He was confirmed as Clerk, Grade II, provisionally on 1-4-1930, and finally on 30-12-1930. Thereafter, he passed the prescribed Departmental examination of the Accounts Department in November, 1943, and he was promoted to the post of Junior Inspector of Station Accounts in June, 1944. Subsequently, on 24-12-1958 he was promoted, to the post of Senior Inspector of Station Accounts, and later he was confirmed in the said post with effect from 21-3-1960 in the grade of Rs. 435-20-575. While he was working as Senior Inspector of Station Accounts, Traffic Accounts Department, Northern Railway, Delhi-Kishanganj, Delhi, the General Manager, Northern Railway, published in the Northern Railway Gazette on 16-11-1967 an announcement (Annexure 'A') to the effect that the petitioner would be retired from service with effect from 20-4-1968 i.e. on his attaining the age of 58 years. Thereupon, the petitioner claiming that he was a ministerial servant, and that having entered service prior to the year 1938, was entitled to remain in service till he attained the age of 60 years as per Cl. (2) (b) of Rule 2046 (F. R. 56) of the Indian Railway Establishment Code, Volume II, filed the present writ petition praying for the reliefs already set out above.

3. The Rule 2046 (2) relied upon by the petitioner reads as under:—

"2046 (F. R. 56) (2) (a) Except as otherwise provided in this Rule, every Railway servant shall retire on the day he attains the age of 58 years.

(b) A ministerial Railway servant who entered Government service on or before the 31st March, 1938, and held on the date—

(i) a lien or a suspended lien on a permanent post, or

(ii) a permanent post in a provisional substantive capacity under clause (d) of Rules 2008 and continued to hold the same without interruption until he was confirmed in that post.

"shall be retained in service till the day he attains the age of 60 years."

4. The respondents in the writ petition are (1) Union of India represented by the General Manager, Northern Railway, (2) The Financial Adviser and Chief Accounts Officer, Northern Railway, (3) The Deputy Chief Accounts Officer, Traffic Accounts, Northern Railway, and (4) The Railway Board, Ministry of Railways, Government of India. The contention of the respondents is that the petitioner was a permanent holder of the post of Senior Inspector of Station Accounts, but the said post was not a ministerial post and the petitioner was not a ministerial servant and the Cl. 2046 (2) (b) of the Indian Rail-

way Establishment Code, Volume II, did not apply to the petitioner, and that his retirement at the age of 58 years was quite in accordance with Rule 2046 (F. R. 56) (2) (a). The petitioner, admittedly, entered Government service before 31-3-1938 and held on that date a lien on a permanent post, viz. the post of Clerk, Grade II, in which he was confirmed on 30-12-1930. But, in order to get the benefit of the provision in Rule 2046 (2) (b), he had to be a ministerial Railway servant. Thus, the controversy between the parties is as to whether the petitioner was ministerial servant or not.

5. The term 'ministerial servant' is defined in Rule 2003 (F. R. 9) (17) of the Indian Railway Establishment Code, Volume II, as under:—

"Ministerial servant means a Railway servant of a subordinate service whose duties are entirely clerical and any other class of servants specially defined as such by general or special order of a competent authority."

According to first part of the definition, in order that an employee of the Railway can claim to be a 'ministerial servant', his duties have to be "entirely clerical." Shri Chopra, the learned counsel for the petitioner, did not contend, in our opinion rightly, that the duties of a Senior Inspector of Station Accounts are "entirely clerical" because his duties include inspection also. The second part of the definition, however, provides that any other class of servants may be specially defined as 'ministerial servants' by a general or special order of a competent authority, and Shri Chopra's contention is that the Senior Inspectors of Station Accounts were, in fact, specially defined as 'ministerial servants' by the competent authority. It has, therefore, to be seen whether there was such a special definition by an order of the competent authority.

6. According to Rule 2303 (F. R. 9) (5), "competent authority" in relation to the exercise of any power under the Rules, means the President or any authority to which such power is delegated in Appendix 32, Serial No. 1 in Appendix 32 in the Indian Railway Establishment Code, Volume II (second Reprint), 1951, shows that the power of the President to declare a railway servant to be a ministerial servant was delegated, with reference to Rule 2303 (5), to all Heads of Departments. However, Rule 2283 (S. R. 310) (b) in the said Code of 1951 provided that—

"Any power delegated by the Appendix XXXII to a Head of a Department may be exercised by the Railway Board."

Thus, the competent authority for making a declaration that a Railway Servant was a ministerial servant was the Railway Board.

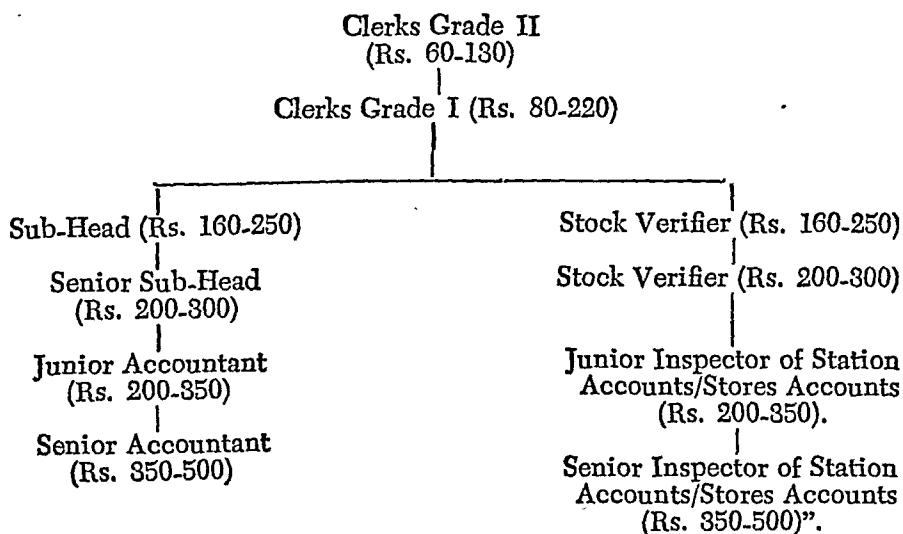
7. In 1951, the Railway Board made a declaration No.E.48.RTI/9/2, dated 1-8-1951 (Annexure 'B' to the writ petition), whereby certain categories of Railway servants were declared as ministerial for the purpose of Rule 2046 (2). Senior Inspectors of Station Accounts were not among the categories so declared in 1951.

8. In 1958, Vol. II of the Indian Railway Establishment Code was reprinted (3rd Reprint) embodying all corrections and amendments made upto that year. In 1959, a revised edition of Volume I of the Code was issued. As stated in the prefatory note to the revised edition, certain Appendices of the earlier Code were removed from the revised edition and embodied in the Indian Railway Establishment Manual, which was issued separately. The said Manual was published in 1960 embodying the aforesaid Appendices and "All administrative orders of Code, rules and allied Establishment matters issued by the Railway Board from time to time and current on 31st March, 1959." In the prefatory note to the Manual, it was stated that "the provisions of this Manual do not supersede the Rules contained in any of the Indian Railway Codes and in case

of conflict, the latter should prevail. This Manual may not be referred to as the final authority and a reference should always be made to the original orders on the subject." Chapter I of the Manual is divided into sections 'A' to 'G'. Section 'B' bears the heading "Rules for the recruitment and training of Class III, Class IV and workshop staff". It is subdivided into sub-sections (I) to (IV). The rules in sub-sections (I) to (III) apply to Class III and workshop and artisan staff. Sub-sec. (III) deals with the recruitment and training of the staff in various Departments. One of them is the Accounts Department (IXth) and paragraphs 48 to 57 relate to the same. Paragraphs 48 to 52 are given the heading "Ministerial Staff (Accounts Department)." Paragraphs 53 and 54 are given the heading "Accounts Department (Cash and Pay Branch)." Paragraphs 55 to 57 are given the heading "Other Ministerial staff on Railways." The heading and paragraph 48 run as under:—

"IX. Ministerial Staff (Accounts Department).

48. The Classes included in this group and the normal channel of their promotion are as under:—



Shri Chopra relied upon the heading "Ministerial Staff", and contended that as Senior Inspector of Station Accounts was shown in the diagram in the aforesaid paragraph, the description in the heading should be regarded as a declaration by the Railway Board that Senior Inspectors of Station Accounts are ministerial servants. On the other hand, Shri Nanak Chand, the learned counsel for the respondents, contended that the diagram given in paragraph 48 was not intended to be a declaration or special definition within the meaning of the second part of the definition of ministerial servant in Rule 2003 (17), but

was intended only to show the normal channel of promotion for the classes of officers included in the diagram. He also referred to paragraph 15, which is in sub-section (III) of Section 'B' in the Manual, It runs as under:—

"15. The diagram showing normal channels of promotion which are reproduced in this sub-section are illustrative and not exhaustive and they should not be taken to exclude classes not specifically mentioned, which, it may be the recognised practice for a particular administration to admit to any of the groups shown. It shall, moreover, be open to the adminis-

tration to transfer staff from one grade to another for which they may be fully qualified, but care must be taken to avoid hardship to staff already in the latter group."

At the end of the Manual is Appendix X with the heading "Concordance." It purports to show the authorities for the paragraphs occurring in the various Chapters of the Indian Railway Establishment Manual. The authorities for paragraphs 48 to 52 are stated in the concordance as "Railway Board's Letters Nos. E(NG)56/DE-III dated 20th December 1956, No. E(S)I-57 C. P. C. 40, dated 7th March, 1957, and Case No. E. 56 (Manual) I/1-B." Shri Nanak Chand produced the said letters and the Case mentioned in the Concordance for perusal by the Court. The two letters do not contain any reference to ministerial staff mentioned in the heading for paragraphs 48 to 52. The file relating to the Case No. E-56 mentioned in the Concordance merely contains the original drafts of paragraphs 48 to 52, etc. prepared prior to the publication of the Manual. Thus, the authorities mentioned in the Concordance do not throw any further light on the question under consideration. Paragraph 15 referred to by Shri Nanak Chand is also not of any help as it merely states that the diagrams should not be taken to exclude classes not specifically mentioned therein. We have thus only the description as "Ministerial Staff (Accounts Department)" in the heading to paragraphs 48 to 52. The question is as to whether the said description amounted to a declaration or special definition within the meaning of the definition of "Ministerial servant" in Rule 2003 (17) of the Code.

Shri Chopra contended that it amounted to such a declaration in view of the words used in paragraph 48 of the Manual. He pointed out that immediately after the heading, the paragraph commenced with the words "the classes included in this group" and then stated that the normal channel of promotion of the said classes was as shown in the diagram set out thereafter, and that the words "this group" referred, in the context, to the ministerial staff in the Accounts Department mentioned in the heading. He further pointed out that this view is further supported by the heading "Other Ministerial Staff on Railways" to paragraphs 55 to 57, that the said paragraphs dealt with three categories, namely (1) Office Clerks (2) Typists and (3) Stenographers, that the duties of these three categories were entirely clerical, and that was why they were grouped under the heading "Other Ministerial Staff on Railway", and that reading the heading "Ministerial Staff (Accounts Department)" to paragraphs 48 to 52 and the heading "Other Ministerial Staff on Railways" to paragraphs 55 to 57 together, it is clear that the Railway Board

which published the Manual intended to describe the group of classes mentioned in the diagram in para. 48 as "Ministerial staff" and it was only after describing the same in that manner that the Railway Board proceeded to state in para. 48 that the normal channel of promotion of the said classes was as set out in the diagram given in that paragraph.

There appears to be some force in the contention of Shri Chopra that the use of the words "Ministerial staff" in the heading to paragraphs 48 to 52 did amount to a declaration specially defining the various classes in the diagram mentioned in paragraph 48 as "Ministerial servants" within the meaning of the 2nd part of the definition of "Ministerial servant" in R. 2003 (17) of the Indian Railway Establishment Code. But, we consider that it is not necessary to express our opinion on the said contention as the paragraph 48 was subsequently substituted by a new paragraph with a different heading.

On 26-7-1962, the Railway Board issued a correction slip No. 67 whereby paragraph 48 was substituted by the following paragraph:—

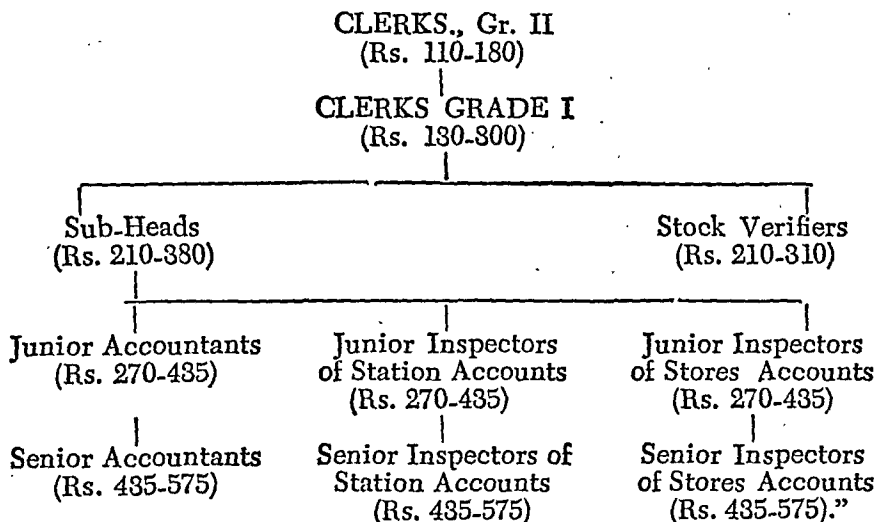
"Ministerial and Non-Ministerial Staff.
(Accounts Department)

48. The Classes included in the group and the normal channel of their promotion are as under:—

(For table see next page)

It has to be noted that the heading was changed into "Ministerial" and "Non-ministerial staff". The new heading merely indicates that the classes of employees mentioned in the diagram include both ministerial and non-ministerial staff, and does not specify which of them are ministerial staff and which are non-ministerial staff. While the previous heading was worded in a positive manner, the new heading is neutral.

Shri Chopra argued that while there was a positive declaration in 1960 that the classes of employees mentioned in the diagram were ministerial servants, the new heading does not make any specific declaration to the contrary and, therefore, the earlier declaration should be held to have continued to be in force. We are unable to accept this argument. It is true that the new heading is, as already stated, neutral. But, the fact remains that the old heading was substituted by the new one, and, therefore, it cannot be regarded to have continued in force. Even if the old heading had amounted to a declaration, the effect of the correction made in 1962 was to cancel the earlier declaration made in 1960 and substitute the new heading which, even according to Shri Chopra, does not amount to a declaration but was neutral, and no declaration has been made specially defining Senior Ins-



pectors of Station Accounts as ministerial servants after 26-7-1962. It was open to the Railway Board which was the competent authority either to declare or not to declare a class of Railway employees as ministerial servants, and, as such, had undoubtedly the power to cancel or change its earlier declaration, even if there was one. In fact, Shri Chopra did not question the said power of the Board. He however, contended that if the old heading had amounted to a declaration, even though the Board had the power to cancel or change its earlier declaration, it could do so only after giving notice to the petitioner affording him an opportunity to show cause against the proposed change, and as no such opportunity was given to the petitioner, the order cancelling the earlier declaration should be quashed as being in violation of principles of natural justice and the provision in Art. 311 of the Constitution. This contention also is not tenable.

The declaration of a class of the Railway employees as "Ministerial servants" as envisaged by the second part of the definition in Rule 2003 (17) is a matter of policy, and it is entirely for the Railway Board to formulate its policy. It is also open to the Railway Board to change its policy from time to time, and when it does so change its policy and cancels its earlier declaration, it only exercises the power vested in it without reference to any particular individual. In the present case, even if the old heading had amounted to a declaration as contended by Shri Chopra, the Railway Board cancelled the same and substituted in its place a new heading which was neutral, and the effect of the change was general and was applicable to all Senior Inspectors of Station Accounts. Further, the power of the Board to declare certain classes of Railway employees as "Ministerial" is by virtue of the power conferred upon it by Rule 156 of the Railway Establishment Code, Volume I. to

make rules of general application to Railway servants under its control, read with Rule 2003 (5) and Serial No. 1 in Appendix XXXII in the Code, Volume II. Therefore, when in exercise of the said power the Board either makes a declaration or cancels an earlier declaration affecting a class of employees in general, no question of giving a notice to the employees to show cause against the proposed action of the Board arises, nor any question of violation of principles of natural justice or the provisions of Art. 311 (2) is involved. It follows from the above discussion that the petitioner was not a ministerial servant and was not, therefore, entitled to the benefit of the provision in Rule 2046 (F. R. 56) (2) (b) of the Indian Railway Establishment Code, Volume II.

9. Another contention of Shri Chopra was that the Senior Accountants in the Accounts Department of the Railway are, admittedly, ministerial servants, that the Senior Inspectors of Station Accounts and the Senior Accounts perform the same job and functions, that the incumbents of both the posts comprise of personnel recruited through common examination with common syllabus, that there should not, therefore, be any discrimination between them and that the discrimination shown against the Senior Inspectors of Station Accounts in the matter of the age of compulsory retirement is hit by Art. 16 (1) of the Constitution. This contention is based upon the averments made by the petitioner to that effect in his writ petition.

In answer to the said averments, it was stated in the counter-affidavit of Shri G. P. Gupta, filed on behalf of the respondents, as follows:—

"The post of Senior Accountant neither corresponds to the post of Senior Inspector of Station Accounts nor involves similar functions nor it is comprised of personnel recruited through an examination with common syllabus. It is also submitted

Singapore between 1953 and 1958 and stayed there most of the time on account of exigencies of business, but he continued to possess the Indian domicile where his wife and dependent children as also some other members of his family continued to reside. The petitioner used to come to India every now and then. The passport issued to the petitioner by the Union of India expired on 28-1-1954 and a fresh passport valid till 1959 was issued to him by the Indian Authorities in Singapore. In 1959, the political situation in Singapore was such that the petitioner had either to leave Singapore leaving his entire property and interest there unattended and return to India or to acquire Singapore citizenship. Compelled by these adverse circumstances, according to the petitioner's averment, he involuntarily acquired the citizenship of Singapore, but he never relinquished Indian citizenship, nor had he the intention to do so. Throughout his stay in Singapore, he had *animus revertendi* in relation to India which continued to be his home. His wife did not acquire Singapore citizenship because there was no such compulsion felt by her. In 1959, the petitioner wanted to come back to India to stay here for some time with his family members, but he was told that, by virtue of his Singapore citizenship, he could not leave Singapore without obtaining a Singapore passport, with the result that he was compelled to obtain a Singapore passport.

At the present moment, according to the petitioner's averment, he holds a Malaysian passport valid up to 1969. This passport is also stated to have been obtained by the petitioner under compulsion and stress of circumstances without any intention to relinquish his Indian citizenship. Between October, 1959 and February, 1967, he claims to have made 15 trips to India where he stayed with his family for different periods. Lastly he came here on 4-3-1967, but was detained by the Indian Immigration Authorities in Bombay on 6-3-1967 and was thereafter deported to Singapore. According to the petitioner, he was deported without assigning any reason, but presumes that it was done because he was treated as a foreigner. Since then many enquiries have been made by the petitioner's Solicitors from the Government of Maharashtra and also from the Government of India, but without any satisfactory result. It is on these averments that the reliefs, as mentioned above, are claimed in these proceedings.

3. In the affidavit in reply sworn by a Deputy Secretary in the Ministry of Home Affairs, a preliminary objection has been taken to the competence of this writ petition on the ground that disputed questions of fact have been raised which cannot be decided by this Court and it is

added that it is neither feasible nor possible for this Court to decide them. The Central Government, it is said, is in possession of definite information that the petitioner is a citizen of Singapore and this fact has also been ascertained by the Central Government from its diplomatic office in Malaysia and Singapore. The petitioner obtained certificate No. 44190 dated 23-1-1958 from the Government of Singapore after getting himself registered as a citizen of that country, and on such acquisition, the petitioner ceased to be a citizen of India by virtue of Section 9 (1) of the Citizenship Act of 1955. He is on this premise described to be a foreigner and his allegation to the contrary is controverted. The assertion by the petitioner that the acquisition of Singapore citizenship by him was involuntary, has also been denied.

The fact that even now the petitioner holds Malaysian passport valid upto 1969, is also relied upon in support of the plea that the petitioner has relinquished Indian citizenship and it is urged that Indian citizenship automatically terminated under Section 9 (1) of the Citizenship Act the moment the petitioner acquired Singapore citizenship by registration. The petitioner's intention in regard to the acquisition of Indian citizenship and also the fact that the petitioner visited India on several occasions, have been described to be irrelevant because a foreigner can also visit India on the strength of a valid passport. The petitioner being a foreigner according to the reply, the fundamental rights guaranteed to citizens under Art. 19 of the Constitution are stated not to be available to him.

4. The petitioner's learned counsel has in his elaborated arguments drawn our attention to certain Articles of the Constitution and has placed principal reliance on a recent decision of the Supreme Court in *Mohd. Ayub Khan v. Commissioner of Police, Madras*, AIR 1965 SC 1623. The following passage from this decision has been specifically relied upon:—

"(10) Paragraph 1 of Sch. III which raises a rebuttable presumption, when it appears to the Central Government that a citizen has voluntarily acquired foreign citizenship, casts the burden of proof upon the citizen to disprove such acquisition, and Paragraph 2 which authorises the Central Government to make enquiries for the purpose of determining the question raised, strongly support the view that the Central Government must arrive at a decision that the Indian citizen has voluntarily acquired foreign citizenship, before action can be taken against him on the footing that his citizenship is terminated. Paragraph 3 raises a conclusive presumption that a citizen of India who had obtained a passport from a foreign country on any date, has before that date volun-

tarily acquired citizenship of that other country. By the application of the rule in Paragraph 3, the authority must regard obtaining of a foreign passport on a particular date as conclusive proof that the Indian citizen has voluntarily acquired citizenship of another country before that date. But obtaining of a passport of a foreign country cannot in all cases merely mean receiving the passport. If a plea is raised by the citizen that he had not voluntarily obtained the passport, the citizen must be afforded an opportunity to prove that fact. Cases may be visualized in which on account of fraud or misrepresentation he may be induced, without any intention of renunciation of his Indian citizenship, to obtain a passport from a foreign country. It would be difficult to say that such a passport is one which has been 'obtained' within the meaning of Paragraph 3 of Sch. III and that a conclusive presumption must arise that he has acquired voluntarily citizenship of that country.

(11) We are not concerned in this case with the truth or otherwise of the plea raised by the appellant in his petition before the High Court that he was compelled to obtain the passport from the High Commissioner for Pakistan. Bala-krishna Ayyar, J., observed that the plea of the appellant was not bona fide. But it is not the function of the Courts to determine the question whether the plea raised is true or not: it is for the authority invested with power under Section 9 (2) to determine that question if it is raised. The High Court in appeal was of the view that S. 9 laid down an objective test and once it was found that the passport was obtained in fact by an Indian citizen from another country, the law determined the legal consequences of that conduct and no question of his 'intent or understanding arose'. We are unable to agree with that view. If voluntary acquisition of citizenship of another country determines Indian citizenship within the meaning of Sec. 9 (1), and by virtue of paragraph 3 of Sch. III of the Citizenship Rules a conclusive presumption of voluntary acquisition of citizenship is to be raised from the obtaining of a passport from the Government of any other country, it would be implicit that the obtaining of a passport was result of the exercise of free volition by the citizen. This view is strengthened by the scheme of Section 9 (2) read with Rule 30 which contemplates an enquiry by an authority prescribed under sub-section (2) for determination of the question whether citizenship of another country has been acquired by an Indian citizen."

The learned counsel has taken us through Sections 8, 9, 10 and 18 of the Citizenship Act 57 of 1955 and has also

submitted that under Rule 30 of the Citizenship Rules, if any question arises as to whether, when or how any person has acquired the citizenship of another country, then it is for the Central Government alone to decide this question. Shri Anand has also referred us to the decision of the Supreme Court in Government of Andhra Pradesh v. Syed Mohd. Khan, AIR 1962 SC 1778, in which Gajendragadkar, J. (as he then was), speaking for the Bench, observed as follows:—

"It has been urged before us by Mr. Tatachari for the appellant that the effect of our decision in the case of Izhar Ahmad Khan, AIR 1962 SC 1052, is that as soon as it is shown that a person has acquired a passport from a foreign Government, his citizenship of India automatically comes to an end, and he contends that in such a case, it is not necessary that the Central Government should hold any enquiry and make a finding against the person before the appellant can issue an order of deportation against him. In our opinion, this contention is clearly misconceived. In dealing with the question about the validity of the impugned section and the Rule, this Court has, no doubt, stated that 'the proof of the fact that a passport from a foreign country has been obtained on a certain date conclusively determines the other fact that before that date he has voluntarily acquired the citizenship of that country.' But in appreciating the effect of this observation, it must be borne in mind that in all the cases with which this Court was then dealing, the question about the citizenship of the petitioners had been expressly referred to the Central Government and the Central Government had made its findings on that question. It was after the Central Government had recorded a finding against the petitioners that they had acquired the citizenship of Pakistan that the said writ petitions came before this Court for final disposal and it is in the light of these facts that this Court proceeded to consider the contention about the validity of the impugned section and the impugned rule. It is plain, therefore, that the observations on which Mr. Tatachari relied were not intended to mean that as soon as it is alleged that a passport has been obtained by a person from a foreign Government, the State Government can immediately proceed to deport him without the necessary enquiry by the Central Government. Indeed, it is clear that in the course of the judgment, this Court has emphasised the fact that the question as to whether a person has lost his citizenship of this country and has acquired the citizenship of a foreign country has to be tried by the Central Government and it is only after the Central Government has decided the point that the State Government can deal with the person as a foreigner."

or restrict transactions of such society with any non-member, or that the Registrar after giving an opportunity to the society of being heard had issued any direction regulating or restricting such transactions. Of course, Shri Cabral laid considerable stress on the prolonged negotiations that had preceded the registration of the society on 15-4-1964. However, those negotiations have no bearing on the question that arises for determination between the parties in the present revision petition. Those negotiations at the best had influenced the Registrar in sanctioning the registration of the society. He might have secured some commitments from the Comunidade at that stage in regard to the proposed contract between the Comunidade and the society if and when registered. However, unless those commitments had found place in some directive issued by the Registrar in terms of Rule 44 after the society was registered and before the contract was signed and they were incorporated in the contract, it would be difficult to subscribe to the contention that the contract had been made "under the provisions of Sec. 45." However, this having not been urged on behalf of the society that the aforementioned commitments had been incorporated by the Registrar in any directive issued to the society after the latter had been registered, and it being not the contention that such commitments were incorporated in the contract, I see no difficulty in recording the conclusion that the contract between the parties had not been made "under the provisions of Section 45." As such the ingredients of Section 91(1) are not proved in the instant case and in consequence sub-section (3) of Section 91 does not come into play. In other words, the jurisdiction of the Civil Court to entertain a suit respecting a dispute arising out of the contract dated 23-8-1964 is not barred by sub-section (3) of Section 91 of the Act.

5. The observations made in the case reported in AIR 1967 Bom 124, Dharamchand Premchand v. Kopargaon Taluka Kapus Ginning and Pressing Society Ltd., were relied upon by the parties' learned counsel in support of their rival contentions. The facts of that case were that Kopargaon Society used to purchase cotton from its members and then sell it to other persons. On 25-11-1962 an auction was held by that society when Dharamchand Premchand offered the highest bid for three lots of cotton and paid Rs. 11,000/- towards the part-price of the cotton purchased. The purchasers subsequently failed to take delivery of the cotton or to make the payment of the balance of the purchase-money. The Society consequently approached the Registrar under Section 91 of the Act with the prayer that the dispute between

the parties be decided under the provisions of the Act, and the Registrar referred the dispute to his nominee in terms of Section 93 of the Act. The purchasers denied that the dispute fell within the ambit of Section 91 of the Act. The nominee consequently referred the matter to the Registrar for deciding the question raised by the purchasers and this was done in terms of Section 91(2) of the Act. The Assistant Registrar, who heard the matter, reached the conclusion that the transaction between the society and the purchasers fell within the ambit of Section 45 and consequently clause (c) of Section 91(1) applied to the case. He, therefore, remitted the case to the nominee of the Registrar for his final decision in the matter. This order of the Assistant Registrar was challenged by the purchasers before the High Court.

The contention of the purchasers prevailed in the High Court which held that the expression "transactions under the provisions of Section 45" used in clause (c) of sub-section (1) of Section 91 means "transactions in respect of which restrictions have been prescribed under Section 45", and that no restrictions had been prescribed in regard to the transaction of the auction entered into between the society and the purchasers. The facts of the case in hand are almost on all fours with those of the reported case. It is not proved that any restrictions had been prescribed by the Registrar under Section 45 of the Act respecting the contract dated 23-8-1964. If so, the case would not fall within the ambit of Section 91(1) with the consequence that the applicability of sub-section (3) of Section 91 would not be attracted. I would, therefore, hold, in agreement with the trial court, that its jurisdiction is not barred respecting the dispute which has arisen between the Comunidade and the society.

6. Before concluding I would like to point out, as was done by the Bombay High Court in the aforementioned case of Dharamchand Premchand, that clause (c) of Section 91(1) is not happily worded. The expression "transactions under the provisions of Section 45" has no meaning in the context that Section 45 does not per se prescribe any transactions. That section, already reproduced above, only authorises that the transactions between a society and persons other than members of the society may be subjected to certain restrictions provided such restrictions form part of the rules. Therefore, the expression "transactions under the provisions of Section 45" used in clause (c) of Section 91(1) requires suitable amendment. I may suggest that that expression be replaced by the expression "transactions subject to restrictions contemplated by Section 45".

7. In view of the conclusions recorded above, this petition fails and is rejected with costs. Advocate's fee Rs. 32/-.

Petition dismissed.

AIR 1970 GOA, DAMAN & DIU 35
(V 57 C 7)

V. S. JETLEY, J. C.

Purxotoma Ramanata Quenim and another, Petitioners v. Union of India and others, Respondents.

Writ Petn. No. 32 of 1968, D/- 17-7-1969.

(A) Essential Commodities Act (1955), S. 3(1) — Gur (Regulation of Use) Order (1968) — Order is not invalid for being silent as to formation of opinion for purpose specified in S. 3(1) — It is not an indispensable requirement of law that formation of such opinion should be stated in the Order — Circumstances as to satisfaction can be established in any other way e.g., in counter affidavit— AIR 1965 S.C. 1167 & AIR 1968 Goa 105, Rel. on. (Paras 4, 5)

(B) Constitution of India, Art. 226 — Subsequent events — Validity of order under S. 3 of Essential Commodities Act — Order amended even prior to filing of petition under Art. 226 — Validity of order as amended must be considered. (Para 7)

(C) Essential Commodities Act (1955), S. 3 — Construction of sub-section — "Regulation" — Meaning of — Gur (Regulation of Use) Order (1968) — Order is valid and not beyond powers of Central Government under S. 3 — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Construction of sub-section) — (Words and Phrases — "Regulation").

The correct approach in construing sub-sections (1) and (2) of Section 3 is to assume that whatever is included in sub-section (2) is also included in sub-section (1). The words of sub-section (1) are wide and of general nature. Sub-section (2) is of particular nature. In enacting sub-section (2), Parliament has provided guidance to the Central Government in the matter of what it can legally do for securing the two objects of sub-section (1): (a) for maintaining or increasing supplies of any essential commodity; or (b) for securing their equitable distribution and availability at fair prices. The matters enumerated in sub-section (2) of Section 3 are only illustrative, as such enumeration is without prejudice to the generality of the powers conferred by sub-section (1). (Para 10)

Clause (d) of sub-section (2) of Section 3 must be read along with its parent sub-section (1) of Section 3 not only for

the purposes of the two objects of the Act, but also for the purposes authorised therein, namely, for "regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein." The Gur (Regulation of Use) Order (1968) is made under Section 3 in its entirety and not under clause (d) of sub-section (2) of Section 3 which is only illustrative. (Para 10)

It is true that the Act is a piece of social legislation conceived to give effect to the socio-economic objects and, therefore, it is not to be narrowly construed, but even so there is no sufficient justification for construing 'regulating' so widely as to include therein the function of prohibition. Prima facie, the power to regulate will not include the power to prohibit. The word 'regulation' has to be understood in its ordinary sense. Words in statutes vary as the colour of a kaleidoscope but the word 'regulation' has retained its conservative character with some exceptions. (Para 10)

The proviso to clause 3, enabling use of gur in stock on the date of the commencement of the impugned order with the prior permission of the Central Government is clearly regulatory; but, for the ban on the use of gur in future for the preparation of alcoholic liquor, one must turn to the parent sub-section (1) of Section 3. The words used therein are 'regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein'. The order is not concerned with production of gur. (Para 10)

The prohibition on use of gur for the purposes of alcoholic liquor is to be considered in the background of "supply and distribution" position of gur when the impugned order was issued. The prohibitory part of the order, is to be related to 'supply and distribution' functions in sub-section (1) of Section 3 and, when so related, the order would seem to be intra vires and not ultra vires Section 3 of the Act. The order is not beyond the powers conferred on the Central Government by Section 3 of the Act. (Para 10)

(D) Constitution of India, Art. 19(1)(g) — Essential Commodities Act (1955), S. 3 — Gur (Regulation of Use) Order (1968) — Reasonableness of the restriction imposed by the order is to be adjudged in the context of the scheme of the Act and not territorially — Act specifies authorised purposes for which order can be passed under S. 3 — Use of consumption of gur as food is more important than its use for preparation of alcoholic liquor — Order comes within clause (6) of Art. 19 and thus Art. 19(1)(g) is not violated — AIR 1959 S. C. 1124, Disting. Case law discussed. (Para 12)

(E) Constitution of India, Art. 14 — Scope—Essential Commodities Act (1955),

S. 3 — Gur (Regulation of Use) Order (1968) does not violate Art. 14.

While Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation, and that in order to pass the test of permissible classification two conditions must be satisfied, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification, may be founded on different basis, namely, geographical, or according to the objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the objects of the Act under consideration. (Para 13)

Clause (d) of sub-section (2) of Section 3 permits use and consumption of 'gur' as defined for preparation of any article used as drink or medicine for human consumption. This is one class of persons using gur. As against that class there is the other class where use of gur is prohibited to distillers for preparation of alcoholic liquor. There is sufficient basis for permitting the use and consumption of gur for the purposes specified, and also for prohibiting its use for preparation of alcoholic liquor. The statutory discrimination is not illogical. The classification has a rational relation to the two objects of the Act sought to be achieved. The classification is reasonable for the purposes of the Act. The Order does not violate Article 14 of the Constitution. AIR 1964 S.C. 1633, Disting.

(Para 13)

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- (1969) W. P. Nos. 282, 407 and 408 of 1968, D/- 30-4-1969=(1969) 2 S.C.C. 166 (S.C.), Harakchand Bhandia v. Union of India 9, 13
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- (1954) AIR 1954 SC 220 (V 41)= 1954 SCR 873, Cooverjee v. Excise Commissioner, Ajmer 12
- (1954) AIR 1954 SC 359 (V 41)= 1955-1 SCR 92=1954 Cri. L. J. 1002, Biswabhusan Naik v. State of Orissa 5
- (1954) AIR 1954 SC 465 (V 41)= 1955-1 SCR 380=1954 Cri. L. J. 1322, Hari Shankar v. State of M. P. 12
- (1954) AIR 1954 SC 634 (V 41), Madhya Bharat Cotton Association Ltd. v. Union of India 12
- (1954) AIR 1954 SC 728 (V 41)= 1955 (1) SCR 707, Saghir Ahmed v. State of U. P. 12
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 (1945) AIR 1945 P.C. 156 (V 32)= 10
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 (1943) AIR 1943 F.C. 1 (V 30)=44 10
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 (1896) 1896 A.C. 88=65 L. J. P. C. 4, Toronto Municipal Corporation v. Virgo 7
 (1896) 1896 A. C. 348, Attorney-General for Ontario v. Attorney-General for the Dominion 7
 (1888) 13 A.C. 446=57 L. J. P. C. 73, Slattery v. Naylor 8, 10
 4 Wheat 316, McGullough v. Maryland 9
 S. J. Sorabji assisted by P. G. Navelkar, for Petitioners; S. Tamba, Govt. Pleader, for Respondents.

ORDER:— This is a petition under Article 226 of the Constitution seeking a declaration that The Gur (Regulation of Use) Order, 1968, dated 3rd April, 1968, is unconstitutional, illegal, ultra vires, null and void, and also an appropriate writ directing the Union of India (respondent no. 1), to withdraw and cancel that order.

2. The case of the petitioners Purxotoma Ramanata Quenim and Waman Vishwanath Quenim, set out in their petition supported by an affidavit, broadly stated, is that they carry on the business of distillation and sale of country liquor in this territory for which they are holders of a lease of monopoly of distillation and sale of country liquor by virtue of a contract dated 26th July, 1963, with the State Government (respondent no. 2). This business is extensive. They are required to use and consume large quantities of jaggery for the purposes of distillation of liquor. Jaggery is the sole and indispensable commodity required for the process of distillation of liquor. They have been

purchasing large quantities of jaggery to meet the requirements of this business. They have about 15,000 maunds of jaggery in stock of the total value of about Rs. 5 lakhs. On 3rd April, 1968, the Central Government in purported exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955, passed the Gur (Regulation of Use) Order, 1968 (hereinafter referred to as 'the impugned order').

By the impugned order, 'gur' has been defined under Clause 2 as meaning the article commonly known as gur, jaggery and other substances specified therein. Clause 3 prohibits their use for any purpose other than the purpose of:— (a) consumption in the form of gur; (b) preparation of any article (not being alcoholic liquor) used as drink for human consumption; or (c) cattle feed. With the passing of the impugned order, the petitioners were directed on 10th May, 1968 by the Commissioner of Excise (respondent No. 3), not to use gur for the distillation of liquor with immediate effect. The impugned order and the said direction are illegal, ultra vires, inconsistent and without or in excess of jurisdiction and without the authority of law for the following reasons:— (a) that the condition precedent to the passing of the impugned order under sub-section (1) of Section 3 of the Essential Commodities Act, 1955, is the formation of an opinion for the purposes mentioned therein. There is no such formation of opinion as will appear from the impugned order, and, therefore, there has been non-compliance with the said condition. In other words, there has been no application of mind; (b) the impugned order in prohibiting the use and consumption of gur including jaggery is ultra vires; (c) that it is not possible for the petitioners to carry on their business without the use or consumption of jaggery. The effect of the impugned order is to bring about the closure of their business thereby imposing unreasonable restrictions on their fundamental rights guaranteed under Article 19(1) (f) and (g) of the Constitution. The restrictions imposed are drastic, excessive and arbitrary and not in the interests of the general public; and (d) that Clause 3(b) of the impugned order makes a differentiation between the preparation of any article and the preparation of alcoholic liquor. This differentiation is unjustified and irrational, and further it does not bear any real or substantial relation to the object of the Essential Commodities Act, 1955. There is thus violation of Article 14 of the Constitution.

3. The case of the respondents is set out in the counter-affidavit sworn by the Chief Director in the Directorate of Sugar

and Vanaspati on behalf of the respondent No. (1). Their case is that the common raw material for the distillation of alcoholic liquor is molasses and mahua. The impugned order was amended twice on 23rd May, 1968 and 24th June, 1968. By the first amendment, Clause 3(b) was amended so as to permit use of gur for the purpose of medicine also; a proviso was also added providing that the gur in stock with the industrial users including distillers on the date of commencement of the impugned order may be used by them for industrial purposes, with the prior permission of the Central Government. By the second amendment the definition of 'gur' in Clause 2 was amended so as to include, in addition, a solution of gur in water. The Central Government gave careful consideration to the circumstances prevailing before taking a decision to issue the impugned order. The position at the time of passing the impugned order was that the prices of gur in the main producing areas began to rise steeply towards the end of March, 1968.

This rise was attributed to large scale purchases of gur by some distilleries for the manufacture of liquor or due to inquiries floated by them. The gur is an item of daily use of the poorer sections of the community throughout India and as the rise in the prices of gur had its effect on the prices of other sweetening agents like khandsari and sugar sold in the free market, the Central Government was of the opinion that it was necessary and expedient for maintaining and increasing supplies of an essential commodity like gur for direct consumption of the general public and for securing its equitable distribution and availability at fair prices, to regulate the use of gur. The distillation of alcoholic liquor is not the main purpose for which gur and jaggery are used. The effect of the impugned order is to ensure availability of this essential commodity for direct consumption by the general public. The proviso to Clause 3 enabling the use of gur in stock with the industrial users including distillers with the prior permission of the Central Government was intended to alleviate hardship.

The petitioners are free to use molasses for distillation of alcoholic liquor or use other substitutes like mahua etc. The impugned order does not violate Article 19(1) (f) and (g) of the Constitution. The restrictions imposed are reasonable in the interests of the general public. The impugned order does not permit the use of gur for the purpose of any industrial product including alcoholic liquor. The gur which is mainly a concentrated form of carbohydrates is an energy-giving food for the poorer sections who consume it as food. The distinction made in sub-section (b) of

Clause 3 of the impugned order excluding alcoholic liquor from other articles of food in the preparation of which gur may be used is, therefore, justifiable. This distinction is not irrational. There is thus no violation of Article 14 of the Constitution. It is denied that the petitioners have any personal or proprietary rights which are affected. The impugned order is valid and not unconstitutional. In the counter-affidavit sworn by the respondent No. (3) on his behalf and also on behalf of the respondent No. (2), what is affirmed by the Chief Director of the Directorate of Sugar and Vanaspati, is more or less, repeated, and therefore no useful purpose would be served by further repetition.

4. The following questions arise for consideration upon the averments made in the petition and the affidavits:— (1) whether the impugned order is invalid because of failure to form an opinion for the purposes specified in Section 3(1) of the Essential Commodities Act, 1955; (2) whether the impugned order is ultra vires Section 3 of this Act; and (3) whether it violates Article 19(1) (f) and (g) and Article 14 of the Constitution.

5. The first question need not detain me long in view of the averments made in the main counter-affidavit that the necessary opinion was formed after careful consideration of the circumstances prevailing before the impugned order was issued. It is true that the impugned order is silent as to the formation of that opinion, but it is not an indispensable requirement of law that it should say so in terms. In this connection, the attention of Mr. Sorabji, learned counsel for the petitioners, is invited to 'Hamdard Dawakhana v. Union of India' AIR 1965 SC 1167, where a similar question arose in relation to the Food Products Order 1955, passed in exercise of the power conferred on the Central Government under Section 3 of the Act. Gajendragadkar C. J., speaking for the Supreme Court, observed:—

"It is true as Mr. Pathak contends that in the absence of any specific averments made by the Fruit Order that the Central Government had formed the necessary opinion, no presumption can be drawn that such opinion had been formed at the relevant time; but it would have been open to the respondents to prove that such an opinion had been formed at the relevant time; and it cannot be suggested that the failure to mention that fact expressly in the Fruit Order itself would preclude the respondents from proving the said fact independently".

A similar question was also considered by this Court in 'Gangadhar Narsingdas v. Asst. Collector, Customs', AIR 1968 Goa 105 (124) in the context of the notification issued under Section 4-A of the

Tariff Act, 1934. In that case, relying on 'Biswabhusan Naik v. State of Orissa', (1955) 1 SCR 92=(AIR 1954 SC 359) and 'State of Bombay v. Bhanji Munji', (1955) 1 SCR 777=(AIR 1955 SC 41), decided by the Supreme Court, it was held that it is not necessary for the Central Government to state in the notification that it is satisfied that the circumstances envisaged in the said Section 4-A existed. It may be desirable but not obligatory to do so. The circumstances as to satisfaction not mentioned in the notification can be established in any other way, for example, in the counter-affidavit, as in the instant case. In view of this statement of law, of which Mr. Sorabji is well aware, he does not press this question.

6. The second question has been canvassed and debated at sufficient length. To appreciate this question, it is necessary to take a bird's eye-view of the relevant provisions of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act'). As will appear from its preamble, the Act was enacted "to provide, in the interests of the general public, for the control of the production, supply and distribution of, and commerce in certain commodities". S. 1 speaks of short title and extent. S. 2 is the definitions provision on usual lines. Clause (a) thereof defines "essential commodity". "Essential commodity", under that clause, means any of the following classes of commodities specified in sub-clauses (i) to (xi). One of the classes specified in sub-clause (v) is "foodstuffs including edible oil seeds and oils". Section 3 is a pivotal section. It is sub-divided into 3 sub-sections.

Sub-section (1) vests the Central Government with the powers to control production, supply, distribution of essential commodities; it states that if the Central Government is of the opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub-section (2) contemplates, without prejudice to the generality of the powers conferred by sub-section (1), that an order made under sub-section (1), may provide for several matters enumerated in Clauses (a) to (j). We are concerned with the matter enumerated in Clause (d) — 'for regulating by licences, permits or otherwise, storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity. The other sub-clauses are not relevant and so also sub-section (3) of Section 3. The remaining sections provide for delegation of powers, penalties, and ancillary and incidental matters. They need not be noticed.

Sub-section (1) of Section 3 uses the words 'regulating or prohibiting'. Clause (d) of sub-section (2) of Section 3 employs the word 'regulating'. Some other clauses use the words 'regulating or prohibiting' in different contexts. The dictionary meaning of 'regulate' is 'to control, govern or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings'. (See 'Shorter Oxford English Dictionary'). "What law protects it has a right to regulate" ('Conflict of Laws' by Story, p. 633). The word 'regulate' may not be a term of art, and, therefore, in accordance with the usual rule of interpretation, it has to be given its natural and popular meaning. It may, in certain circumstances, include the concept of prohibition depending upon the nature of the activity sought to be regulated. Let us analyse the impugned order and endeavour to find out whether it is invalid. If it is, it has to be struck down, otherwise it has to be maintained.

7. The petition under Article 226 was received in the office on 27th June, 1968. It makes no mention of the first amendment made on 23rd May, 1968. By that amendment, the proviso was added to Clause 3 enabling clearance of stock of gur with the industrial users including distillers on the commencement of the said order i.e. 3rd April, 1968. When asked to explain why the said petition omitted to make mention of this amendment, Mr. Sorabji states that the petitioners were not aware of its existence. This may be so, but the validity of the said order is not to be considered in isolation. It has to be considered as amended. The second amendment on 24th June, 1968 has no bearing on the question under consideration. Clause 3 of the impugned order is under the heading 'Regulation of use of gur'. This heading cannot be referred to for the purpose of construing this clause, if it is otherwise clear and unambiguous. This clause is worded in negative terms. It is clear and unambiguous. It says—

"No person shall use gur for any purpose other than the purpose of:— (a) consumption in the form of gur; (b) preparation of any article (not being alcoholic liquor) used as drink or medicine for human consumption; or (c) cattle feed".

The injunction is that barring the use of gur for the purposes permitted, it is not to be used for any other purposes. 'Jaggery' used by the petitioners is included in the term 'gur' as defined and its use by the petitioners for distilling alcoholic liquor is prohibited. It regulates as well as prohibits. The regulation is in regard to the purposes permitted. The prohibition is in regard to the purposes not so permitted. The argument of Mr. Sorabji

is that in so far as regulation aspect of this clause is concerned, he can have no objection on the ground of ultra vires, but what he objects — and objects strongly — is its prohibition aspect. This, he argues, is ultra vires Section 3. In this connection he invites my attention to Clause (d) of sub-section (2) of Section 3, noticed earlier. This argument deserves careful consideration, but before I consider it, I may refer to — (1) 'Toronto Municipal Corporation v. Virgo', (1896) A.C. 88; (2) 'Bhola Prasad v. Emperor', AIR 1942 F.C. 17; and (3) 'State of Mysore v. Sanjeeviah', AIR 1967 SC 1189, cited by Mr. Sorabji. In the first decision, Section 495 of the Municipal Act of Ontario gave local authorities the power to make by-laws for licencing, regulating and governing hawkers and petty chapmen; and this was held not to authorize a by-law prohibiting hawkers from plying their trades at all in a substantial and important portion of the city. Lord Davey, while delivering judgment of the Judicial Committee, observed at p. 93:—

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words. Their Lordships refer (amongst others) to S. 489, sub-ss. (25), (26), (28), (29), (44), (46), (51) and S. 496, Sub-ss. (3), (13), (14) and (15). The language of these sub-sections — "preventing or regulating"; "preventing or regulating and licencing" — tends to shew that the framers of the Act did not intend to include a power to prevent or prohibit in a power to regulate or govern."

This decision was reviewed by the Federal Court in the second decision cited. In that case, it was observed by Gwyer C. J., speaking for the Federal Court that:—

"We see no reason to dissent from the view that the power to regulate does not include a power to prohibit."

In 'Attorney General for Ontario v. Attorney General for the Dominion', (1896) A.C. 348, the aforesaid observations of Lord Davey were quoted with approval by Lord Watson at p. 363. This case also

is reviewed by Gwyer C. J. The ratio of the decision of the Judicial Committee was that the power given to the Dominion Parliament by Section 91 (2) of the British North America Act, to make laws in the regulation of trade and commerce did not enable the Dominion Legislature to enact legislation to prohibit the traffic in intoxicating liquors. It may be stated that the Federal Court was considering the scheme of the Bihar and Orissa Excise Act, 1915 as amended by the Bihar and Orissa Excise (Amendment) Act, 1940, and, in that connection the words 'to prohibit the possession of intoxicating liquors by any person or class of persons' in the context of Entry 31, List 2, Schedule 7 and Section 100 of the Constitution Act, 1935, were construed.

In the third decision, AIR 1967 SC 1189, the facts were that by Section 37(1) of the Mysore Forest Act 1900, the State Government is authorized to make rules to regulate the transit of forest produce. Section 32(2) provides "such rules may, amongst other matters, (b) prohibit the import, export, collection, or moving of forest produce without a pass from an officer authorized to issue the same or otherwise than in accordance with the conditions of such pass". By Rule 2 framed in exercise of the power conferred under Clause (b), a person intending to transport forest produce in any of the areas specified in Schedule 'A' must obtain a pass from a forest officer. This rule was regarded by the Supreme Court as "clearly regulatory of the right to transport forest produce", but not the two provisos added thereto. The first proviso is:— "Provided that no such permit shall authorize any person to transport forest produce between sun-set and sun-rise in any of the areas specified in Schedule 'A'. This proviso was added by notification dated April 15, 1959.

By another notification dated September 14, 1960, the second proviso was added — "provided further that permission may be granted to timber merchants on their requisition to transport timber upto 10 p.m. under the following conditions:— (i) the party who wishes to avail of the concessions should pay a cash deposit of Rs. 1,000/- as security for due compliance with the Timber Transit Rules as in force; and (ii) that the deposit may be forfeited to Government for breach of any of the conditions of the Timber Transport Rules. The validity of these two provisos was challenged in a petition under Article 226 of the Constitution in the High Court of Mysore. It was held by that Court that by the provisos added to Rule 2, the State Government had, while seeking to regulate the transport of timber, stopped transport altogether, and in doing so the State Government acted in excess of the powers conferred

upon it by Section 37 of the Act. The State of Mysore appealed to the Supreme Court after obtaining special leave under Article 136 of the Constitution. Shah J., delivering judgment on behalf of the Supreme Court, observed:—

"By the terms of the two provisos there is an absolute prohibition against transportation of forest produce between the hours of 10 p.m. and sun-rise, and a qualified prohibition between the hours of sun-set and 10 p.m. If a transporter of a forest produce makes a cash deposit of Rs. 1,000/- as security, he may be permitted to transport forest produce between the hours of sun-set and 10 p.m.

... ..

 Power to impose restrictions of the nature contemplated by the two provisos to R. 2 is not to be found in any of the clauses of sub-s. (2) of S. 37. By sub-s. (1) the State Government is invested with the power to regulate transport of forest produce "in transit by land or water". The power which the State Government may exercise is, however, power to regulate transport of forest produce, and not the power to prohibit or restrict transport. Prima facie, a rule which totally prohibits the movement of forest produce during the period between sun-set and sun-rise is prohibitory or restrictive of the right to transport forest produce. A rule regulating transport in its essence permits transport, subject to certain conditions devised to promote transport; such a rule aims at making transport orderly so that it does not harm or endanger other persons following a similar vocation or the public, and enables transport to function for the public good."

8. I may refer to two other decisions cited by learned Government Pleader, in support of the contention, that the power to regulate under Clause (d) of sub-section (2) of Section 3 of the Act would also include the power to prohibit. The first decision is — 'Aluminium Corp. of India v. Coal Board', AIR 1957 Cal. 326. In that decision while considering the argument at the Bar — that the Central Government cannot under the guise of regulating coal mines governed by the Coal Mines (Conservation and Safety) Act, 1952, take upon itself the power of levying a tax — the learned Judge of the Calcutta High Court said at p. 329:—

"In my opinion, the word "Regulation" would not ordinarily imply power to impose taxation, but under particular circumstances where funds are required for the implementation of the objects of an Act, it might include the power of raising such funds. I must, however, admit that the matter is not free from doubt."

This decision is not directly to the point. There is, however, a high authority

in support of the contrary view that the power of taxation or levying fee can only be conferred in specific terms ('Mohammed Yasin v. Town Area Committee, Jalalabad'), (1952) SCR 572=(AIR 1952 SC 115), followed in 'Asa Ram v. District Board, Muzzafarnagar', (1959) Supp. (1) SCR 715 (718)=(AIR 1959 SC 480 at p. 482). The decision in Asa Ram's case, (1959) Supp. (1) SCR 715=(AIR 1959 SC 480) is an authority for the proposition that the power of regulation would include the power of issuing licences. The decision in Mohammed Yasin's case, 1952 SCR 572=(AIR 1952 SC 115) is an authority for the principle that there is distinction between granting licences which depends on the power of regulation, and levying of licence fees, which can only be levied if there is a specific provision to that effect.

Clause (d) of sub-section (2) of Section 3 of the Act provides regulation by licences in specific terms. The second decision is 'Arjan Das v. State of Punjab', AIR 1958 Punj 400. In that case the validity of the Punjab Opium (Restriction on Oral Consumption) Rules made by the Punjab Government under Section 5 of the Opium Act, 1878 was challenged on the ground of ultra vires. Section 4 of the Opium Act prohibits possession, transport, import or export or sale of opium unless permitted by the Act or by any other enactment or by rules framed under the Act. Section 5 empowers the State Government to make rules under the Act to permit absolutely or subject to conditions and also to regulate the possession and sale etc. of opium. Section 5 was enacted keeping in view the local conditions. It was held by the Punjab High Court that the rules which in effect introduced rationing leading to complete prohibition of opium are not inconsistent with the provisions of the Opium Act, under which they were made, nor are these provisions beyond the scope of the Act. In this connection the following observations at p. 401 are relevant:—

"Whether or not "regulation" of an activity includes its total prohibition, depends upon the nature of activity sought to be regulated and also on the facts and circumstances of each case. It has been held by the Judicial Committee of the Privy Council in Commonwealth of Australia v. Bank of New South Wales, 1950 A.C. 235, that the power of regulation does not normally include the power of prohibition but under certain circumstances even prohibition may be held to be covered by the power of regulation. In Slattery v. Naylor, (1888) 13 AC 446, the Judicial Committee upheld a bye-law prohibiting interment in a particular cemetery although S. 153 of the Municipalities Act 1867 in that case had empowered the Municipal Commit-

tee to make bye-laws for only regulating the interment of the dead. In the present case the legislature in S. 4 of the Act has declared its decision of prohibiting sale and possession of opium".

A directive principle enshrined in Article 47 of the Constitution was also relied upon by the learned Judge in support of the view that "regulations" and "conditions" include prohibition of the opium trade. This decision is with reference to the particular phraseology of Sections 4 and 5 of the Opium Act and the rules made thereunder. It is also not directly to the point.

9. I may also cite some decisions. Section 3 of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act 1949, is a provision somewhat similar to Section 3 of the Act. This provision was construed by the Supreme Court in 'V. S. R. & Oil Mills v. State of Andhra Pradesh', AIR 1964 SC 1781. In that case it was contended by Mr. M. C. Setalvad, learned counsel, that the power to regulate conferred on the respondent by Section 3(1) of the said 1949 Act cannot include the power to increase the tariff rate, although it would include the power to reduce the rates. Gajendragadkar C. J., speaking for the Supreme Court, repelled this argument in the following words:—

"This argument is entirely misconceived. The word "regulate" is wide enough to confer power on the respondent, to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which S. 3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate". (p. 1787).

In a very recent judgment dated 29th April, 1969 — Civil Appellate Jurisdiction Civil Appeal No. 882 of 1968 (SC), — the expression 'regulation' in Entry 3 of List 1 Seventh Schedule of the Constitution was construed by Bhargava J., speaking for the Supreme Court, thus:—

"We cannot accept that the word "regulation" can be so narrowly interpreted as to be confined to allotment only and not to other incidents, such as termination of existing tenancies and eviction of persons in possession of the house accommodation. The dictionary meaning of the word "regulation" in the Shorter Oxford Dictionary is "the act of regulating" and the word "regulate" is given the meaning of "to control, govern or direct by rule or regulation". This entry thus gives the power to Parliament to pass legislation

for the purpose of directing or controlling all house accommodation in cantonment areas. Clearly, this power to direct or control will include within it all aspects as to who is to make the constructions, under what conditions the constructions can be altered, who is to occupy the accommodation and for how long, on what terms it is to be occupied, when and under what circumstances the occupant is to cease to occupy it, and the manner in which the accommodation is to be utilised. All these are ingredients of regulation of house accommodation and we see no reason to hold that this word "regulation" has not been used in this wide sense in the entry."

It will be noticed that the word "regulation" in the legislative entry was construed liberally so as to include "all those ingredients of regulation of house accommodation". The principle of interpretation is well settled that widest possible construction must be given to the words used in the legislative entries and that they are to be construed most liberally and not in a narrow and restricted sense. (See 'Ajoy Kumar v. Local Board', AIR 1965 SC 1561; and 'Punjab D. Industries v. I. T. Commr.', AIR 1965 SC 1862; and 'Harakchand Bhantia v. Union of India', Writ Petns. Nos. 282, 407 and 408 of 1968, decided on 30th April, 1969 (SC), relating to the vires of the Gold Control Act, 1968.) "We must not forget", said Mr. Chief Justice Marshall, in 'McGullough v. Maryland', 4 Wheat 316 (407), in a different context, "that it is a Constitution we are expounding". This principle of construction will not apply to the construction of Section 3 of the Act, the object of which is "to promote welfare activities or to eradicate a grave social evil". ('Nathul v. State of M. P.', AIR 1966 S.C. 43).

It may be stated that the Act is a piece of social legislation in terms of Article 302 of the Constitution conceived to give effect to socio-economic purposes, but even so, the words used therein are not to be "most liberally" construed. The subject-matter of the Act is substantially relatable to Article 246 read with Entry 33 of Concurrent List of the Constitution. In 1950 A.C. 235 cited by the learned Judge of the Punjab High Court, it was held that as Section 46 of the Australian Banking Act, 1947, authorised the total prohibition of private banking, it directly restricted the inter-State business of banking, and, therefore, its object was to restrain, and not merely to regulate, inter-State "trade commerce and intercourse", and, therefore, it was contrary to Section 92 of the Australian Constitution. This decision relates to total prohibition of private banking in express terms and has no direct bearing. Each case has to be considered on its facts and merits and in

its own setting of time and circumstances, the decisions in other cases being illustrative only. The decisions cited earlier deal with construction of the words "regulation or prohibition" in express terms.

10. I shall now revert to the impugned order. According to Mr. Sorabji, learned counsel for the petitioners, the subject-matter of the impugned order is relatable to clause (d) of sub-section (2) of Section 3 of the Act. The Government Pleader, in addition, relies on clause (g) of sub-section (2) of Section 3. Clause (g) *ex facie* is inapplicable. We are not concerned here with regulating or prohibiting any class of commercial or financial transactions relating to *gur* for the purposes of this clause. The correct approach in construing sub-sections (1) and (2) of Section 3 is to assume that whatever is included in sub-section (2) is also included in sub-section (1). The words of sub-section (1) are wide for reasons that are obvious. Sub-section (1) is of general nature. Sub-section (2) is of particular nature. In enacting sub-section (2), Parliament has provided guidance to the Central Government in the matter of what it can legally do for securing the two objects of sub-section (1) — (a) for maintaining or increasing supplies of any essential commodity or (b) for securing their equitable distribution and availability at fair prices. The matters enumerated in sub-section (2) of Section 3 are only illustrative, as such enumeration is "without prejudice to the generality of the powers conferred by sub-section (1).

Sub-section (2) contemplates an order under sub-section (1) as will appear from the words "an order made thereunder" in sub-section (2). In *'Santosh Kumar Jain v. The State'*, (1951) S.C.R. 303 = (AIR 1951 S.C. 201) the orders made under sub-section (2) of Section 3 of the Essential Supplies (Temporary Powers) Act, 1946 were construed by the Supreme Court. Sub-section (1) of S. 3 of this Act empowered the Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of an essential commodity, or for securing their equitable distribution and availability at fair prices, by order notified, to provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce thereunder. Sub-section (2) enacted that "without prejudice to the generality of the powers conferred by sub-section (1) an order made therein may provide for various matters enumerated therein. Patanjali Sastri, J. (as he then was), delivering judgment on behalf of the Supreme Court, observed:—

"It is manifest that sub-section (2) of S. 3 confers no further or other powers on the Central Government than what

are conferred under sub-section (1), for it is "an order made thereunder" that may provide for one or the other of the matters, specifically enumerated in sub-section (2) which are only illustrative, as such enumeration is "without prejudice to the generality of the powers conferred by sub-section (1)....."

In *'Emperor v. Sibnath Banerji'*, AIR 1945 P.C. 156, the Privy Council considered the question of detention of Sibnath Banerji and others in terms of Rule 26 of the Defence of India Rules, 1940, purported to have been made under S. 2(2) (x) of the Defence of India Act, 1939. It had earlier been held by the Courts in India, following the decision of the Federal Court in *'Keshav Talpade v. Emperor'*, AIR 1943 F.C. 1, that this rule was ultra vires of the rule-making power of the Government of India under Section 2(2) (x), and the detention, therefore, of these persons was bad. This line of reasoning adopted by the Federal Court was not accepted by the Privy Council. The Privy Council observed at page 160:—

"Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-ss. (1) and (2) of the Defence of India Act, and Counsel for the respondents in the present appeal was unable to support that statement, or to maintain that R. 26 was invalid. In the opinion of their Lordships, the function of sub-sec. (2) is merely an illustrative one: the rule-making power is conferred by sub-section (1) and "the rules" which are referred to in the opening sentence of sub-sec. (2) are the rules which are authorised by, and made under sub-section (1); the provisions of sub-sec. (2) are not restrictive of sub-sec. (1), as indeed, is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)".

Applying the principle of construction in these two decisions we have to read clause (d) of sub-section (2) of Section 3 along with its parent sub-section (1) of Section 3 not only for the purposes of the two objects of the Act, but also for the purposes authorised therein, namely, for "regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein." That it can be so read for the two objects is not disputed by Mr. Sorabji. The impugned order is made under Section 3 in its entirety and not under clause (d) of sub-sec. (2) of Section 3 which is only illustrative. Section 3(2)(6) of the Defence of India Act, 1962 empowers the Central Government to make rules "regarding the publication of news and information". It may not be legal to sustain a rule under this section which empowers the Central Government to pass an order prohibiting publication of news and information by

newspapers. I have chosen an extreme illustration likely to command assent. The argument of Government Pleader that the word regulation in clause (d) of sub-section (2) of Section 3 should be so construed as to include within its ambit and scope the concept of prohibition does not seem to be convincing.

It is true that the Act is a piece of social legislation conceived to give effect to the socio-economic objects and, therefore, it is not to be narrowly construed, but even so there is no sufficient justification for construing 'regulating' so widely as to include therein the function of prohibition. Prima facie, the power to regulate will not include the power to prohibit. The word 'regulation' has to be understood in its ordinary sense. Words in statutes vary as the colour of a kaleidoscope but the word 'regulation' has retained its conservative character with some exceptions, as in the case of (1888) 13 AC 446 cited in the decision of the Punjab High Court. The concluding observations of Lord Davey and the observations in other decisions cited earlier by Mr. Sorabji seem to support his contention that clause (d) of sub-section (2) of Section 3, in its context, cannot be invoked for saving the impugned order in so far as the prohibitory function is concerned.

The rule of interpretation 'poscitur a sociis' will apply. Parliament could have used the word 'prohibiting' in addition to 'regulating' in clause (d) of sub-section (2) of Section 3, as in the case of sub-sec. (1) of Section 3 and clauses (g) and (h) of sub-section (2) of Section 3 but this was not done, presumably because what was intended in clause (d) of sub-section (2) of Section 3 was regulation in its ordinary sense. The proviso to clause 3, enabling use of gur in stock on the date of the commencement of the impugned order with the prior permission of the Central Government is clearly regulatory; but, for the ban on the use of gur in future for the preparation of alcoholic liquor, we have to turn to the parent sub-section (1) of Section 3. The words used therein are 'regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein'. The impugned order is not concerned with production of gur. As, stated earlier, the impugned order is to be construed in the context of sub-section (1) of Section 3 read with clause (d) of sub-section (2) of Section 3 not only for giving effect to the two objects of the Act, but also for the various purposes specified therein.

In the main counter-affidavit the necessity for issuing the impugned order in relation to 'gur', as defined, is explained in para 6 — "for securing its equitable distribution and availability at fair prices".

The prohibition on use of gur for the purposes of alcoholic liquor is to be considered in the background of "supply and distribution" position of gur when the impugned order was issued. The petitioners could only use gur in the future if supply and distribution to them is free, but not otherwise. 'Supply' means 'to furnish, provide, confer (something needed, desired or used)' while 'distribution' means 'the dispersal among consumers of commodities produced'; (see 'The Shorter Oxford English Dictionary'). The prohibitory part of the impugned order, in my opinion, is to be related to 'supply and distribution' functions in sub-section (1) of Section 3 and, when so related, the impugned order would seem to be *intra vires* and not *ultra vires* Section 3 of the Act. The functions relating to supply, distribution and use of gur are interdependent for purpose of preparation of liquor. A person supplying or distributing gur would seem to be liable for abetment under Section 8 of the Act. The Central Government can very well say that the dispersal of gur is for direct consumption of those whose need is greater. Let us not bother about the form of the impugned order when only substance is important. I do not agree with Mr. Sorabji that the impugned order is beyond the powers conferred on the Central Government by Section 3 of the Act. This question is accordingly decided against the petitioners.

11. The third question, namely, whether the impugned order violates Article 19(1) (g) and Article 14 of the Constitution remains to be considered. This I am considering on the assumption that the impugned order is *intra vires* Section 3 of the Act. The object is to dispose of this matter finally in case a contrary view is possible on the question of *ultra vires*. The normal practice is not to answer constitutional questions if petitions under Articles 226 and 227 of the Constitution could be effectively disposed of on other grounds. The machinery etc., which the petitioners are using for preparation and distillation of country liquor is leased to them by the respondent No. 2 (State Government) under contract, dated 26th July, 1963. It is the case of the respondents that the petitioners have no proprietary or personal interest in this property. The said property admittedly belongs to the respondent No. 2. In view of this position, Mr. Sorabji is asked to explain how Article 19(1)(f) is attracted. He submits that he is not pressing this ground of attack on the impugned order. He, however, presses grounds of attack based on violation of Article 19(1)(g) and Article 14 of the Constitution.

12. It is stated by Mr. Sorabji that the petitioners are citizens of India and as such they have a fundamental right

guaranteed to them under Article 19(1)(g) to carry on their trade or business in country liquor, and this right is arbitrarily restricted by the impugned order. It is not in dispute that they are citizens of India. It is further stated by Mr. Sorabji that the restriction imposed by the impugned order is not a reasonable restriction within the meaning of saving clause (6) of Article 19. This fundamental right is not an absolute right, as will appear from this clause. It is conceded by Mr. Sorabji that the restriction is in the interests of the general public. The poorer people must have gur as their food even though its use is denied to distillers for preparation of alcoholic liquor. It is clear that the impugned order does restrict the said right of the petitioners. It prohibits them from using gur for preparation of alcoholic liquor.

It is, therefore, for the respondents to satisfy this Court that the restriction imposed is reasonable. (See 'Saghir Ahmed v. State of U. P.', AIR 1954 SC 728 and 'Hari Chand Sarda v. Mizo District Council', AIR 1967 SC 829), cited by Mr. Sorabji. In 'Krishan Kumar v. J. & K. State', AIR 1967 SC 1368, it was held that dealing in liquor is business and that the citizen has a right to do this business. The broad argument in that case that dealing in noxious and dangerous goods like liquor is dangerous to the community and subversive to its morals and hence dealing in liquor is not trade or business was not accepted by the Supreme Court. In the oft-cited case 'State of Madras v. V. G. Row', AIR 1952 SC 196, the Supreme Court laid down an elaborate test of reasonableness which has since been accepted in subsequent decisions of that Court. Patanjali Sastri, C. J., delivering judgment on behalf of the Supreme Court, observed at page 200:—

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

The context was the principle enunciated earlier in 'Dr. N. B. Khare v. State of Delhi', AIR 1950 SC 211, that both substantive and procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness, that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions,

but also the circumstances under which and the manner in which their imposition had been authorized. The decision in Row's case, AIR 1952 SC 196, was with reference to Article 19(1)(c) read with clause 4 of the Constitution but the aforesaid observations, with respect, are apposite on the test of reasonableness in Clause (6) of Article 19. The State cannot reasonably be required to measure the test of reasonableness in the nice balance of a jeweller's scale. It is well settled that reasonableness of the restriction is to be judged not in the background of theoretical standards or predetermined pattern ('Cooverjee v. Excise Commissioner, Ajmer', AIR 1954 S.C. 220).

The principle enunciated in Cooverjee's case, AIR 1954 S.C. 220 is that in the case of the laws prohibiting trades in noxious or dangerous goods such as production or trading in liquor, it would be a reasonable restriction to prohibit trade or business altogether. In this connection, reference may also be made to Saghir Ahmed's case, AIR 1954 S.C. 728 (supra) and 'Madhya Bharat Cotton Association v. Union of India', AIR 1954 SC 634, where prohibition was treated as only a kind of restriction. According to Mr. Sorabji, the restriction on use of gur for preparation of alcoholic liquor is drastic and excessive and further it has no reasonable relation to the objects of the Act sought to be achieved, and in support of this argument he cites 'Narendra Kumar v. Union of India', AIR 1960 SC 430. In this case the validity of The Non-ferrous Metal Control Order, 1958 was successfully challenged because of non-compliance with the provisions of Sections 3(5) and 3(3) of the Act. This order controlling prices was passed under Section 3 of the Act. The following observations in 'Chintaman Rao v. State of Madhya Pradesh', AIR 1951 SC 118 were cited therein at page 434:—

"The effect of the provisions of the Act, however, has no reasonable relation to the object in view but is so drastic in scope that it goes much in excess of that object. Not only are the provisions of the statute in excess of the requirements of the case but the language employed prohibits a manufacturer of bidis from employing any person in his business, no matter wherever that person may be residing. In other words, a manufacturer of bidis residing in this area cannot import labour from neighbouring places in the district or province or from outside the province. Such a prohibition on the face of it is of an arbitrary nature inasmuch as it has no relation whatsoever to the object which the legislation seeks to achieve and as such cannot be said to be a reasonable restriction on the exercise of the right."

The facts of this case are distinguishable, but the observations, with respect, are material. This was an extreme case of restrictions being drastic and arbitrary in their very nature. The position is different in so far as the impugned order is concerned. The preamble of the Act is not without significance. The law is well settled that the preamble is the key to the interpretation of an Act and its assistance could be sought in order to decide the scope and object of the legislation ('Diwan Sugar & General Mills (Private) Ltd. v. Union of India', AIR 1959 SC 626). In this decision by their Lordships of the Supreme Court, the preamble of the Act under consideration was relied upon, amongst other reasons, to uphold the validity of the Sugar (Control) Order, 1955 passed in exercise of the power conferred on the Central Government under Section 3. We are not considering a case of vesting of uncontrolled discretion with the licencing authorities, as in the case of AIR 1967 SC 829, which makes the restriction unreasonable. We are also not considering a case of the Act suffering from the vice of excessive delegation without guidance. The policy for guidance is laid down in clear terms in the preamble read with Section 3 of the Act. As pointed out earlier, the Act has specified the authorized purposes for which the orders could be passed under Section 3.

In 'Hari Shankar v. State of M. P.', (1955) 1 SCR 380=(AIR 1954 S.C. 465), it was said that in respect of commodities essential to the community it is reasonable to have restrictions which may, in certain circumstances, extend to total prohibition for a time, of all normal trading in that commodity. The impugned order seems to be of a transitory nature intended to meet the difficult situation caused because of increase in prices of gur on account of large scale purchases of gur by distillers. In this connection Government Pleader invites my attention to the Press note issued by the Central Government explaining its necessity and background. The impugned order does not speak of duration, nor does the Press note, but it seems to be of a temporary nature. The greatest good of the greatest number was considered as a ground for reasonableness in upholding the validity of a notification issued under the U.P. Sugar Cane Act ("Tika Ramji v. State of U.P.", AIR 1956 SC 676 (710)). This test applies to this case. The distillers of alcoholic liquor constitute a microscopically small section of people as compared to a very large section of poorer people who consume gur as food. The need for individual freedom is balanced with the need for social control. The argument of Mr. Sorabji that the impugned order is operating in this territory where there is no prohibition and, therefore, it imposes un-

reasonable restriction is devoid of substance.

Reasonableness of the restriction imposed by the impugned order is to be adjudged in the context of the scheme of the Act and not territorially and, when so adjudged, I have no doubt that it comes within the purview of clause (6) of Article 19 and, therefore, is saved from successful challenge. The petitioners are not prevented from trading in gur. They can purchase gur in any quantity they like from suppliers and distributors but cannot use it for preparation of alcoholic liquor. It is true that rights declared in words may be lost in reality, but this case does not fall in that category. In enacting the impugned order, the Central Government acted with due deliberation and care keeping in view the prevailing situation. The test of reasonableness in Row's case, AIR 1952 SC 196, is satisfied in this case. The use and consumption of gur as food is certainly more important than its use for preparation of alcoholic liquor. The facts in the 'Lord Krishna Sugar Mills Ltd. v. Union of India,' AIR 1959 SC 1124, cited by Government Pleader, are distinguishable from the facts of the present case and this decision, with respect, has no bearing on the question under consideration. I hold that Article 19(1)(g) is not violated.

13. It is next submitted that the impugned order violates Article 14 of the Constitution. The meaning, scope and effect of Article 14 has been explained by the Supreme Court in a number of decisions — 'Chiranjitlal Chowdhury v. Union of India', AIR 1951 SC 41, 'Ramkrishna Dalmia v. Justice S. R. Tendolkar', AIR 1958 SC 538, 'State of M. P. v. Bhopal Sugar Industries', AIR 1964 SC 1179 and some other decisions including the recent decisions in Harakchand Bantia's case, W. P. Nos. 282, 407 and 408 of 1968, D/- 30-4-1969 (SC) (supra). The law declared by the Supreme Court is now well established. This law is that while Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation, and that in order to pass the test of permissible classification two conditions must be satisfied, namely (i) the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differential must have a rational relation to the object sought to be achieved by the statute in question.

The classification, it has been held, may be founded on different basis, namely, geographical, or according to the objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the

objects of the Act under consideration. Let us apply the law declared by the Supreme Court to the impugned order. Clause (d) of sub-section (2) of Section 3 permits use and consumption of 'gur' as defined for preparation of any article used as drink or medicine for human consumption. This is one class of persons using gur. As against that class there is the other class where use of gur is prohibited to distillers for preparation of alcoholic liquor. In 'Harman Singh v. Regional Transport Authority, Calcutta Region', AIR 1954 SC 190. Mahajan J. (as he then was), speaking on behalf of the Supreme Court, observed at page 192:

"A law applying to a class is constitutional if there is sufficient basis or reason for it. In other words, a statutory discrimination cannot be set aside as the denial of equal protection of the laws if any state of facts may reasonably be conceived to justify it."

There is sufficient basis for permitting the use and consumption of gur for the purposes specified, and also for prohibiting its use for preparation of alcoholic liquor. The statutory discrimination is not illogical. Mr. Sorabji cites 'State of Rajasthan v. Mukan Chand', AIR 1964 SC 1633, in support of his contention that the differentia has no rational relation to the objects of the Act sought to be achieved. It was held in that case that the portion of Section 2(e) of the Rajasthan Jagirdars' Debt Reduction Act excluding certain debts due to creditors mentioned in clauses (i) to (vi) infringes Article 14 of the Constitution and is therefore invalid. This portion, according to the Supreme Court, did not satisfy the test of permissible classification. This decision, with respect, has no application to the facts of the present case. The classification in our case has a rational relation to the two objects of the Act sought to be achieved. The classification is reasonable for the purposes of the Act. I hold that the impugned order does not violate Article 14 of the Constitution.

14. In the view taken of this case, the validity of the impugned order is maintained and the petition filed by the petitioners is dismissed with costs. The costs are assessed at Rs. 200/-.

15. The Court is entitled to effective assistance from the State. Learned Government Pleader qualified in the Portuguese system of law is not reasonably expected to do adequate justice to this case.

Petition dismissed.

AIR 1970 GOA, DAMAN & DIU 47
(V 57 C 8)

V. S. JETLEY, J. C.

Chandrakant Shantaram Cautonker,
Applicant v. State, Respondent.

Ref. No. 11 of 1969, D/- 5-8-1969.

(A) Criminal P. C. (1898), Ss. 537(a), 342 and 242 — Motor Vehicles Act (1939), S. 48 (3) (vi) — Offence under S. 48 (3) (vi) — Summons case — Substance of accusation against accused explained to him — Accused denying charge — Failure to examine accused under S. 342 — No prejudice shown — S. 537(a) can be relied upon, assuming S. 342 is attracted.

Under Section 537(a) the conviction and sentence are not reversible on account of any error, omission or irregularity in any proceedings during the trial unless the error, omission or irregularity has in fact occasioned a failure of justice. Mere non-examination or defective examination is not a ground for interference unless prejudice is established. Real and not fanciful or imaginary prejudice is what is contemplated. Case law discussed.

(Para 4)

Therefore where in a prosecution under S. 48(3)(vi), Motor Vehicles Act, which was a summons case, the substance of accusation against the accused was explained to him as required by S. 242, Cr. P. C. and he denied the charges and it was not shown that any prejudice was caused to the accused because of failure to examine him under S. 342;

Held S. 537(a) could be relied upon assuming S. 342 was attracted. (Para 4)

(B) Motor Vehicles Act (1939), Ss. 48 (3)(vi) and 112 — Offence under S. 48 (3) (vi) — Accused not a previous convict — Maximum punishment of fine being Rs. 100/- sentence imposing a fine of Rs. 150/- cannot be sustained — Sentence of fine altered from Rs. 150/- to 100/-.

(Para 5)

(C) Criminal P. C. (1898), S. 342 — Whether applies to summons case — (Quaere) — Conflicting. Case law referred.

(Para 3)

Cases Referred: Chronological Paras

(1967) AIR 1967 Goa 60 (V 54)=

1967 Cri. L. J. 746, Leofred Lobo v. State

4

(1963) AIR 1963 S.C. 612 (V 50)=

1963 (1) Cri. L. J. 495, Jaidev v. State of Punjab

4

(1962) AIR 1962 S.C. 1239 (V 49)=

1962 (2) Cri. L. J. 296, Rama Shankar Singh v. State of W. B.

4

(1956) AIR 1956 S.C. 536 (V 43)=

1956 Cri. L. J. 940, Moseb Kaka Chowdhry v. State of W. B.

4

(1956) AIR 1956 S.C. 731 (V 43)=

1956 Cri. L. J. 1365, Chikkaranga Gowda v. State of Mysore

4

(1940) AIR 1940 Bom. 314 (V 27)=
42 Cri. L. J. 71, Emperor v.
Kondiba Balaji

3

(1921) AIR 1921 Bom. 374 (V 8)=
22 Cri. L. J. 17, Emperor v. Fer-
nandez

3

(1914) AIR 1914 Cal. 663 (V. 1)=15
Cri. L. J. 190, Mohammed Hossain
v. Emperor

3

S. K. Kakodkar, for Applicant; G. V.
Tamba, for State.

ORDER:— This is a reference made by the learned Sessions Judge under Section 438 of the Code of Criminal Procedure. The recommendation, in substance, made by him is that the sentence of fine of Rs. 150/- imposed by the learned Magistrate for an offence under Sec. 48(3) (vii) of the Motor Vehicles Act, 1939, read with the relevant rules thereunder and conditions of permit, is in excess of the maximum limit of fine provided under Section 112 and, therefore, it should be set aside.

2. The material facts leading to this reference are that the respondent was tried summarily for contravening the provisions of Section 48(3)(vi) of this Act. (Clause (vii) mentioned is a mistake). The accusation against him was that on 26th September, 1968, at 19.30 hrs. he had carried, in a bus driven by him, 30 extra passengers. The learned Magistrate dealt with this case as a summons case, under Chapter XX of the Criminal Procedure Code (hereinafter referred to as "the Code"). He tried it summarily in accordance with the provisions of Chapter XXII of the Code. The respondent in his examination denied that he had taken extra passengers. The number of such extra passengers was 30. The prosecution examined four witnesses in support of the accusation against the respondent. In his defence the respondent examined a witness by name Sadananda Assonorcar. This witness deposed that the respondent had not carried extra passengers as alleged. The four prosecution witnesses deposed in clear terms that he had carried extra passengers as stated by them.

The learned Magistrate accepting the prosecution evidence convicted him under Section 48(3) (vii) and sentenced him to pay a fine of Rs. 150/-. This sentence was passed by him presumably relying on Section 112 of the Act. A revision petition was filed against the conviction and the sentence recorded by the learned Magistrate in the Sessions Court. The learned Sessions Judge after considering the arguments urged on behalf of the respondent and the State, made the above recommendation. He also took note of the argument advanced on behalf of the respondent that failure to

examine the respondent under Section 342 of the Code had caused prejudice to him. The learned Sessions Judge beyond taking notice of this argument did not make recommendation that the sentence of fine imposed should be set aside because of failure to comply with the provisions of this section. This, in short, is the background of the case leading to the reference.

3. Mr. S. K. Kakodkar, learned counsel for the respondent, contends that the provisions of Section 342 are also applicable to summons cases and, in support of this contention, he cites 'Emperor v. Kondiba Balaji', 42 Cri. L. J. 71=(AIR 1940 Bom. 314). This is a Division Bench judgment of the Bombay High Court, and, according to the learned Chief Justice, with whom his brother Judge agreed, every failure to comply with Section 342 of the Code does not necessarily vitiate the trial. If the Court is satisfied that failure to comply with the strict terms of the Section has caused no prejudice, the court should not interfere. The provisions of Section 537 of the Code would cover such a case. The learned Chief Justice also observed that Sec. 342 applies even to summons cases tried summarily under Section 263 and the accused is prima facie prejudiced if no statement is taken at all. In reaching this decision the Division Bench relied on an earlier decision 'Emperor v. Fernandez', AIR 1921 Bom. 374 and also 'Mahommed Hossain v. Emperor', AIR 1914 Cal. 663, decided by the Calcutta High Court. As against this view, the learned Single Judge of the Andhra Pradesh High Court came to the conclusion after considering the scheme of the trial of summons cases under Chapter XX and also mode of summary trial under Chapter XXII, that the provisions of Section 342 are not applicable to summons cases. There are some decisions of other High Courts, also on this point but for the purposes of disposal of this reference, it is really not necessary to decide the larger question whether the provisions of Section 342 are applicable to summons cases, in so far as second examination, as contemplated by Section 251-A of the Code is concerned.

This section is included in Chapter XXI relating to trial of warrant cases by Magistrate. Section 342 in Chapter XXIV is under the heading "General provisions as to inquiries and trials". It does not say it applies to summons cases or warrant cases. It is silent and for good reasons. It is not in dispute in the instant case that the respondent was explained the substance of the accusation against him as required by Section 242 of the Code and he stated that he had not taken extra passengers. There was, therefore, examination of the respondent once but not the second time after the defence evi-

correspondence which may have taken place between her and her husband and (iii) that the appellant did not get herself examined by a doctor although a suggestion to that effect was made by the Court. As for the first two, the appellant's case was that she did not know who was the doctor and that she had not preserved any correspondence. There is no reason for not accepting her explanation. But even if her explanation is not convincing that is not sufficient to get over the probabilities of the case to which I have earlier drawn attention. The third reason calls for more than a brief notice. Mr. Mehta argued, and I think rightly, that a woman's hymen may be ruptured from a variety of causes, though she may in truth be a virgin and a woman would not run the risk of an adverse inference and a possible blot on her if the hymen was found ruptured. The failure to produce that negative evidence should not therefore have weighed with the Judge. But he said he had advised the appellant before the appeal was filed to get herself examined by the Civil Surgeon and she had done so. He produced the report of the Civil Surgeon showing that the appellant was a virgin. He made an application for permission to lead that additional evidence. Rule was issued to the respondent and it was forwarded by post at the same time as the notice of the appeal but although the notice of the appeal has returned served, the notice of that application has not returned. It is not therefore possible to permit that additional evidence to be adduced. However, his submission that the appellant's failure to adduce the negative evidence which the learned Judge called for should not have weighed with the Judge is on the facts of this case well founded.

15. For these reasons, in my opinion, the evidence of the petitioner should have been accepted on the facts and circumstances of the case. Accepting it I hold it to have been proved that her husband was impotent at the time of the marriage and continued to be so till the institution of the petition. The petition must therefore be allowed.

16. The appeal is allowed and the respondent's marriage with the appellant is annulled under Section 12(1)(a) of the Hindu Marriage Act, 1955. The respondent having not contested there will be no orders as to costs. "

- Appeal allowed.

AIR 1970 GUJARAT 49 (V 57 C 8)

B. J. DIVAN AND V. R. SHAH, JJ.

Maneklal Nathalal Jingar, Petitioner v. Ochhavlal Chhaganlal and another, Opponents.

Civil Revn. Appln. No. 822 of 1965, D/- 3-12-1968 against order of 2nd Joint Civil J., Jr. Division, Baroda, D/- 15-9-1965.

Civil P. C. (1908), O. 21, Rr. 97, 35 and 103—Limitation—Delivery under warrant issued under O. 21, R. 35 resisted — Fresh warrant obtained — Same resister objecting to delivery again — Application under O. 21, R. 97 made, more than 30 days after first resistance but within 30 days after the second resistance — Application not barred under Art. 129, Limitation Act, 1963.

Where delivery under a warrant issued under O. 21, R. 35 Civil P. C. is resisted and a fresh warrant is obtained but the same resister objects to delivery again, an application under O. 21, R. 97 made then, though more than 30 days after the first resistance, but within 30 days after the second resistance is not barred under Art. 129 Limitation Act. (Para 11)

The making of an application under O. 21, R. 97 is permissive and it is an enabling provision for the decree-holder. No penalty can be imposed upon him if he fails to avail himself of this.

(Para 9)
The different rules of O. 21 deal with the procedure in execution of a decree and the issuance of a warrant under O. 21, R. 35 is a step in the entire procedure to help the decree-holder to obtain the fruits of his decree. He is entitled to say to the court at any stage of the procedure that he will not like to have its help any more. But this will not deprive him of his right to go to the court again at any time during which the decree is enforceable and it is implicit in this right that he can make an application under O. 21, R. 97 every time he is resisted.

(Para 9)
A resistance to delivery of possession is a mere intimation to the decree-holder that the resister will not allow him to take possession. It is open to the decree-holder not to join issue with him at that time and to allow the warrant to lapse. Since the making of the application under O. 21, R. 97 is not mandatory, a resistance comes to an end with the abandonment by the decree-holder of his right to enforce the warrant for possession by making an application under O. 21, R. 97. That resistance cannot then be said to be continued when a fresh obstruction is made to delivery under a fresh warrant.

(Para 9)
The resistance or obstruction mentioned in Art. 129 of the Limitation Act refers to the resistance or obstruction complain-

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ed of in the application under O. 21, R. 97. If, therefore, the complaint is as to a second obstruction, time will begin to run from the date of the second obstruction and not from the date of the first obstruction. (Para 9)

Therefore, even if the first obstruction had been made by the same person in the same character as the second obstruction, in respect of an application under O. 21, R. 97 complaining of the second obstruction, time will begin to run from the date of the second and not of the first obstruction. (Para 9)

In view of the nature of the proceedings and the language of Art. 129 Limitation Act, it is more imaginary than real to say that a decree-holder, finding his application under O. 21, R. 97 in respect of the first obstruction beyond time, will defeat the provision of the Limitation Act by taking out a fresh warrant and then making an application in time for a second obstruction, though it may be more than 30 days after the first resistance. Art. 129, Limitation Act only bars an application about a resistance made more than 30 days ago. If a second obstruction is made, the complaint is not about the first obstruction but only about the second. Since the law allows the decree-holder to make such an application, it cannot be said that Art. 129, Limitation Act is made nugatory. (Para 10)

Thus an application under O. 21, R. 97 in respect of a second resistance to delivery under a fresh warrant under O. 21, R. 35, filed more than 30 days after a first obstruction to a similar delivery, but within thirty days after the second obstruction is not barred under Art. 129 Limitation Act. (1896) ILR 18 All. 233 & AIR 1953 Cal. 499 & AIR 1959 Cal. 613, & AIR 1949 Mad. 753 & AIR 1919 Pat. 425 (2) (FB) & AIR 1957 Trav. Co. 287 & AIR 1947 Sind 118, Foll. Observation in AIR 1933 Bom. 457 (FB), Dissenting from (1896) ILR 18 All. 233, held obiter. (Para 9)

Cases Referred: Chronological Paras

- (1959) AIR 1959 Cal. 613 (V 46),
P. N. Pathak Sharma v. Renuka
Debi 9
- (1957) AIR 1957 Tra. Co. 287 (V 44)
=ILR (1956) Trav. Co. 1139,
Gnanappu v. T. Pillai 9
- (1953) AIR 1953 Cal. 499 (V 40)=
91 Cal. L. J. 55, Official Trustee
v. Monmothonnath 9
- (1949) AIR 1949 Mad. 753 (V 36)=
1949-1 Mad. L. J. 656, Narayan-
swami v. Veerappa 9
- (1947) AIR 1947 Sind 118 (V 34)=
ILR (1946) Kar. 317, Kotumal v.
Gur Ashram 9
- (1933) AIR 1933 Bom. 457 (V 20)=
35 Bom. L. R. 1033 (FB), Mukund
Bapu v. Tanu Sakhu 7, 9

- (1919) AIR 1919 Pat. 425 (2) (V 6)
=4 Pat. L. J. 94 (FB), Raghu-
nandan v. Ramcharan 9
- (1896) ILR 18 All. 233=1896 All.
W. N. 84, Narain Das v. Hazari
Lal 7, 9

B. J. Shelat, for Applicant; N. H. Bhatt,
for Opponent No. 2.

ORDER:— This application raises a short point about limitation in respect of an application made under Order 21, Rule 97 of the Civil Procedure Code and arises under the following circumstances:

2. The petitioner-original decree-holder obtained a decree for possession against opponent No. 1-original judgment-debtor. He filed Darkhast No. 569 of 1964 and a warrant for possession was issued under Order 21, Rule 35 of the Civil Procedure Code. The opponent No. 2 resisted the delivery of possession and thereafter the petitioner withdrew his Darkhast on 2-4-1965. He filed another Darkhast No. 220 of 1965 and obtained a fresh warrant for possession on 25-4-1965. Opponent No. 2 again resisted the delivery of possession to the petitioner and the petitioner filed Miscellaneous Application No. 156 of 1965 on 26-4-1965 under the provisions of Order 21, Rule 97 to remove the resistance made by opponent No. 2 and for possession of the premises. It does not appear from the record of the case before us as to when the first resistance was made by opponent No. 2, but it was conceded on behalf of the petitioner that the first resistance was made more than 30 days before the filing of Miscellaneous Application No. 156 of 1965. The learned trial Judge dismissed this application on the ground that it was barred by limitation under Article 129 of the Indian Limitation Act, 1963 (hereinafter referred to as "the Act").

3. The learned trial Judge came to the conclusion that the second resistance was made by the same person in same character and therefore, though the application was made within 30 days from the date of the second resistance by opponent No. 2, the limitation in fact began to run from the date of the first resistance; and since the application was filed more than 30 days after the first resistance, it was barred by the provisions of Article 129 which prescribes, for such an application, a period of 30 days from the date of resistance or obstruction. Having arrived at these findings, the learned trial Judge dismissed the application of the petitioner. It is against the dismissal of this application that the petitioner has filed this Civil Revision Application.

4. On behalf of the petitioner it was urged that under the provisions of the Civil Procedure Code, so long as the decree for possession is alive and enforceable, he is entitled to file a Darkhast and to obtain a warrant for possession of the

property under Order 21, Rule 35. Under Order 21, Rule 97 he is entitled to make an application to the Court complaining of resistance or obstruction to delivery of possession to him every time such resistance or obstruction is caused by any person. It is further contended that the provisions of Order 21, Rule 97 entitling him to make an application complaining of such resistance or obstruction are not mandatory but are merely permissive and enabling and intended to provide a summary remedy to him to remove the resistance or obstruction without filing a suit in the first instance. Article 129 of the Act prescribes a period of 30 days from the date of the resistance or obstruction as the period during which such an application should be made. The contention on behalf of the petitioner, therefore, is that it is open to him to ignore the previous obstruction and to make an application under Order 21, Rule 97 in respect of the subsequent obstruction and that every obstruction or resistance gives him a fresh cause for making an application under Order 21, Rule 97; and therefore, if he makes an application within 30 days from the date when the obstruction or resistance complained of by him has been caused, his application is within time.

5. On behalf of the opponent No. 2, his learned advocate Mr. Bhatt supported the judgment of the learned trial judge. He argued that if every act of resistance were deemed to give a fresh period of limitation, such a proposition would be in conflict with the provisions of Order 21, Rule 103. He urged that if such a proposition were accepted, it would enable a decree-holder, who had applied under Order 21, Rule 97 against a previous resistance and failed therein, again to take out a warrant for possession and thereafter to make a second application against a fresh obstruction or resistance and he would again call upon the Court to investigate into the right of the obstructor or resister. Mr. Bhatt urged that in this manner, the provisions of Order 21, Rule 103, which make the decision of the Court on an application under Order 21, Rule 97 final, will be nullified.

6. The argument of Mr. Bhatt is devoid of any substance. If the Court investigates into the claim of the resister or obstructor on an application under Order 21, Rule 97 and decides not to remove that obstruction or resistance, that order itself becomes final and conclusive, subject to the result of a suit, under Order 21, Rule 103. Therefore, the executing Court will not be competent to go over again into the merits of a second application complaining of resistance or obstruction under Order 21, Rule 97.

7. The learned trial Judge relied upon certain observations in the case of

Mukund Babu v. Tanu Sakhu, AIR 1933 Bom. 457 (FB). That is a case decided by a Full Bench of the Bombay High Court. In that case the judgment-creditor who had taken out a warrant for possession under Order 21, Rule 35 and who was obstructed in the delivery of possession to him, did not file an application under Order 21, Rule 97 complaining of such an obstruction. The Darkhast in which the warrant for possession was issued, was struck off the file on 21st of January 1927. The judgment-creditor filed a fresh Darkhast on 6th July 1927 and asked for issue of a warrant for possession under Order 21, Rule 35. Both the Courts below came to the conclusion that the application for a fresh warrant to obtain possession under Order 21, Rule 35 did not lie as the judgment-creditor did not file an application under O. 21, R. 97 in respect of the resistance to delivery of possession in the first Darkhast. The Full Bench held, after consideration of certain decisions, that because of the mere fact that the judgment-creditor did not file an application complaining of the obstruction in the first Darkhast, he was not disentitled from filing a fresh Darkhast and from obtaining a fresh warrant for possession under Order 21, Rule 35. That was the only point before the Full Bench for decision and the Full Bench decided it in favour of the judgment-creditor, holding that he was entitled to a fresh warrant for possession under Order 21, Rule 35. Beaumont, C. J., who delivered the leading judgment, observed on page 456:—

"All that the applicant is asking at the moment is that a fresh warrant for possession may issue under R. 35, and to that, I think, he is entitled. That really disposes of the appeal, because we are not dealing today with the rights which may accrue under that fresh warrant. But as the whole question has been argued, and as the rights accruing under the warrant will arise for decision at a later stage of these proceedings, it is, I think, desirable that we should indicate our opinion upon the point."

The learned Chief Justice then proceeded to consider as to what would be the position of the obstructor if he obstructed the delivery of possession in pursuance of the fresh warrant and the judgment-creditor made an application under Order 21, Rule 97 against the obstructor. Dealing with this point, he observed as follows:—

"..... it will be open to the party obstructing to show that his obstruction is by the same person and in the same character as the former obstruction in respect of which no proceedings were taken, and if he succeeds in proving that, Art. 167 will then be a bar to the decree-holder's application. The mere fact that the application is made in respect of a fresh warrant for possession does not, in

my view, involve that the obstruction is a fresh obstruction."

We may mention that Article 167 in the Limitation Act of 1908 corresponds now to Article 129 of the Limitation Act of 1963. In so expressing itself, the Full Bench dissented from the decision in *Narain Das v. Hazari Lal*, (1896) ILR 18 All. 233. It is clear that the above observations about bar of Article 167 of the Limitation Act of 1908 were not necessary for the decision of the actual point involved in the case before the Court. This is in terms stated by the Court. The Court, however, decided to indicate its view in case the decree-holder was again obstructed in execution of the fresh warrant. It is clear therefore, that these observations of the Full Bench are obiter and therefore, not binding upon us, though they are entitled to due weight. No other authority was shown to us on behalf of the petitioner.

8. The other view, which is adopted by several of the other High Courts in India is to the effect that every resistance or obstruction gives rise to a fresh period of limitation which begins from the date of the particular resistance or obstruction complained of. The main reasons on which these High Courts have based the above view can be summarised as follows:—

9. (1) Making of an application under Order 21, Rule 97 complaining about the resistance or obstruction to delivery of possession is permissive and an enabling provision for the decree-holder and he is not bound to make such an application. No penalty of any nature can be imposed upon the litigant if he fails to avail himself of a merely permissive or enabling remedy.

(2) The different rules of Order 21, deal with procedure in execution of a decree. The issuance of a warrant for possession is a step in the entire procedure for helping the decree-holder to obtain the fruits of his decree. The decree-holder is entitled to say to the Court at any stage of the procedure that he would not like to have the help of the Court any more. Merely because he does not ask the Court to help him any further, it would not deprive him of his right to go to the Court again at any time during which his decree is alive and enforceable.

(3) When a person resists or obstructs delivery of possession he merely intimates to the decree-holder that he would not allow him to take possession. It is open to the decree-holder not to join issue with him at that time and to allow the warrant to lapse. This conduct of the decree-holder may be the result of (a) his belief that the claim of resister is correct, or (b) he may not, for some reason, be prepared to spend time and money at that particular time; or (c) he may feel

that the claim of the resister or obstructor is of a temporary duration; or (d) he may think it advisable to deal with the resister or obstructor out of Court. Since the making of the application under Order 21, Rule 97 is permissive and not mandatory, the resistance or the obstruction that was occasioned at the first time comes to an end with the abandonment by the decree-holder of his right to enforce the warrant for possession by making an application for the removal of resistance or obstruction. That obstruction cannot then be said to be continued when a fresh obstruction is made to delivery of possession under a fresh warrant for possession.

(4) Since the law allows the decree-holder to abandon, at his sweet will, the enforcement of warrant for possession and to apply for a fresh warrant for possession at any time so long as the decree for possession remains alive and enforceable, it is implicit in this right of the decree-holder that he can make an application under Order 21, Rule 97 every time he is obstructed or resisted.

(5) Article 167 of the Limitation Act of 1908 (corresponding to Article 129 of the Limitation Act of 1963) relates to a complaint of resistance or obstruction to delivery of possession of immovable property decreed and the period of limitation begins to run from the date of resistance or obstruction. The resistance or the obstruction mentioned in the third column of Article 167 refers to the resistance or obstruction of which the complaint is made in the application under Order 21, Rule 97.

If, therefore, the complaint is made regarding the second obstruction, time will begin to run from the date of the second obstruction and not from the date of the first obstruction.

These are the different reasons which have induced the High Courts of Calcutta, Madras, Allahabad, Patna, Travancore-Cochin and Sind to accept the view that even if the first obstruction was made by the same person in the same character as the second obstruction, in respect of the application under Order 21, Rule 97 complaining of the second obstruction, the time would begin to run from the date of the second obstruction and not from the date of the first obstruction. Some of the cases in which this view has been expressed by the High Courts are: (1896) ILR 18 All. 233; *Official Trustee v. Monmothath*, AIR 1953 Cal. 499; *P. N. Pathak Sharma v. Renuka Debi*, AIR 1959 Cal. 613; *Narayanswami v. Veerappa*, AIR 1949 Mad. 753; *Raghunandan v. Ramcharan*, AIR 1919 Pat. 425(2) (FB); *S. Gnappu v. T. Pillai*, AIR 1957 Trav. Co. 287 and *Kotumal v. Gur Ashram*, AIR 1947 Sind 118. We are in agreement with the conclusion and the reasoning expressed in these decisions and, with respect, we do

not think that the observations in AIR 1933 Bom. 457 (FB) (supra) lay down the correct law.

10. It was urged on behalf of opponent No. 2 that if the period of limitation were to run from the second obstruction it would make Article 129, a dead letter because every decree-holder finding that his application under Order 21, Rule 97 in respect of the first obstruction would be beyond time, would defeat this provision of the Limitation Act by taking out a fresh warrant for possession and thus invite a fresh resistance and then making an application within 30 days from the date of the second resistance, even though it may be more than 30 days after the first resistance. In our opinion, in view of the nature of the proceedings and the language of the Article in question, the fear expressed by Mr. Bhatt on behalf of opponent No. 2 is more imaginary than real. What Article 129 of the Limitation Act of 1963 does is to bar the making of an application about the resistance or obstruction which was made more than 30 days ago. If a second obstruction is made, the complaint is not about the first obstruction but is about the second obstruction; and since the law allows the decree-holder to make such an application, it cannot be said that the provisions of Article 129 are made nugatory.

11. We, therefore, hold that the Miscellaneous application made by the petitioner on 26-4-1965 is not barred by limitation.

12. In the result, therefore, this revision application is allowed and the order passed by the learned trial Judge dismissing the application as barred by limitation is set aside and we remand the application back to the trial Court with a direction to proceed further therein in accordance with law. Opponent No. 2 will pay the cost of this revision application to the petitioner and bear his own. Rule made absolute with costs.

Petition allowed.

AIR 1970 GUJARAT 53 (V 57 C 9)*

A. R. BAKSHI AND D. A. DESAI, JJ.

Saurashtra Iron Foundry and Steel Works Private Ltd. and others, Petitioners v. Bhavnagar Nagarpalika and another, Opponents.

Special Civil Applns. Nos. 943, 946 and 979 of 1968, D/- 16-1-1969.

Municipalities — Gujarat Municipalities Act (34 of 1964), Ss. 99, 101, 102, 103 and 275 — Scope — Octroi rules and bye-laws, after due publication, and conside-

EM/HM/C117/69/JRM/B

*(Only portions approved for reporting by the High Court are reported here).

ration of objections, accorded sanction by Government — Rates on some items increased by Government while granting sanction — Date of imposition of levy published — Government after such publication but prior to proposed date of imposition issuing corrigendum modifying those rules and bye-laws — Corrigendum however not published by municipality — Part of corrigendum relating to rules is not ultra vires powers of Government — That part, to be made effective, needs publication — Other part concerning bye-laws is invalid — Corrigendum is not order under S. 99 — Non-publication of corrigendum by municipality does not render whole sanction, rules and bye-laws invalid — That part of sanction increasing octroi rates on some of items alone is invalid — (General Clauses Act (1897), S. 21).

Where octroi rules and bye-laws, after due publication and consideration of the objections received, are sanctioned by the Government, after increasing the rates on some items and after the date of imposition of the levy is published but prior to the proposed date of imposition issues a corrigendum modifying those rules and bye-laws, and the corrigendum is not published by the municipality, that part of the corrigendum relating to rules is not ultra vires the powers of the Government and to be made effective, that part needs publication. The other part of the corrigendum relating to the bye-laws is invalid. The corrigendum is not an order under S. 99 of the Gujarat Municipalities Act and its non-publication by the Municipality does not render the whole sanction, rules and bye-laws invalid. That part of the sanction increasing octroi rates in respect of certain items alone is invalid. (Para 16)

S. 99 is the source of power vested in the Municipality to impose taxes mentioned therein and Ss. 101, 102 and 103 provide for the machinery for the imposition. Function of the State Government is to accord sanction with or without modifications within the limits of S. 102. S. 99 also empowers the Government to pass general or special orders subject to which a Municipality may impose a tax. But that is altogether a different and separate power vested in the Government and it is apart from the machinery provided for the obligatory steps to be taken, beginning from the selection of the tax to be imposed to the publication of the date from which the tax can be effectively levied. (Para 5)

When the Government, after according sanction, has the power by virtue of S. 99 to effect further modification in the rules before they are put into force, there is no reason why during the course of the proceedings for the imposition it cannot have the power to rectify any lacuna.

The sanction being a substantial and necessary ingredient for the imposition, it cannot be said to be merely a condition of the exercise of the power by the Municipality such that it can never be modified once it has been signed by the Government. This conclusion flows from the Act itself and therefore, it will not be necessary to derive additional support from S. 21 of the General Clauses Act, though it is possible to argue that the sanction is in the nature of an order and therefore subject to S. 21 of the General Clauses Act and that it will for that reason be open to the Government to modify its sanction before the rules become final. (Para 7)

S. 103 clearly provides for the publication of the sanction along with the rules. The corrigendum, must therefore, be published by the Municipality to be made effective and so long as the same is not published, it cannot be said to have been incorporated in the rules. The definition of "octroi" clearly indicates that it is a tax on the entry of goods into the limits of a municipal borough for consumption, use or sale therein and the imposition of tax by virtue of S. 99 is permissible as an octroi on animals or goods or both brought within the octroi limits for consumption, use or sale therein. The Municipality, therefore will not be able to recover octroi on such goods which do not fall within that definition. (Para 9)

In Spl. Civil Appln. No. 943 of 1968.

I. M. Nanavati with B. K. Mehta and D. U. Shah, for Petitioners; H. M. Mehta with M. R. Barot (for No. 1) and G. N. Desai, Govt. Pleader with R. M. Gandhi, Addl. Govt. Pleader (for No. 2), for Opponents.

In Spl. Civil Appln. No. 946/68.

B. K. Mehta with D. U. Shah, for Petitioner; H. M. Mehta with M. R. Barot (for No. 1) and G. N. Desai, Govt. Pleader with R. M. Gandhi, Addl. Govt. Pleader (for No. 2), for Opponents.

In Spl. Civil Appln. No. 979/68.

H. M. Mehta with M. R. Barot, for Petitioner; G. N. Desai, Govt. Pleader with R. M. Gandhi, Addl. Govt. Pleader, for Opponents.

ORDER:— These are three petitions which arise on account of the imposition of octroi tax by the Bhavnagar Municipality. Since there are certain common facts and questions that would require to be considered in these three petitions, it would be convenient to dispose them of by one judgment, though each petition will be dealt with separately.

2. There are certain facts which are undisputed and common to all the three petitions and, therefore, may be stated at the outset. The Bhavnagar Municipality was constituted under the Bhavnagar Municipality Act as it was in force in the

erstwhile State of Bhavnagar and was deemed to have been constituted thereafter under the Bombay Municipal Boroughs Act, 1925 as applied to the State of Saurashtra in 1949, and under the Gujarat Municipalities Act, 1963, when it was enacted and applied to the State of Gujarat. Formerly, the Bhavnagar Municipality (hereinafter called 'the Municipality') levied and collected terminal tax on the goods imported within the municipal limits of Bhavnagar and there were the Bhavnagar Municipal Terminal Tax Rules, which continued to be in force during the period when the Bombay Municipal Boroughs Act was applicable and also thereafter by virtue of Clause (vi) of sub-section (2) of Section 279 of the Gujarat Municipalities Act, 1963, (hereinafter referred to as 'the Act'). The Municipality was thus collecting terminal tax under the Bhavnagar Municipality Terminal Tax Rules after 1st July 1949 under the Bombay Municipal Boroughs Act, 1925, and after 1st January 1965 under the Gujarat Municipalities Act, 1963. It may be mentioned that the Municipality had, by passing a resolution on 5th April 1956 decided to impose and levy octroi duty on sugar of any kind and its products and had made Rules and bye-laws for the purpose of levying and collecting that tax and the Municipality had commenced collecting the octroi duty on sugar and its products from October 1956. There was an area known as Dock Estate Area which was not included within municipal limits and was consequently not liable to levy of either octroi or terminal tax. It may also be mentioned that the Municipality had made attempts to get the Dock Estate Area included within municipal limits. Such an attempt was made in 1964 when the Municipality issued a proclamation inviting objections to the proposal to include the area of Dock Estate within the municipal limits and the Government of Gujarat declared that the Dock Estate area be included within the municipal limits with effect from 8th March 1965. The Municipality had also thought of converting the terminal tax into octroi and with that end in view, passed a resolution in its Ordinary General Meeting held on 15th December 1965 resolving to make necessary amendments and changes in the Rules and the Bye-laws in force for levy and collection of octroi duty on sugar of any kind and its products so as to include other goods and articles in the Schedule to the said Rules. The Municipality published in the local newspapers of Bhavnagar under Sections 101 and 275 of Gujarat Municipalities Act for the information of the persons likely to be affected thereby, a draft of the proposed Rules and Bye-laws with a public notice inviting objections to be

filed within one month from the date of the said notice. Objections were filed against the proposed draft of the Bye-laws and Rules by some trade associations, industrial and commercial establishments and by some individual citizens. The Municipality had appointed a Sub-Committee to consider the objections filed before it but before the said Committee could complete its work, the Municipality was superseded in June 1967 and the State of Gujarat appointed an Administrator for the administration of the Municipality. The Administrator of the Municipality then forwarded the Rules and Bye-laws to the State Government with the objections received and the Government of Gujarat by a Resolution dated 18th June 1968 accorded sanction with modifications to the Octroi Rules and Bye-laws framed by the Municipality which, on receipt of the sanction, published a notice specifying 1st August 1968 as the date from which the octroi duty was to be imposed within the municipal limits. The State of Gujarat issued a corrigendum dated 8th July 1968 making certain additions and modifications in Rules and Bye-laws. The Rules and Bye-laws and the corrigendum referred to above are the subject matter of these petitions.

3. The petitioners in Special Civil Application No. 943 of 1968 have urged that the Government Resolution dated 18th June 1968 and the notice of the Municipality dated 29th June 1968 publishing the sanction specifying 1st August 1968 as the date from which octroi duty would be imposed and the Government corrigendum dated 8th July 1968 are ultra vires the powers of the State Government and the Municipality and are in excess of jurisdiction and are against the mandatory provisions of the Gujarat Municipalities Act. In the petition it has also been stated that these Notifications are discriminatory, arbitrary and unjust and prayer is made for quashing the same and for a writ prohibiting the Municipality from levying and collecting the octroi duty.

4. The first contention of Mr. Nana-vati was that on the corrigendum being issued on 8th July 1968 it got engrafted in the octroi rules and bye-laws as sanctioned by the Government by its Resolution dated 18th June 1968 and the Municipality could enforce the rules and bye-laws and levy octroi only by and after incorporating the corrigendum in the originally sanctioned rules and bye-laws. It was contended that the corrigendum Appendix "F" being issued by the State Government, the same had the legal effect of being a part and parcel of the earlier sanction given by the State Government at Exhibit "D" and the corrigendum was an integral and inseparable part of the original sanction. The Municipality had not notified under Section 103

its intention to levy octroi according to rules and bye-laws as finally sanctioned by the corrigendum and consequently, it was contended, the collection of octroi was illegal and unauthorized and it was not, therefore, open to the Municipality to levy and collect octroi according to the earlier sanction Appendix "D" discarding the corrigendum Appendix "F". It was pointed out that the Municipality had decided to enforce octroi rules disregarding the corrigendum regarding the refund of deposit in respect of goods in transit and, therefore, also the levy of octroi by the Municipality would be illegal and unauthorized. On the other hand it was urged on behalf of the Municipality by Mr. H. M. Mehta that the Government having once given its sanction on 18th June 1968, had no power to issue the corrigendum which consequently was of no effect and that, therefore, its non-publication under Section 103 was of no consequence.

5. [Their Lordships after quoting certain sections from the Gujarat Municipalities Act, observed:—]

If we examine the Scheme of the relevant provisions relating to the imposition of a tax, it appears that Section 99 is the source of power vested in the Municipality of imposing the taxes mentioned therein and Sections 101, 102 and 103 provide for the machinery for imposing a tax. If we summarize the steps that are required to be taken for bringing the tax into existence and to make it effective, these steps as could be gathered from the provisions of Sections 101, 102 and 103 are:—

(1) Passing of a resolution by the Municipality for selecting a tax specified in Section 99;

(2) preparation and approval of rules;

(3) publication of the rules;

(4) receipt by the Municipality of objections in writing from the inhabitants of the municipal borough;

(5) consideration of the objections by the Municipality;

(6) submission of the objections with its opinion and any proposed modifications by the Municipality to the State Government;

(7) sanction of the rules with or without modifications by the State Government; and

(8) publication of the sanctioned rules together with a notice reciting the sanction, the date and serial number thereof and also specifying the date from which the tax shall be imposed.

These steps constitute a compact machinery which enables a municipality to put into force its right of imposing a tax given to it by Section 99 of the Act. The source of the power to impose tax is in

the municipality and it is the municipality which is levying the tax, the function of the State Government being to accord sanction with or without modifications within the limits of Section 102 of the Act. Section 99 of course does empower the Government to pass general or special orders subject to which a Municipality may impose a tax. But that is altogether a different and a separate power vested in the Government, which on its own can make the imposition of a tax by the Municipality subject to its general or special orders. This power which is vested in the Government is apart from the machinery provided by Sections 101, 102 and 103 which provide for the obligatory steps which have to be taken from the beginning, that is, from the selection of the tax which is to be imposed to the publication of the date from which the tax could effectively be levied.

6-7. [Narrating the steps taken by the Municipality and quoting the corrigendum in Para 6, their Lordships observed:]

On a perusal of the corrigendum it would be seen that the corrigendum is divided into two parts. By the first part the rules are affected and by the second part the bye-laws are modified. It would, therefore, require to be seen whether the sanction that has once been given by the Government can subsequently be amended, modified or varied by the Government. There are three aspects from which this question can be approached. Firstly, when once the sanction is given by Government, the power to grant sanction is exhausted once for all and the Government cannot by any subsequent action amend or modify the sanction or the rules. The second aspect would be that the Government can modify the sanction and the rules before the publication of the sanction and the rules by the Municipality and the third view that can be canvassed is that the sanction and the rules could be modified till the levy of octroi becomes effective, that is to say, till the expiry of the date notified by the Municipality on which the octroi would come into force as duly imposed. The first question is whether there is anything in Sections 101, 102 and 103 of the Act which gives an indication that the sanction when once it is signed by Government becomes conclusive and final so that it can never be withdrawn or modified by Government even before the octroi becomes effective and leviable. There is no such express prohibition in either of the sections nor such a prohibition can be read from the words and the phraseology of the sections. As the sections indicate, the sanction of the Government does not appear to be merely a form of acquiescence by Government of the rules and the tax imposed by the

Municipality. But the Government has to exercise its mind on the question whether the tax and the rules as proposed should be confirmed and sanctioned or should be sanctioned with modifications. The Government is required to consider the objections preferred by the citizens and the opinion of the Municipality on such objections and after taking into consideration these matters, the Government has further to consider whether it would refuse to sanction the rules or whether it would give its sanction with or without modifications or whether it would return the rules to the Municipality for further consideration. It has further to be seen that although the original source of the power to tax is in the Municipality, the sanction to the rules whereby tax is proposed to be imposed is an essential part of the machinery as is the resolution of the Municipality selecting a tax for imposition. All these facts including the fact that the Government is given the power even to refuse to sanction the rules or to sanction the rules with modifications would suggest that the Government is given a power to sanction and while using that power it has to consider the several circumstances mentioned above. As already stated, there is no prohibition to the use of the power till the rules become effective and there is no specific prohibition against modification of the sanction by Government until of course the rules have become effective on the date of enforcement as notified by the Municipality as provided in Section 103 of the Act. Once the rules have become effective and once the tax has become leviable, the power to sanction must be deemed to have been fully utilised and, therefore, exhausted and if after the rules have become effective, the Government feels that conditions should be imposed to the levy of octroi, then possibly it may have recourse to Section 99 of the Act by passing a general or a special order. The imposition and the levy of the tax, therefore, it appears, has been made subject to the control of the Government in two ways; one of the ways being to pass general or special orders to which the levy would be subject and the other mode of control being by the reservation of the power in the Government to refuse to sanction or sanction with modification the rules by which tax is proposed to be imposed. Of course the latter machinery for control, namely, the power to sanction is given to the Government while the proceedings by the Municipality for the imposition of the tax are in progress and it would, therefore, be reasonable to take the view that the power vested in Government under Section 102 of the Act would continue to vest in it during the period in which the proceedings for the imposition of the tax are in progress and

till those proceedings have culminated in an enforceable and effective levy of tax. We do not think, therefore, that the corrigendum is ultra vires the powers of Government because the power of Government was exhausted once the sanction was issued on 18th June 1968. The sanction is an effective part of the machinery to make the rules and the imposition of tax effective and it cannot be said that the Government had lost seisin over the rules merely because it had put its signature on the sanction or merely because the office of the Government had not the physical possession of the rules which might have been sent to the municipality with the sanction. The real question is whether there is anything to suggest in the sections that the power of Government to sanction gets exhausted completely when once the act of sanction has been performed by the Government. If that would be so, the result would be that the Government would be unable to effect further modification if it is discovered by the Government that there was some lacuna in the rules which must be rectified before the rules were put into force. When such a power in the Government seems to exist by virtue of Section 99, there is no reason why during the course of the proceedings for the imposition of tax Government could not have the power to rectify any lacuna which appears to it to have crept in the rules. The sanction, as stated above, is a substantial and necessary ingredient for the imposition of the tax and it cannot be said that the sanction of Government is merely a condition of the exercise of power by the Municipality, such that it can never be modified once it has been signed by the Government. This conclusion to which we have arrived flows from the provisions of the Act itself and, therefore, it would not be necessary to derive additional support from the provisions of Section 21 of the General Clauses Act, although it is possible to argue, as was urged on behalf of the petitioner, that the action taken by the Government in sanctioning the rules was in the nature of an order and, therefore, subject to the provisions of Section 21 of the General Clauses Act and that it would for that reason be open to Government to modify its sanction before the rules became final and effective. Mr. Mehta's contention was that Section 21 of the General Clauses Act would be inapplicable inasmuch as the sanction to be given by Government could not be said to be an order within the meaning of Section 21 of the General Clauses Act.

8. The learned Government Pleader appearing on behalf of the State had tried to support the corrigendum on an additional ground that the corrigendum should be considered as an order under

Section 99 as a special order of Government. Looking to the nature of the modification made by the corrigendum it cannot be said that it is an order under Section 99. What the corrigendum does is to make or add a rule or a bye-law and by its very nature it suggests to correct or amend rules and bye-laws which are placed in the machinery for the purpose of imposing a tax under Sections 101, 102 and 103 of the Act. Substantially it is the function of the municipality to make bye-laws and rules and the essential condition of making of rules and bye-laws is in inviting public objections. We are, therefore, not inclined to accept the argument of the learned Government Pleader that the corrigendum should be construed as an order under Section 99 of the Act. The aforesaid discussion leads us to the conclusion that the modification of the rules made by Government by the corrigendum dated 8th July 1968 cannot be held to be outside the powers of the Government. But that would not be the position as regards that part of the corrigendum which modifies the bye-laws because there is no provision for modification in Section 275 of the Act. Sub-section (4) of Section 275 provides that no bye-law, or alteration or rescission of a bye-law made under sub-section (1) shall have effect unless and until it has been sanctioned by the State Government and it will be seen that the phraseology employed in this sub-section is entirely different from the one which is employed in Section 102 of the Act. The corrigendum, therefore, in so far as it relates to the bye-laws would be ineffective. In this view of the matter it would be unnecessary to consider whether the corrigendum modifying the bye-laws would be discriminatory and be hit by Article 14 of the Constitution. Again this point was not pressed by Mr. Nanavati appearing on behalf of the petitioner.

9. The next question for consideration would be as to what would be the effect of the corrigendum relating to the rules when the same has not been published by the Municipality. Section 103 of the Act clearly provides for the publication of the sanction along with the rules. The corrigendum must, therefore, be published by the Municipality to be made effective and so long as the same has not been published, it cannot be said to have been incorporated in the rules. If that is so, it would have to be considered whether the non-publication of the corrigendum relating to rules and its consequential ineffectiveness would render the whole sanction and the rules ineffective and invalid. It was urged by Mr. Nanavati that on the corrigendum being issued, it must be taken as having been engrafted in the octroi rules as sanctioned by the Govern-

ment on 18th June 1968 and the Municipality could enforce the rules and bye-laws and levy octroi only by incorporating the corrigendum in the originally sanctioned rules and bye-laws and that since the Municipality had not notified under Section 103 its intention to levy octroi according to rules and bye-laws as finally sanctioned by the corrigendum, the collection and levy of octroi would be illegal and unauthorised. According to Mr. Nanavati the Municipality cannot disregard the corrigendum relating to the refund of deposit relating to goods in transit and the levy of octroi without these rules contained in the corrigendum would be unworkable and also illegal and unauthorised as the same formed an integral part of the rules as sanctioned by Government. In order to decide this question it would be necessary to see whether the rules contained in the corrigendum are such that without them the levy of octroi becomes unworkable and illegal. The rules contained in the corrigendum relate to the refund of deposit relating to goods in transit and it was urged that if these rules were not in force, octroi would be levied on all types of goods irrespective of the fact whether they were introduced in the city for the purpose of consumption, use or sale. It is true that in the absence of such rules the Municipality might find it difficult to decide at the octroi post as to what goods were being introduced for consumption, use or sale. The definition of "octroi" clearly indicates that it is a tax on the entry of goods into the limits of a municipal borough for consumption, use or sale therein, and the imposition of tax by virtue of Section 99 is permissible as an octroi on animals or goods or both brought within the octroi limits for consumption, use or sale therein. The Municipality, therefore, would not be able to recover and collect octroi on such goods which do not fall within the above definition and, therefore, the argument that in absence of the rules as provided in the corrigendum it would enable the Municipality to recover the octroi tax even on goods which are not introduced within the borough for consumption, use or sale therein does not appear to be well founded. No doubt it would be in the interest of the municipality to have such a rule which seems to have been left out and it would be for the municipality to publish the rule so as to make it effective with a view to facilitate the working of collection of octroi. But for that reason it cannot be said that the first sanction which was given by the Government was invalidated and that the rules as they were sanctioned on 18th June 1968 could not be enforced although they were properly published by the municipality as provided by Section 103 of the Act. We

are, therefore, not inclined to accept the argument of Mr. Nanavati that the octroi rules cannot be said to have come into force although they have been published by the municipality because the corrigendum was not published by the municipality after the rules were modified by Government by the corrigendum. The rules and bye-laws contained in the corrigendum are not such and so inextricably connected with the rules and bye-laws originally sanctioned that it would be impossible even to enforce the original rules and bye-laws which were duly published by the municipality along with the sanction received by it from the Government.

10. The next point that requires to be considered is whether the Government while granting the first sanction had added an increased burden in the octroi rates on certain items and had added new items for imposition of octroi as was urged by Mr. Nanavati. It was urged that the Government, while granting the sanction had changed the basis from ad valorem calculation as proposed by the municipality to the basis of weight and that because of all this, not only the levy on those items would be bad but the entire set of octroi rules would become unenforceable as the same were indivisible. Because certain items which are the subject matter of the sanction carry additional burden of octroi by virtue of the sanction, it could not be said that the sanction would be bad as a whole and also in respect of items in respect of which no additional burden is imposed. Section 102 of the Act gives power to the Government to sanction, modify or impose conditions not involving an increase in the amount of octroi to be imposed and it cannot be said that if the sanction improves upon the rate of octroi on a particular item by imposing a burden as regards that item, the sanction as a whole would be invalid. Each item would stand by itself and the sanction would be valid in respect of those items which would fall within the purview of Section 103 of the Act provided no additional burden is imposed while giving the sanction. We have, therefore, to see on which of the items it has positively been shown that an additional burden has been imposed.

16. [Enumerating such items and referring to details of individual applications in portion of Para 10 and in Paras 11 to 15, their Lordships continued:]

The aforesaid discussion leads us to the following conclusions:—

(1) The corrigendum dated 8th July 1968 which modifies the sanction dated 18th June 1968 is not outside the powers of the Government in so far as it relates to rules;

(2) The said corrigendum is invalid in so far as it relates to bye-laws;

(3) The corrigendum modifying the sanction relating to Rules dated 18th June would require to be published by the Municipality to be made effective and so long as the same has not been published, it cannot be said to have been incorporated in the rules;

(4) The corrigendum cannot be construed as an order under Section 99;

(5) The non-publication of the modified sanction contained in the corrigendum would not render the whole sanction and the rules and bye-laws ineffective and invalid;

(6) By the sanction dated 18th June, 1968, the additional burden imposed would be in respect of items as shown in the Schedules "A" and "B" appended and the sanction in respect of those items only would be invalid and not in respect of others;

(7) The corrigendum was not issued by the Government mala fide.

* * *

Petitions partly allowed.

AIR 1970 GUJARAT 59 (V 57 C 10)

J. M. SHETH, J.

Petlad Bulakhidas Mills Co. Ltd. and another, Appellants v. Union of India and another, Respondents.

Second Appeals Nos. 463 and 452 of 1961, D/- 22-11-1968, against decisions of Extra Asst. Judge at Nadiad, in Civil Appeals Nos. 232 and 159 of 1960.

Contract Act (1872), Ss. 72, 15, 14 — 'Coercion' in S. 72 not conterminus with the definition in S. 15 — It merely means payment under compulsion which the defendant has no right to claim.

The word 'coercion' in S. 72 Contract Act should not be given the same meaning as is found in the definition of that word in S. 15. The word 'coercion' in S. 72 or in Illustration 'B' to that section should not be construed to mean coercion 'with intention of causing any person to enter into an agreement'. The word 'coercion' must therefore be there used in its general and ordinary sense as an English word, and its meaning is not controlled by the definition in S. 15. That definition is expressly inserted for the special object of applying to S. 14 i.e., to define what is the criterion whether an agreement was made by means of a consent extorted by 'coercion' and does not control the interpretation of 'coercion' when the word is used in other surroundings. (Para 17)

Therefore, when the amount is not legally payable and if the plaintiff is required to pay it under compulsion, the plaintiff is entitled to repayment unless the defendants can show that they had a right to recover from him under law.

(Para 17)

Held, on facts that one of the appellants who had not been compelled to pay was not entitled to repayment, while in the other whose facts were different was entitled. (1913) ILR 40 Cal. 598 (PC) & (1928) 2 KBD 306, Foll. (Paras 21, 22)

Cases Referred: Chronological Paras

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| (1928) 1928-2 K.B.D. 306=139 L. T. | |
| 275, Hardic and Lane Ltd. v. Chilton | 22 |
| (1925) 1925 A.C. 700=133 L. T. 370, Sorrell v. Smith | 22 |
| (1913) ILR 40 Cal. 598=40 Ind. App. 56 (P.C.), Kanhaya Lal v. National Bank of India Ltd. | 17 |

(In S. A. 463/61):—

K. S. Nanavati, for I. M. Nanavati, for Appellant; R. H. Daru, for Respondent.

(In S. A. 452/61):—

K. S. Nanavati for I. M. Nanavati, for Appellant; R. H. Daru, for Respondent No. 2.

JUDGMENT:— The plaintiff-appellant sued the respondents-defendants, the Union of India and the Western Railway, for recovery of Rs. 1,680.06 nPs. The plaintiff-appellant is the Petlad Bulakhidas Mills Co. Ltd., Petlad. It filed a Civil Suit No. 213 of 1959 in the Court of the Civil Judge, Junior Division, Petlad to recover the aforesaid amount.

2. The undisputed facts in that suit are as under:—

3. The plaintiff had entered into a contract for a railway siding at Petlad for their mills with the then B.B. & C.I. Railway Company Administration. That agreement is Ex. 33, dated 20-1-1922. The said agreement was continued when the Union of India took over the Administration of all the Indian Railways. By a letter, dated 3rd Sept., 1955, Ex. 21, the General Manager of the Respondent No. 2, Railway, intimated to the plaintiff that the agreement regarding siding facilities of the plaintiff would be terminated after six months from 1st October, 1955 if the plaintiff did not agree to revised rates as proposed by the defendant No. 2, Railway Administration. There was some correspondence between the Railway and the plaintiff, which resulted in a letter from the Divisional Superintendent, Western Railway, Baroda, dated 24-1-1957, informing the plaintiff amongst other things that the revised charges mentioned in the notice, dated 3rd September, 1955 will be effective from the date of the said notice, i.e., 3-9-1955. After some further correspondence, the plaintiff received a letter, dated 21st February, 1957, Ex. 23 from the Divisional Superintendent, Western Railway, Baroda, intimating it that the revised agreement containing the revised charges should be executed early and failure to do so, will result in siding being disconnected by

the respondent-defendant No. 2. The plaintiff thereupon having no other alternative, agreed to execute a draft agreement sent to it and sent that agreement with the necessary copies duly signed with its letter, Ex. 24, dated 25th February, 1957. It also remitted a sum of Rs. 75/- for stamp charges as required by the said letter, dated 21st February, 1957. After about 10 months, the plaintiff received a letter from the Divisional Superintendent, Western Railway, Baroda, dated 22nd January, 1958, Ex. 26. It was stated in that letter that the Railway was proposing to put into effect the revised charges mentioned in its notice, dated 3-9-55, from 5-11-1951. That was the date on which the B.B. & C.I. Railway was integrated into the Western Railway and not from 3-9-1955 as mentioned in its earlier letter, dated 24th January, 1957. With that letter, the defendant No. 2 sent a bill of Rs. 2,876.93 nPs. being the difference between the old rates and new rates from 5-11-1951 to 30-9-1958. On receipt of it, the plaintiff took objection to it and stated that such a retrospective effect of revised charges could not be made effective legally and that they were always ready and willing to pay the revised charges from 3-9-1955 for which the plaintiff had approved the draft agreement as required by the Divisional Superintendent, Western Railway, Baroda. Some correspondence ensued between the parties; but the plaintiff's request was not acceded to. The plaintiff was sent a letter Ex. 27, dated 27-6-58, informing finally that if it did not pay the bill as mentioned within 15 days from the date of the receipt of the letter, the Station Master, Petlad was informed to discontinue the siding facilities from that date and that the Station Master, Petlad shall not permit any traffic on the siding from the said date. The plaintiff had thereupon paid under protest the amount demanded by its letter, Ex. 28, making a specific mention that the demand was illegal and it was paying the amount under protest. The plaintiff gave the necessary notice under Section 80 of the Civil Procedure Code thereafter on 21st December, 1958 and thereafter filed the present suit for recovery of the amount paid in excess. The suit claim was made as under:—

"Rs. 2,876.93 nPs.

Less:—

Rs. 1,291.87 nPs.

Add:—

Rs. 80.00 nPs.

Rs. 15.00 nPs.

Rs. 1,680.06 nPs.

Total."

Amount demanded at the revised rates for the period from 5th November, 1951 to 30th September, 1958 as per statement from Divisional Superintendent, Baroda, paid on 2nd July, 1958 and 16th October, 1958.

Amount due at revised rates from 3rd September, 1955 to 30th September, 1958.

By way of damages from 2nd July, 1958 till date of suit.

Notice charges.

4. The defendants by their written statement Ex. 11, contended inter alia that the Railway had authority to withdraw the facilities of siding afforded to the plaintiff. A notice was given for the same. The Railway had revised their rates as a matter of uniform policy for such sidings. Those revised rates were to be put into force from 5th November, 1951. The plaintiff had an option not to avail of that opportunity of continuance of siding facilities. The plaintiff did not avail of that opportunity and acceded to the request made by the Respondent No. 2, Railway. It could not, therefore, be said that the amount was recovered under coercion and duress. The plaintiff had, therefore, no right of repayment.

5. The learned Civil Judge, Junior Division, Mr. M. A. Baqui who heard the aforesaid suit, decreed the plaintiff's suit with costs. The following decretal order was made on 11th August, 1960:—

"Plaintiff's suit is decreed. Defendants shall pay Rs. 1,680.06 nPs. together with costs of the suit and together with 6 per cent. interest thereon from the date of the suit till realisation within 6 months in default of which plaintiff shall be entitled to recover that amount from the defendants by due process of law. Defendants shall bear their own costs."

6. Being dissatisfied with that judgment and decree, the defendants filed the Civil Appeal No. 232 of 1960 in the District Court, Kaira at Nadiad. The learned Extra Assistant Judge, Nadiad, Mr. M. C. Trivedi, allowed the appeal with costs.

7. Being dissatisfied with that judgment and decree, the plaintiff has preferred this second appeal to this Court.

8. The Second Appeal No. 452 of 1961 is filed by M/s. Rajratna Naranbhai Mills Co. Ltd., Petlad. That plaintiff had filed a Civil Suit No. 566 of 1958 in the same Court against the respondents-defendants for recovery of Rs. 2,999-21 nPs. That

Company had entered into an agreement with B.B. & C.I. Railway Administration on 5th January, 1922 for the railway siding at Petlad for the said Mills. That agreement was amended and that amended agreement was dated 24th April, 1926. Those two agreements are Exs. 29 and 30. The said agreement was continued when the defendant No. 2, the Union of India took over the Administration of all Indian Railways. On 21-6-1957, the plaintiff received a notice from the General Manager of defendant No. 1, Railway, purporting to be a notice of terminating the aforesaid agreement for the railway siding after six months from 1st July, 1957, if the plaintiff did not agree to revised charges proposed in the notice and that too, from 5th November, 1951. That notice is Ex. 32. Ex. 33 was the reply given by the plaintiff, stating that they were forced to accept the new basis of charges from 5-11-1951 retrospectively. They did take an objection that this action of the railway was unjustified and they had to accept the aforesaid offer as there was a threat to dismantle the siding and withdraw the facilities of railway siding given to it. The amount was, therefore, paid under protest vide Ex. 37. It was the say of the plaintiff that the said demand was illegal and they had submitted to the illegal demand as there was a threat of withdrawing the facilities of siding. The plaintiff gave a requisite notice under Section 80 of the Civil Procedure Code and thereafter filed the present suit to recover the said amount together with interest and costs.

9. The defendants by their written statement Ex. 10 in this suit, also had taken up the same contentions as in the suit referred to above earlier.

10. The learned Joint Civil Judge, Junior Division, Petlad, Mr. S. T. Shah, who heard that suit, decreed that suit with costs. He made the following decretal order on 11th April, 1960:

"The plaintiff shall recover Rs. 2,999.21 nPs. (two thousand nine hundred and ninety-nine rupees and 21 nPs.) together with the running interest at 4 per cent from the date of the suit till realisation and costs of the suit from the defendants.

A decree shall be passed in favour of the plaintiff and against the properties of both the defendants jointly and severally."

11. Being dissatisfied with that judgment and decree, the defendants preferred a Civil Appeal No. 159 of 1960 in the District Court of Kaira at Nadiad. This appeal was heard alongwith the aforesaid Appeal No. 232 of 1960 by the learned Extra Assistant Judge, Mr. M. C. Trivedi and both these appeals have been disposed of by a common judgment. Both the appeals are allowed with costs and suits have been dismissed with costs.

11-A. Being dissatisfied with that judgment and decree, the plaintiff-appellant has preferred this second appeal to this Court.

12. As some common questions are involved in both these appeals, they are heard together and they are being disposed of, by a common judgment. It may be at the outset noted that in both the appeals, the facts are not practically challenged. They are undisputed facts. More or less, the question involved is the question of law.

13. The learned Extra Assistant Judge has disposed of both the appeals and allowed the appeals on the ground that the plaintiffs paid the amount of the excess charge demanded by the Railway Administration and they did so under the protest. Subsequently they have filed the present suits for refund of the amounts paid by them alleging that the amounts were paid by them under coercion and duress. So the question before him for decision was whether it could be said that the two plaintiffs had paid the amounts of excess charges under the threat of withdrawing the facility of the assisted siding and if they paid the amount under such a threat, whether it amounted to coercion and duress. It was not disputed that under the original agreements with the plaintiffs, the Railway Administration had reserved to it a right to withdraw the facility of the assisted Railway siding by giving six months' notice without assigning any reason for it. In the present cases the Railway Administration has exercised its said right and the plaintiffs were compelled to execute the proposed revised agreement and pay the revised charges retrospectively because they were not prepared to allow the Railway Administration to exercise its right of withdrawing the facility of assisted railway siding as agreed under the original contract. The plaintiffs had no right to say that the Railway Administration was not at liberty to terminate the agreement by a six months' notice.

14. The learned Extra Assistant Judge has also observed that "the plaintiffs are not in a position to say that the Railway was not authorised to give notice to the plaintiffs that the facility of the assisted railway siding would be withdrawn on expiry of the period of six months' notice. It was true that the plaintiffs would have been put to great hardship and loss if the facility of the assisted railway siding was withdrawn by the railway. It is also proved that the plaintiffs would not have paid the amounts demanded by the railway and they would not have executed the proposed revised agreements if the Railway Administration had not threatened them by serving upon them a notice for withdrawing the faci-

lity of the assisted railway siding. ("I quite agree with the learned pleader of the respondents that the amounts were paid by them under the threat given to them by the Railway Administration"). But the question is whether the threat given to them by the Railway Administration amounts to coercion under Sec. 72 of the Indian Contract Act? It has been contended by Shri R. M. Bhatt for the appellants that it was a proposal made to the plaintiffs in the normal course of business and they had chosen to accept the proposal because it was to their advantage. The plaintiffs are not in a position to say that the acceptance of the proposal by them was not advantageous to them. They had chosen to pay the amounts demanded by the Railway Administration rather than lose the benefit of the assisted Railway siding. They were at liberty to lose the benefit of the assisted Railway siding if they thought that the terms of the revised agreement were not to their advantage. It is also proved that the notice given by the Railway Administration to the plaintiffs for withdrawing the facility of the assisted Railway siding on expiry of the agreed period of six months was also not in contravention of the terms of the original contract. According to Shri Yagnik and Shri Shah the act of the Railway was illegal because under the terms of the original contract the Railway could not recover excess charges with retrospective effect. I would have agreed to their contention if the Railway had claimed the excess charges with retrospective effect without exercising its right of withdrawing the facility of the assisted Railway siding by six months' notice. The act of the Railway Administration in serving the plaintiffs with a notice to disconnect the Railway siding by itself is neither illegal nor in contravention of the terms of the original contract. The recovery of the excess charges with retrospective effect cannot be said to be illegal or in contravention of the terms of the original contract because the plaintiffs had a right to choose to let go the facility of the assisted Railway siding and if they had chosen that course, the Railway Administration could not have recovered from them, the revised rates from 5th November, 1951. The amount of the revised rates was paid by them in consideration of the Railway Administration withdrawing the notice served upon them for disconnecting the railway line as provided by the original contract."

15. The learned Extra Assistant Judge, in support of his conclusion, has relied upon certain observations made in an English decision, to which I will make reference at an appropriate stage. After referring to those observations, he has observed as under:—

"In the present case it is not disputed that the Railway Administration was not entitled under the original contract to demand from the plaintiffs the amount of the revised rates but the threat given by the Railway Administration to disconnect the Railway line of the plaintiffs was completely in accordance with the terms of the original contract and, therefore, it cannot be said that the revised agreement was obtained by the Railway Administration from the plaintiffs by threatening to do an act which was not lawful. The proposed revised agreement was executed by the plaintiffs in reply to the threat of the Railway Administration to cut off the assisted Railway siding which threat was not unlawful. Now when the threat given was not unlawful, the agreement executed by the plaintiffs under the said threat cannot be said to be unlawful and, therefore, it cannot be said that the said agreement was executed by them under coercion."

It has been further observed in para 11 as under:—

"It should be noted that the plaintiffs cannot be said to have executed the proposed revised agreement and also cannot be said to have paid the amounts of the revised charges without consideration. They were offered an option either to pay the revised charges without consideration or to allow the Railway Administration to exercise its right under the original contract to withdraw the assisted Railway siding. The plaintiffs chose the first course and they paid the revised charges retrospectively and they chose to take the advantage of the assisted Railway siding on the terms offered by the Railway. In my opinion, all this was done in the normal course of business and the plaintiffs cannot be said to have executed the proposed revised agreement and they also cannot be said to have paid the amounts in question under coercion and duress. The act of the Railway in serving the plaintiffs with a notice to withdraw the facility of the assisted Railway siding was in accordance with the terms of the contract and the plaintiffs had chosen to accept the offer for the consideration paid by them. Hence it cannot be said that the amounts in question were recovered by the appellant Railway Administration by coercion and the duress." It appears that the ratio laid down by the learned Extra Assistant Judge is quite correct.

16. Section 15 of the Indian Contract Act defines "coercion" as under:—

"'Coercion' is the committing, or threatening to commit, any act forbidden by the Indian Penal Code or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

If this was the meaning to be given to the word 'coercion', even so far as the use of that word in Section 72 of the Contract Act was concerned, it could be said that in the instant case there was no coercion. That Section 72 of the Contract Act runs as under:—

“A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.”

The question, therefore, that arises for consideration is as to what is contemplated by the word 'coercion' used in this Section 72 of the Contract Act.

17. In the case of *Kanhaya Lal v. National Bank of India Ltd.*, (1913) ILR 40 Cal. 598 (P.C.), to which the learned Advocate Mr. Nanavati has drawn my attention, it has been observed as under:—

“Section 72 of the Contract Act (IX of 1872) is not exhaustive. The meaning of the word “coercion” used in that section is not controlled by the definition in Section 15; but is used in its general and ordinary sense. The definition in Section 15 is expressly inserted for the special object of applying to Section 14, i.e., to define what is the criterion whether an agreement was made by means of a consent extorted by coercion, and does not control the interpretation of “coercion” when the word is used in other surroundings.”

Some of the relevant observations have been made by their Lordships at pages 609 to 612 which can be referred to, with advantage at this stage:—

“A wrongful interference with the plaintiff's lawful enjoyment of his own property is alleged. The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings, by which sooner or later he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong. To this he was in no way bound to submit. He was free to choose a course which did not involve any such prolongation of the trespass. Accordingly he paid under protest the sum demanded, and under English law he was unquestionably entitled to demand a repayment of that sum, because it was an involuntary payment produced by coercion, viz., the wrongful interference of the defendants with his full and free enjoyment of his property. By English law it is not open to the

wrongdoer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act, or estop him from claiming that it was done under coercion.

The argument before their Lordships accordingly turned chiefly on contentions that the Indian Statute Law precluded the application in India of these well known principles of English Common Law. These contentions were two in number. In the first place, the respondents contended that in case the property of a stranger is seized under an attachment, the Code of Civil Procedure requires him to proceed under the group of sections commencing with Section 278, and that this is his only remedy. Their Lordships have no doubt that the procedure referred to, is merely permissive. It is analogous to the procedure by interpleader, which in England would be open in similar cases to parties owning the goods seized. But the fact that such a procedure is open to him if he chooses to adopt it interferes in no way with his right to take any other lawful alternative.

The main contention, however, was that the allegations in the plaint did not show “coercion” according to Indian Law. It was contended that nothing could be “coercion” under Indian Law unless it satisfied the definition of “coercion” which is found in Section 15 of the Indian Contract Act and that the allegations in the plaint failed so to do because they did not show that the “unlawful detaining or threatening to detain” the property was “with the intention of causing any person to enter into an agreement”. Their Lordships are of opinion that this argument is not sound and that it is based on a fundamental misunderstanding of the object and effect to Section 15 of the Indian Contract Act.” After referring to Sections 11, 12, 13 and 14 to 18 of the Contract Act, the relevant observations made at page 612 are as under:—

“It is clear, therefore, that this definition of ‘coercion’ is solely a definition which applies to the consideration whether there has been ‘free consent’ to an agreement so as to render it a contract under Section 10. This explains why in the definition of ‘coercion’ it is limited to an unlawful act done ‘with the intention of causing the person to enter into an agreement.’ But it would be to make nonsense of the statute if it were to be taken to mean that ‘coercion’ in a legal sense could only exist if the object was to bring about a contract. Indeed such an interpretation would render the Act inconsistent with itself. Section 72, which is in Chapter 5, which deals with ‘certain

relations resembling those created by contract', reads as follows:—

'A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it'. and illustration B to that section reads as follows:—

'A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive'.

It is impossible to contend that the coercion referred to in this section or in the above illustration is 'with the intention of causing any person to enter into an agreement'. The word 'coercion' must therefore be there used in its general and ordinary sense as an English word, and its meaning is not controlled by the definition in Section 15. That definition is expressly inserted for the special object of applying to Section 14, i.e., to define what is the criterion whether an agreement was made by means of a consent extorted by 'coercion' and does not control the interpretation of 'coercion' when the word is used in other surroundings." This decision lends support to the submission made by Mr. Nanavati, appearing for the plaintiffs. It is submitted by him that if the amount is not legally payable and if the plaintiff is required to pay it under compulsion, the plaintiff is entitled to repayment unless the defendants can show that they had a right to recover from him or it under law.

18. So far as the facts of the second Appeal No. 452 of 1961 are concerned, it will be significant to note that by the very first letter, dated 21st June, 1957, the plaintiff was asked to pay the revised charges proposed by the notice and that too, from 5th November, 1951. If the plaintiff did not want to accept that offer, the respondents-defendants had stated that the agreement for railway siding would be terminated after six months from 1-6-1957. Under the old agreement it is an admitted position that the Railway had authority to terminate the agreement after giving six months' notice without assigning any reason. The plaintiff did not want to lose this facility of siding. It was advantageous to it. It was more advantageous to have an assisted railway siding than to have a private railway siding. The defendants had a legal right to give such notice for terminating the agreement. They made such an offer and the plaintiff accepted that offer. It may be that the plaintiff accepted that offer, it being more advantageous, though it was under a threat, that if it did not accept the proposal to pay the revised rates from 5th November, 1951, it would lose the

advantage of having an assisted railway siding. But that would not make the payment illegal, as the railway had an authority to terminate this agreement and had given such a notice. The plaintiff had an option to accept the revised rates or to forego the facility of assisted railway siding and the plaintiff chose to have the facility of siding. It cannot, therefore, be said in the circumstances of that case that the defendant had no right to recover the amount from the plaintiff under law. The plaintiff having agreed to pay this amount, the defendant had a right to recover that amount. The reason underlying is that the Railway had authority to withdraw this facility. The plaintiff was put to an option to pay the revised rates or to forego the facility, of a railway siding. Mr. Nanavati has not been able to show that there was any statutory obligation on the part of the Railway to give such a facility of assisted railway siding. As the plaintiff wanted to continue to have this facility, the plaintiff accepted that offer. In that very offer, it was specifically mentioned that the revised rates will have to be paid from 5-11-1951 and the plaintiff agreed to it. It is, therefore, obvious that the plaintiff agreed to it. It is, therefore, obvious that the plaintiff could not make any grievance in regard to such payment. At any rate, the plaintiff cannot say that it is required to pay this amount illegally under compulsion. The defendant having a right to recover this amount from the plaintiff under law, the plaintiff is not entitled to repayment of that amount.

19. So far as the Second Appeal No. 463 of 1961 is concerned, the position is quite different. In that case, the plaintiff was given a notice by the Railway on 3-9-1955 vide Ex. 21. By that notice the plaintiff was informed as to the basis of computation of the revised rates. It was also stated in para 2 that on that basis, revised rates were being uniformly charged and recovered from all siding owners. These charges were to compensate the railway for their share of capital spent on such siding and to reimburse the cost of maintenance of such sidings by them and they are subject to revision from time to time to meet the contingencies.

20. In para 4, it is stated as under:—
"As all the siding agreements are being revised to bring them in line on the standard form of agreement and charges prevailing on this Railway, you are also required to accept the above basis of charges and execute fresh agreement on the standard form, which can be obtained from the District Engineer."

It is thus evident that by this letter, the Railway authority intimated to the plaintiff to execute an agreement on the standard form in the revised form. In para 5 it is stated as under:—

to be adopted by the Panchayat is to summon the offender from time to time if he has not removed the encroachment and continue imposing on him the recurring fine as it becomes due up to the limit prescribed by Section 23 of the Act".

The proper course for a Panchayati Adalat in case of continuing breach therefore, is to issue a notice to the accused for the days during which the breach continued, afford him an opportunity to defend himself and in case the offence is proved punish him according to law. But the imposition of recurring fine seems to be clearly illegal. Moreover, the Panchayati Adalat could at best have imposed a fine of Re. 1 only per diem and imposition of fine of Rs. 2 per diem is not at all warranted by any provision of the Act. That being so the order passed by the Panchayati Adalat cannot be sustained.

8. Accordingly I allow this petition and quash the order of the Panchayati Adalat dated 10-8-1966 imposing a recurring fine on the petitioner. In the circumstances of the case there shall be no order as to costs.

Petition allowed.

AIR 1970 JAMMU AND KASHMIR 33 (V 57 C 9)

J. N. BHAT AND JASWANT SINGH, JJ.

Mir Mohammad, Appellant v. Nain Singh and others, Respondents.

Second Appeal No. 99 of 1968, D/- 22-4-1969 against Judgment of Dist. J., Poonch, O/- 8-8-1967.

(A) Civil P. C. (1908), S. 148 — Extension of time—Suit for pre-emption decreed — Direction to deposit amount decreed within time fixed as condition — Suit to stand dismissed in default — Court becomes functus officio and has no jurisdiction thereafter to extend time: AIR 1962 Cal 485 & AIR 1946 Oudh 52 & AIR 1940 Cal 275 & AIR 1915 Oudh 197 & AIR 1923 Nag 210 & AIR 1924 Lah 359, Ref.

(Para 4)

(B) Civil P. C. (1908), O. 20, R. 14 — Extension of time — Suit for pre-emption — Trial Court directing to deposit amount decreed within certain time as condition — In default suit to stand dismissed — Appeal by plaintiff — Along with appeal, appellant presenting application for extension of time for depositing purchase money determined by trial Court — Determination of purchase money made a specific ground of appeal — Held, appellate Court's decision in dismissing appeal on sole ground that deposit was not made within time limit fixed by trial Court was not correct: AIR 1954 SC 50, Disting.; Case law discussed. (Paras 4, 18)

GM/JM/D39/69/RSK/D

1970 J. & K./3 III G—29

Cases Referred: Chronological Paras

- (1962) AIR 1962 Cal 485 (V 49) = 66 Cal WN 645, Bhutnath Das v. Sahadeb Chandra Panja 4
(1961) AIR 1961 SC 882 (V 48) = (1961) 3 SCR 763, Mahanth Ram Das v. Ganga Das 4
(1954) AIR 1954 SC 50 (V 41) = ILR (1953) Hyd 455, Naguba Appa v. Namdev 2, 4, 17
(1954) AIR 1954 Mani 4 (V 41), Thokchom Haithumba Singh v. R. K. Babusana Singh 4, 8
(1952) AIR 1952 Cal 411 (V 39) = ILR (1952) 1 Cal 53, Bengal Agency and Stores Syndicate v. Stores and Engineering Supply Co. 4
(1946) AIR 1946 Oudh 52 (V 33) = 1945 Oudh WN 322, Sheo Prasad Kaur v. Bhanu Pratap Singh 4
(1944) AIR 1944 Pesh 22 (V 31) = 213 Ind Cas 5, Malik Khan Badshah v. Miram Khan 4, 15
(1940) AIR 1940 Cal 275 (V 27) = 44 Cal WN 449, Haji Eakub Saikh v. Samjan Bibi 4
(1940) AIR 1940 Nag 202 (V 27) = ILR (1940) Nag 157, Laxman v. Deorao 4, 13, 18
(1939) AIR 1939 Nag 120 (V 26) = 1939 Nag LJ 160, Laxman Ramchandra v. Wasudeo Vithal 4, 12
(1939) AIR 1939 Nag 140 (V 26) = 1939 Nag LJ 76, Sarjabai Sakharan v. Bhagwanji Nagoji 4
(1924) AIR 1924 Lah 359 (V 11) = 73 Ind Cas 891, Khan Muhammad v. Ahman 4
(1923) AIR 1923 All 516 (V 10) = ILR 45 All 456, Girdhari Singh v. Bhupal Singh 4, 14
(1923) AIR 1923 Nag 210 (V 10) = 19 Nag LR 8, Ambadas v. Laxman 4, 7
(1915) AIR 1915 Oudh 197 (V 2) = 2 Oudh LJ 162, Mst. Kaniz Kubra v. Bande Husain 4
(1913) ILR 35 All 582 = 11 All LJ 950 (FB), Suranjan Singh v. Ram Bahal Lal 4, 6
(1913) 60 Pun Re 1913 p. 331 = 53 Pun LR 1913, Naba v. Pathana 4, 16
(1912) 17 Ind Cas 868 (1) = 10 All LJ 421, Khurshed-un-Nissa v. Alim-un-Nissa 4, 11, 17
(1903) 53 PR 1903 p. 205 = 167 Pun LR 1903, Gurdit Singh v. Hukam Singh 4, 5
(1896) ILR 18 All 223 = 1896 All WN 43, Jaggar Nath Pande v. Jokhu Tewari 4, 9
Ishwar Singh, for Appellant; V. B. Suddan, for Respondents.

BHAT J.:— This is a civil second appeal against the decree of the learned District Judge, Poonch, dated 8th August 1967 whereby he has dismissed the appeal of the appellant against the decree of the Sub Judge Poonch dated 31-8-1966. The

appellant was a plaintiff in a suit for possession on the ground of right of prior purchase of half of land measuring 63 Kanals 8 marlas under survey No. 77-min in village Dhera Mohra, Tehsil Mendhar. The case of the plaintiff was that the defendant No. 1 Nain Singh had purchased this land from the plaintiff's uncle Mehar Din, who was a co-sharer of the land sold along with the plaintiff. The land was sold by means of a sale deed dated 18-4-1962 for an ostensible consideration of Rs. 3,000. The plaintiff claimed a decree for possession of this land on payment of Rs. 1,000 which was the market price of this land according to the plaintiff. The suit was resisted by the defendant No. 1 who denied the plaintiff's right of prior purchase. The consideration of Rs. 3,000 was alleged to have been actually paid to the vendor by the vendee. The trial Court on the pleadings of the parties framed the following issues in the case:—

1. Whether the plaintiff has prior right of purchase quo defendant No. 1? O. P. on plaintiff.
2. If issue No. 1 is proved, whether the plaintiff has waived his prior right of purchase? O. P. on defendant 1.
3. Whether the sale price was bona fide fixed and paid at Rs. 3,000? O. P. on defendant 1.
4. If issue No. 3 is not proved, what is the market price of the suit property? O. P. on parties.
5. Whether valuation of the suit for the purpose of court-fee and jurisdiction has not been properly fixed. If so, what should be the valuation and how should it be arrived at? O. P. on defendant 1.
6. Whether defendant 1 has effected any improvements in the house in dispute bona fide and if so, what is the value of improvement and is he entitled to be compensated for the same? O. P. defendant.
7. Relief:

2. After recording evidence of the parties, the trial Court decreed the suit of the plaintiff with costs and directed the appellant-plaintiff to deposit Rs. 3,000 purchase money within two months from 31-8-1966 of course taking credit for one-fifth of the purchase money already deposited by the plaintiff. The trial Court ordered that if this amount was not deposited within the above time limit, the suit of the plaintiff would stand dismissed with costs. An appeal was preferred by the plaintiff before the District Judge, Poonch, against this decree. In the appeal among other grounds, a ground was taken that the time for depositing the money as directed by the trial Court had not yet expired, the time granted by the trial Court was very short and as the correct consi-

deration payable by the plaintiff had yet to be determined, the date for deposit of the purchase money be extended. Along with the appeal, an application was presented by the appellant-plaintiff for extension of time for depositing the purchase money determined by the trial Court. In paragraph 2 of the said application the plaintiff submitted that he having preferred an appeal for reducing the price assessed by the trial Court, the question of depositing the money by the date as fixed by the said court, which had not yet expired did not arise, and that he had also made a prayer in the memorandum of appeal for extension of time for depositing the purchase money of the land in dispute, which according to him was only Rs. 1,000/-. This application for extension of time was resisted by the respondent and the lower appellate Court on 29-10-1966 passed the following order:

"That the counsel for the applicant i.e., appellant has admitted that at this stage the granting of this application of the applicant would be an amendment of the decree, therefore, no further argument is necessary in this application. The application should therefore come up along with the appeal on the date fixed i.e. 25-11-1966."

There was some dispute between the parties about the court-fees payable and the lower appellate Court after hearing the parties directed on 26-6-1967 the appellant to make up the deficiency in the court-fee. The appellant paid the deficit court-fees on 20-7-1967. Thereafter arguments were heard on merits. Among the arguments advanced at the bar before the lower Appellate Court, it was contended that as the appellant had not deposited the purchase money determined by the trial Court within the time fixed by it, i.e., within 2 months of the decree the appeal should be dismissed. An authority of the Supreme Court reported as AIR 1954 SC 50 was cited in support of this contention. The lower Appellate Court finding itself bound by the Supreme Court authority, felt helpless and dismissed the appeal on this very ground alone. It is against this order and decree of the lower Appellate Court that the plaintiff has come in second appeal to this court.

3. We have heard the learned counsel for the parties.

4. Mr. Ishwar Singh, the learned counsel for the appellant argued that when time had been fixed by the trial Court for paying the purchase money it could under the provisions of Section 148 C. P. C. enlarge such period even though the period originally granted had expired. Therefore, according to him the trial Court could have extended the time for payment of the money but as the case

was in appeal before the lower Appellate Court, the lower appellate Court was not helpless as it has said in its judgment but it could extend the time for payment of the purchase money by the plaintiff. In support of his contention he referred to AIR 1939 Nag. 140; AIR 1952 Cal. 411 and AIR 1961 SC 882. We are afraid that Section 148 C. P. C. has no bearing on this case. Section 148 C. P. C. refers to cases where a particular court is still ceased of a certain matter. The trial Court ordered the plaintiff on 31-8-1966, when it passed the decree, to deposit Rs. 3,000/- minus the amount already deposited by him within two months and further directed that the suit shall stand dismissed if the money was not paid within the time limit; it became functus officio after the decree was passed by it. It had no jurisdiction over the suit after the decree. The language of Section 148 C. P. C. is so plain that we do not think it necessary to support this view of ours by authorities. However a reference may be made in this behalf to AIR 1962 Cal. 485; AIR 1946 Oudh 52; AIR 1940 Cal. 275; AIR 1915 Oudh 197; AIR 1923 Nag. 210 and AIR 1924 Lah. 359 and so on and so forth. Therefore we do not agree with this argument of the learned counsel for the appellant. But apart from the provisions of Section 148 C. P. C. we have to examine the facts of this case and decide for ourselves whether the lower appellate Court's order dismissing the appeal simply on the ground that the appellant had failed to deposit the purchase money within the time fixed by the trial Court, is proper and can be upheld. It may be straightway mentioned that there is not apparent unanimity in judicial pronouncements upon this fact namely when the trial Court fixes a period for the deposit of the purchase money and an appeal is preferred by the plaintiff pre-emptor against the whole decree before that period expired, what is the effect on the appeal if the purchase money is not deposited by the appellant-plaintiff within the time fixed by the trial Court. On the one hand the following authorities may be mentioned: 53 Pun. Re. 1903 p. 205; (1913) ILR 35 All. 582; AIR 1923 Nag. 210; AIR 1954 Manipur 4; (1896) ILR 18 All. 223, and lastly AIR 1954 SC 50. On the other hand the following authorities may be noticed (1912) 17 Ind. Cas. 868 (1) (All); AIR 1939 Nag. 120; AIR 1940 Nag. 202; AIR 1923 All. 516; AIR 1944 Pesh. 22, and 60 Pun. Re. 1913 p. 331. We have used the word 'apparent' because on a close scrutiny of the authorities above mentioned, there is no real conflict. Let us begin with the Supreme Court authority reported as AIR 1954 SC 50. It is a very small judgment. It lays down that:—

"Mere filing of an appeal does not suspend the decree for pre-emption and un-

less that decree is altered in any manner by the court of appeal, the pre-emptor is bound to comply with its direction with regard to the deposit of amount within the fixed time."

In that case the appeal was withdrawn and the judgment does not indicate as to what were the grounds taken in the appeal. This authority is not at all applicable to the facts of the present case as will be abundantly clear later on in this judgment.

5. 53 Pun. Re. 1903 p. 205 is an Urdu Judgment of Justice Anderson and Justice Robertson. In that case a Tehsildar had passed a decree directing the plaintiff to deposit the money within two months. The plaintiff deposited the money after four days of the expiry of the period fixed by the Tehsildar for deposit. It was held that the plaintiff was negligent and therefore their Lordships did not interfere with the decision of the Tehsildar. Their Lordships further held that the plaintiff had not shown any cause for not depositing the money within time although according to their Lordships the first appellate Court had the power to extend the time for payment. Therefore this authority also does not support the case of the respondent but rather when understood properly may support the case of the appellant.

6. (1913) ILR 35 All. 582 is an Allahabad Full Bench case. In this case the point for determination was whether under Section 148 C. P. C. the Court could extend the time fixed by the decree for payment of the purchase money in a pre-emption case. It held that Section 148 C. P. C. did not empower the court to extend the time. It was further held that an order U/S. 148 C. P. C. was not a decree and therefore not appealable. We have already held that Sec. 148 C. P. C. has no application to this case and therefore we are in respectful agreement with the dictum laid down by their Lordships in this case.

7. AIR 1923 Nag. 210 also is a case which has no bearing on the facts of the present case. In that case it was decided that the executing court had no power to extend the time fixed in a pre-emption decree for payment of the purchase money and Section 148 C.P.C. did not empower the executing court to extend the time. It was further held that S. 151 also could not empower the executing court to extend the time.

8. AIR 1954 Mani 4, pertains to a case where the pre-emptor was directed to deposit the sale money by 16th Nov. 1951. The appeal was dismissed on 5-5-1952 and a subsequent application to the District Judge was made to extend the time till 10-8-1953. It was held that payment after the period prescribed in the

decree would not be a valid deposit. This recital would clearly show that even this case has no application to the controversy involved in this case.

9. (1896) ILR 18 All. 223 a decree was passed in favour of the plaintiff in a suit for pre-emption. The plaintiff did not pay the entire pre-emptive price within the time fixed by the court. The defendant appealed long after the time prescribed by the original decree for payment had expired, and the defendants appeal was dismissed. The plaintiff thereafter paid the balance of the purchase money without there being any extension by the court for such payment. It was held that such payment would not entitle the plaintiff to a decree for pre-emption.

10. Now let us turn to the other authorities:

11. The Allahabad High Court in (1912) 17 Ind. Cas. 868 (1) (All.), held that when the plaintiff-appellant appealed to the District Judge against the decree of the lower court fixing a time for payment of the purchase money but failed to deposit the purchase money within the time fixed by the trial Court, the District Judge dismissed the suit of the plaintiff because the money had not been paid within the time fixed by the trial Court. This decision of the District Judge was set aside by the High Court and the case was remanded to the lower appellate court for decision according to law.

12. In AIR 1939 Nag. 120 the plaintiff was required to deposit the purchase money within a certain period but he went in appeal against the decree of the trial Court and never made the deposit of the purchase money. It was held that the plaintiff could appeal against the decree. It was further held that if the appellate court varied the price fixed by the first court, there was no reason why it should not have the power to vary the time fixed for payment of the price.

13. In AIR 1940 Nag. 202 it was held that:—

"An appellate court on an application made within time fixed for payment of pre-emption money can extend time fixed by trial Court for making deposit of purchase money."

14. In AIR 1923 All. 516 does not strictly apply to the facts of this case but the principle laid down therein recites that:—

"Court has discretion to extend the time for payment of pre-emption money in court. Where the date fixed for payment happened to come in vacation, the money was allowed to be deposited on the day the Court opened."

15. In AIR 1944 Pesh. 22 it was laid down that Section 148 C.P.C. does not apply to deposit of purchase money under the orders of a court decree but the appellate court could extend time.

16. In 60 Pun. Re. 1913 p. 331 their Lordships extended the time for payment because the money had been remitted by money-order by the plaintiff pre-emptor within the time fixed by the trial Court.

17. In our opinion the nearest authorities applicable to this case are (1912) 17 Ind. Cas. 868 (1) (All.) which is directly on the point and AIR 1940 Nag. 202. After detailing the above authorities let us examine the facts of this case.

18. The plaintiffs suit was that the sale price of Rs. 3,000/- entered in the sale deed was fictitious, it consisted of old debts. The market price of this land was hardly Rs. 1,000/- on which he was prepared to pre-empt this land. This issue was decided against the plaintiff by the trial Court and the trial Court fixed two months time for payment of the rest of the purchase money. The plaintiff went in appeal to the District Judge complaining against the fixation of the sale price at Rs. 3,000/- as well as fixing the time limit of two months for payment of the purchase money. He took it as a specific ground of appeal and further made an application for extension of time for the deposit of the purchase money, along with the appeal. This application was not rejected by the lower appellate court but by its order dated 29-10-1966 which we have reproduced above the lower appellate court virtually postponed the decision on that application along with the main appeal because according to the lower appellate court as well as according to the learned counsel for the appellant, any such extension would be an amendment of the decree of the trial Court, which could not be done at interim stage. Therefore this request of the plaintiff for extension of time for payment of the purchase money was kept pending by the lower appellate court and was not rejected by it. The lower appellate court has not decided the case on its merits at least so far as the fixation of the purchase money and the period allowed by the trial court for depositing the rest of the purchase money is concerned. It felt itself bound by the observations of their Lordships of the Supreme Court in AIR 1954 SC 50 which we pointed out did not apply to this case. In our opinion, therefore the lower appellate court's decision in dismissing the appeal simply on the ground that the deposit was not made within the time limit fixed by the trial Court, is not correct and as such it has to be set aside.

19. We therefore allow this appeal, and send back the case to the lower appellate court with the direction that it will decide the whole case on merits including the amount that the plaintiff-appellant shall have to pay in order to be able to exercise his right of prior purchase as well as the time within which

he has to make payment of the balance of the purchase money and other allied matters that may arise in the appeal. Costs of this appeal shall abide the result in the lower appellate court.

Appeal allowed.

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(V 57 C 10)

FULL BENCH

S. M. FAZL ALI C. J., J. N. BHAT,
JASWANT SINGH, M. JALAL-UD-DIN
AND ANANT SINGH, JJ.

Aziz Dar, Appellant v. Sona Dar and others, Opposite Party.

Second Appeal No. 54 of 1968, D/- 20-8-1969 against order of Dist. J., Srinagar, D/- 21-8-1968.

Transfer of Property Act (1882), S. 52 — *Lis pendens* — Applicability — J. & K. Right of Prior Purchase Act (2 of 1993), Section 29 — Pre-emption — Suit for — Suit property cannot be sold by vendee after period of limitation to one having equal right as plaintiff — Persons having no right of prior purchase joined in sale by subsequent vendee — Plaintiff's right of pre-emption not affected.

S. 52 lays down in express terms the law that no litigant shall be allowed to transfer his right to the property in dispute during the pendency of the suit so as to prejudice the interests and rights of the adverse party. The bar to the transfer of the property during the pendency of litigation save under the authority of the court is absolute. A suit for pre-emption which is for the enforcement of a right to claim immovable property, cannot form an exception to the principle laid down in the said section. AIR 1923 All. 31 & AIR 1926 All. 180 & AIR 1914 All. 356, Rel. on. (Para 9)

It is not open to the vendee to resell the property to another person possessing or holding equal or superior right of pre-emption to that of the plaintiff pre-emptor in order to defeat his rights after the period of limitation prescribed for suit for pre-emption and the transfer, if effected could be hit by the doctrine of *lis pendens*. That being so the second vendee, having no right or authority to purchase the property during the pendency of the suit for pre-emption, cannot be substituted as a bona fide vendee so as to affect the rights of the pre-emptor. It will be all the more destructive for his case, if he joins strangers with him in the sale. It cannot be said that in the second sale, the person, who claims an equal right of pre-emption with the plaintiff can be allowed to partially pre-empt

the land. Consequently, the plaintiff's right of pre-emption could not be affected by the re-sale of the suit property and his suit could not be dismissed on this score. Case law discussed.

(Paras 11, 12, 13)
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(1958) AIR 1958 S.C. 838 (V 45)=
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51 Pun. L. R. 39 (FB), Wazir Ali
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(1941) AIR 1941 Lah. 433 (V 28)=
43 Pun. L. R. 581 (FB), Madho
Singh v. James R. Skinner 20
(1932) AIR 1932 P.C. 57 (V 19)=
ILR 54 All. 189, Hans Nath v.
Ragho Prasad Singh 7, 20
(1930) AIR 1930 Lah. 356 (V 17)=
ILR 11 Lah. 258 (FB), Moolchand
v. Ganga Jal 7, 9, 21
(1929) AIR 1929 All. 400 (V 16)=
116 Ind. Cas. 738, Rafiqunnissa Bibi
v. Abdul Shakur Khan 21
(1929) AIR 1929 All. 440 (V 16)=
1929 All. L. J. 537, Malik Singh
v. Shiam Lal 20
(1926) AIR 1926 All. 101 (V 13)=
23 All. L. J. 934, Lakshmi Flour
Mills Co. Ltd., In the matter of 11
(1926) AIR 1926 All. 180 (V 13)=
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(1914) AIR 1914 All. 356 (V 1)=22
Ind. Cas. 266, Kamta Prasad v.
Ram Jog 6, 9, 11, 20, 21
T. Hussain, for Appellant; Sunder Lal,
for Opposite Party.

M. JALAL-UD-DIN, J.:— This case has been referred to the Full Bench in the following circumstances:—

2. Haji Rishi Dar defendant No. 1 purchased land measuring 16 marlas under survey No. 146 Khewat No. 5/5 situate in village Chakpurn Kalan on the basis of a Sale deed dated 27-8-61 registered on 15-12-1961 from Mst. Mukhti and

others. Aziz Dar, the plaintiff, claimed the suit property in exercise of his right of prior purchase. He averred that he and the vendors were co-sharers and the plaintiff besides having right of way over the suit land was also an agnate of the vendors. The suit of the right of prior purchase was instituted in the court of Munsiff Badgam on 13-12-1962. During the pendency of the suit but after 1½ years of the original sale Haji Rishi Dar, the defendant vendee resold the suit land in favour of Qadir Dar, the brother of the plaintiff, and his own sons Sona Dar and Ramzan Dar. The trial Court dismissed the suit of the plaintiff on the ground that as the original vendee had resold the suit property to Qadir Dar and others and Qadir Dar had equal right of prior purchase with the plaintiff (being the brother of the pre-emptor) therefore the latter who had no better title than that of Qadir Dar could not enforce his right of prior purchase as his right was defeated by the resale. The court also held that as during the pendency of the suit the suit property was sold by the original vendee to Qadir Dar, the latter could not be compelled to share half of it with the plaintiff. The first appellate court upheld the view of the trial Court and dismissed the appeal of the plaintiff.

3. The plaintiff's right to claim the property in exercise of his right of prior purchase is not seriously disputed before us; rather the finding of the first appellate court on the point is in favour of the plaintiff. The learned District Judge in regard to this aspect of the matter observes that it is in evidence that the heirs of Mst. Mukhti and Shahban original vendors are still living but the plaintiff being the cousin of these vendors has a right of prior purchase and so has his brother Qadir Dar. Not only the plaintiff claims the property on the ground of his being a co-sharer which has however been negated by the courts below but also on the ground of his being an agnate of the vendors. The case of the plaintiff is covered by third category of sub-clause (b) of Section 14 of the Right of Prior Purchase Act which vests right of prior purchase in the persons who but for such sale would on the death of vendor be entitled to inherit the land sold. However, both the courts below have dismissed the suit of the plaintiff on the ground that the vendee had resold the property in favour of Qadir Dar in private recognition of his pre-emptive rights. Both courts have also held that this transaction is not affected by the doctrine of *lis pendens*.

4. The questions referred to the Bench for adjudication are (1) Whether during the pendency of the suit for right of prior purchase it is open to a vendee to resell the suit property after the period of

limitation to a person possessing right of pre-emption equal or superior to that of the plaintiff in order to defeat the right of the plaintiff pre-emptor and whether such transfer is not affected by the doctrine of *lis pendens* as envisaged in Section 52 of the Transfer of the Property Act. (2) When the subsequent vendee joins with him in the sale other persons who have got no right of prior purchase as against the plaintiff, can such transfer be held valid so as to effect the pre-emptory rights of the plaintiff.

5. These questions being of vital importance and the courts having to deal with them often, the matter on my reference was referred to Full Bench constituted under the order of my Lord the Chief Justice for an authoritative pronouncement thereon.

6. Before the Bench it was argued by Mr. Tassadiq Hussain learned counsel for the appellant that it was not open to the vendee to resell the suit property to another person possessing equal or superior rights of pre-emption with a view to defeat the pre-emptor's suit as the same offended against the provisions of Section 52 of the Transfer of Property Act which completely prohibits the transfer of the subject matter of suit during its pendency. It is urged that it is not a legitimate way of defeating the rights of a pre-emptor, especially so when the sale is held after the period of limitation. The proposition canvassed by the learned counsel is that the law of limitation provides one year's period for instituting a suit for pre-emption and if after this period the suit is brought, it is liable to be dismissed on that score. All persons having or claiming right of prior purchase in respect of the property sold must, therefore, bring an action within the prescribed period of limitation. In the instant case Qadir Dar about whom it is said that he had an equal right of prior purchase with the plaintiff did not bring any suit for pre-emption at all.

It was after 1½ years of the date of the original sale that the vendee resold the property to Qadir Dar alleged to be in private recognition of his right of prior purchase. This would mean that Qadir Dar who had not brought the suit within the period of limitation could not be allowed to have the property in exercise of his right of pre-emption after the period of limitation by circumventing the law of limitation. It is also submitted that when the second vendee Qadir has joined with him in sale, other persons who were mere strangers and who had no right of prior purchase as against the plaintiff, this would in itself set at naught the right of Qadir Dar. The sale being joint and indivisible in favour of all, would become invalid and would not affect the

pre-emptory rights of the plaintiff. While elucidating this argument, an instance is cited of a plaintiff pre-emptor who joins with him in the suit strangers. The plaintiff in such a case will run the risk of his entire suit being dismissed. For the respective propositions a canvassed reliance is placed on AIR 1926 All. 180; AIR 1946 Lah. 142 (F.B.) and 22 Ind. Cas. 266= (AIR 1914 All. 356).

7. As against this, the learned counsel for the opposite side has contended that the right of pre-emption is a weak right and it can be defeated by all possible ways. Not only the vendee can improve his position by equating himself with the pre-emptor which he can do till the date of passing of the decree but also the vendee can defeat the right of pre-emptor by selling the property in dispute to another person holding equal or superior right of pre-emption to the plaintiff. It is submitted that this has been accepted as a legitimate way of defeating the right of the plaintiff as this would substitute the second vendee in the original bargain as it would be deemed that the subsequent vendee has still the means of coercing, by means of legal action, the original vendee to surrender the bargain in his favour. This would be a surrender as a result of private negotiation and in recognition of the right of the second vendee to compel such surrender. In support of this proposition reliance is placed on AIR 1930 Lah. 356 (F.B.); AIR 1932 P.C. 57 and AIR 1960 J. & K. 112. It is further submitted that it is immaterial whether the second sale effected by the original vendee in favour of the subsequent vendee is within or without time prescribed for instituting the suit for pre-emption.

8. Regarding the question that Qadir Dar, the second vendee, has joined strangers in the sale, it is submitted that in so far as the share accruable to Qadir Dar is concerned, to that extent, the suit can be decreed in his favour.

9. In order to examine and appreciate the precise scope and importance of the first question, it is pertinent to advert to Section 52 of the Transfer of Property Act which reads as under:—

"During the (pendency) in any court having authority in the State, or (any) suit or proceeding (which is not collusive and) in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party there-to under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."

This Section lays down in express terms the law that no litigant shall be

allowed to transfer his right to the property in dispute during the pendency of the suit so as to prejudice the interests and rights of the adverse party. It appears that the bar to the transfer of the property during the pendency of litigation save under the authority of the court is absolute. Thus a suit for pre-emption which is for the enforcement of a right to claim immovable property, cannot form an exception to the principle laid down in the said section. The view that the doctrine of *lis pendens* applies to pre-emption cases has been laid down in a number of authorities namely AIR 1923 All. 31, AIR 1926 All. 180, 22 Ind. Cas. 266= (AIR 1914 All. 356). The ratio of these authorities is that where pending a suit for pre-emption, the vendee resells the property to one having equal right to pre-empt, the doctrine of *lis pendens* applies. There is, however, the Punjab authority AIR 1930 Lah. 356 (Supra) which makes an exception in favour of a sale by the original vendee in favour of a person holding or possessing equal or superior right of pre-emption in recognition of such right.

The reason assigned for the exception is stated that the doctrine of *lis pendens* forbids creation of new rights over the property already the subject of the suit *pendente lite* which are calculated to injure the rights of claimants. It does not and it could not apply to the assertion of rights which existed prior to the institution of the pending suits. A pre-emptor is in no worse position than one asserting his right privately when he asserts it by a suit. AIR 1960 J. & K. 112 has followed the Lahore view and in this authority as well the view has been adopted that it is competent for vendee to transfer the pre-empted property in favour of a person in recognition of his right of pre-emption. Neither the Lahore authority nor AIR 1960 J. & K. 112 takes into account the case of a vendee who resells the property to the respondent vendee after the period of limitation. These authorities are therefore distinguishable.

10. The question it seems has been discussed in a more detailed way in AIR 1946 Lah. 142 (F.B.) in which precisely the same question was decided. It was held that the subsequent transferee cannot by virtue of transfer *pendente lite* acquire any title to the suit property capable of affecting, in any manner, the rights of the plaintiff. It could make no difference to the operation of the rule of *lis pendens* even though such transferee had entered into possession of the property in pursuance of the transfer. His possession of the property as against the plaintiff could only be regarded as held without title. By the resale in his favour, he would not acquire any title which he might plead

in bar of the pre-emption suit already pending. It was further observed by Achhru Ram J. who delivered the judgment on behalf of the Full Bench that where the subsequent transferee had lost the means of making use of the coercive machinery of the law to compel the vendee to surrender the original bargain to him, a retransfer of the property in the former's favour could not be looked upon as anything more than a voluntary transfer in the former's favour of such title as he had himself acquired under the original sale. Such transfer had not the effect of substituting the subsequent transferee in place of the vendee in the original bargain. Such a transferee took the property only subject to the result of the suit. Even if he was impleaded as a defendant in such suit, he could not be regarded as any thing other than a representative-in-interest of the original vendee and he had no right to defend the suit except on the pleas that were open to such vendee himself. Even if the subsequent vendee was impleaded, he would not have any right to defeat the suit of the plaintiff by reason of his own superior qualifications. His Lordship further proceeded to observe:—

"If the plaintiff's right of pre-emption is found to be superior to that of the original vendee at all the material times the circumstance that by the time the suit comes up for final decision, but subsequent to the institution of the suit and after the expiration of the period of limitation prescribed for a suit to enforce a right of pre-emption, the property has changed hands by reason of a re-transfer by the vendee will not affect his right to a decree of his claim, irrespective altogether of the qualification possessed by the subsequent transferee who cannot defeat the plaintiff's suit on the ground of his own pre-emptive right in respect of the original sale being equal or superior to that of the former."

In other words the authority lays down the proposition that if right to enforce pre-emption is barred at the time of transfer, such transfer in favour of the subsequent vendee even if he may have equal or superior right of pre-emption is of no avail to such transferee and he cannot defeat the pre-emptive claim of the plaintiff.

11. There are also abundant authorities in support of this view vide AIR 1923 All. 31, AIR 1926 All. 101 and 22 Ind. Cas. 266=(AIR 1914 All. 356) (supra). The ratio decidendi of these authorities is in favour of the proposition that where a resale by the vendee of the property in dispute is effected in favour of a superior pre-emptor after the institution of the suit but after the expiration of limitation the plaintiff's suit must succeed in as

much as the resale by the vendee to the subsequent vendee was at the time when the subsequent vendee had no right to maintain a suit for pre-emption in respect of the original sale. In my opinion, therefore, the answer to the first question must be that it is not open to the vendee to resell the property to another person possessing or holding equal or superior right under pre-emption to that of the pre-emptor after the period of limitation and the transfer, if effected could be hit by the doctrine of *lis pendens*.

12. The answer to the second question follows as a necessary corollary and must be in favour of the plaintiff pre-emptor. In the first instance, the second vendee, having no right or authority to purchase the property during the pendency of the suit of pre-emption, as answered above, he cannot be substituted as a bona fide vendee so as to affect the rights of the pre-emptor. It will be all the more destructive for his case, if he joins strangers with him in the sale. Suppose the second vendee i.e., Qadir Dar maintained a suit for pre-emption, but joined with him strangers namely, the other persons mentioned in the second sale deed, what would be the fate of the case? The consequence would be that his suit would be dismissed. Nor can the position be envisaged that in the second sale, Qadir Dar, who claims an equal right of pre-emption with the plaintiff can be allowed to partially pre-empt the land. The answer to this question must therefore be against the second vendee.

13. The result is that the answers to the two questions formulated above being in favour of the plaintiff pre-emptor, it is clear that his right of pre-emption could not be defeated by the resale of the suit property and his suit could not be dismissed on this score.

14. Mr. Tassaduq Hussain, counsel for the appellant has given a statement to the effect that he would not dispute the consideration as entered in the sale deed and, that he would accept the sale price as Rs. 500/- and would pay the same in case a decree is passed in favour of the plaintiff. The right of the plaintiff to claim pre-emption having been established and because of the plaintiff's concession to accept Rs. 500/- as the sale price the plaintiff, it is clear, is entitled to a decree as prayed for by him.

15. I would, therefore, allow this appeal, set aside the order of dismissal of the suit passed by the courts below and pass a decree for right of prior purchase in respect of the land in dispute as described in the plaint in favour of the plaintiff against the defendants on his depositing Rs. 500/- as consideration money within one month from today's date, fail-

ing which, the suit shall stand dismissed. In view of the important legal points involved in the case, I leave the parties to bear their own costs.

16. S. M. F. ALL CHIEF JUSTICE:
I agree.

17. JASWANT SINGH, J.: I agree.

18. ANANT SINGH, J.: I also agree.

19. BHAT, J.:— I have had the privilege of going through the learned judgment written by my learned brother Hon'ble Justice Jalal-ud-din with which my another learned brother Hon'ble Justice Jaswant Singh has agreed. I would like to add a few words. Two propositions were referred to the Full Bench as would appear from the judgment of my learned brother. The first proposition is: whether during the pendency of the suit for right of prior purchase it is open to a vendee to resell the suit property after the period of limitation to a person possessing right of pre-emption equal or superior to that of the plaintiff in order to defeat the rights of the plaintiff pre-emptor and whether such transfer is not affected by the doctrine of *lis pendens* as envisaged in Section 52 of the Transfer of Property Act.

20. My learned brother has discussed various authorities and the law on the subject. The consensus of authorities on this point is that if the property is alienated by the vendee in favour of a person, who had a preferential right as against the pre-emptor, after the period of limitation prescribed for instituting a suit, the transfer is hit by the doctrine of *lis pendens* and such a transfer would not be sufficient to defeat the suit of the plaintiff who may have even an inferior right to that of a subsequent vendee. The Privy Council in AIR 1932 P.C. 57 held that if a vendee got by gift a share in a village pending a co-sharer's suit for pre-emption, the co-sharer's suit could be defeated and the decisive date was the date of the decree. There are other authorities on this point, some of which have been referred to by my learned brother and they are 22 Ind. Cas. 266=(AIR 1914 All. 356), AIR 1960 J. & K. 112, AIR 1949 EP. 193 (F.B.), AIR 1952 Nag. 51 (F.B.). In AIR 1926 All. 180 it has been held that if a vendee sells the property to one with an equal right the property must be divided between the pre-emptor and the subsequent vendee. But there are however, authorities for the proposition that if a vendee transfers the property which is the subject matter of the suit to a person having an equal right with or a superior right to that of a pre-emptor during the pendency of the suit but before the limitation for bringing the suit for pre-emption by the subsequent transferee, the subsequent vendee can easily defeat the suit of the pre-emptor.

But if the subsequent sale is made after the period of limitation prescribed for a suit for pre-emption, the doctrine of *lis pendens* as contained in Section 52 of the Transfer of Property Act would apply and the subsequent vendee cannot defeat the suit of the pre-emptor whether he has an equal right or an inferior right to that of the subsequent vendee but has a superior right as against the original vendee. For this proposition a number of authorities may be cited viz: AIR 1929 All. 440, AIR 1946 Nag. 367, AIR 1949 EP. 193 (FB) above referred to, AIR 1941 Lah. 433 (FB), AIR 1946 Lah. 142 and AIR 1946 Lah. 322 (FB). Last of all the whole point is covered by a Supreme Court authority reported as AIR 1958 SC 838.

21. In 22 Ind. Cas. 266=(AIR 1914 All. 356) the subsequent sale was within the period of limitation. In AIR 1929 All. 400 resale was effected the same day the original transfer took place. In AIR 1960 J. & K. 112 this point whether the subsequent sale had taken place within the period of limitation has not at all been considered and in the authority reported as AIR 1930 Lah. 356 also this point has not at all been considered. But the matter has been thoroughly discussed by Achhru Ram J. who delivered the judgment on behalf of the Full Bench case in AIR 1946 Lah. 142 and AIR 1946 Lah. 322. In the former case his Lordship says that the doctrine of *lis pendens* applies to pre-emption suits and he holds that if the second sale is within the period of limitation for instituting a suit for pre-emption and the vendee transfers the property to the second vendee in recognition of his right of pre-emption, the transfer cannot be regarded as voluntary and in this case the suit of the plaintiff pre-emptor can be defeated. But where at the time of transfer in favour of A limitation for instituting a suit for pre-emption had expired and A had lost the use of the coercive machinery of law for compelling the vendee to surrender the property in recognition of his right of pre-emption the transfer in favour of A by the vendee must be regarded as a voluntary transfer of such title as the vendee himself had acquired under the original sale so as to attract the principle of *lis pendens*.

In such a case the transfer has not the effect of substituting the subsequent transferee A in place of the vendee in the original bargain. In the later case viz: AIR 1946 Lah. 322 the point was in a suit for pre-emption the sale was effected in favour of another pre-emptor in pursuance of agreement to sell made in his favour prior to the institution of the pre-emption suit but the sale deed was executed after expiry of limitation to sue for

pre-emption. It was held by the Full Bench (Achhru Ram J. again delivering the judgment on behalf of the Full Bench) that a mere agreement to sell the property did not create any rights in the vendee and the sale having been executed and registered after limitation for a suit to enforce his own pre-emptive right had expired, such a sale could not defeat the right of the pre-emptor. These two judgments were followed by another judgment of the same court reported as AIR 1947 Lah. 175. The position was again reconsidered by a Full Bench of the East Punjab High Court in a case reported as AIR 1949 E. P. 193 in which the following points were decided. If a transfer was prior to the suit for pre-emption in favour of a person, with a superior right, the suit could be defeated. But if the transfer was after the suit, the right of pre-emption could only be defeated if the subsequent transfer was in recognition of the right of pre-emption of the subsequent vendee. If the transfer was after the period of limitation had expired, the doctrine of *lis pendens* would apply.

22. Most of these authorities particularly of the Lahore High Court were considered by their Lordships of the Supreme Court in AIR 1958 SC 838 and their Lordships categorically held that:—

"The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. The pre-emptor has a secondary right or a remedial right to follow the thing sold. It is a right of substitution but not of repurchase i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. It is a right to acquire the whole of the property sold and not a share of the property sold. Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place."

Their Lordships in paragraph 19 further held that "it is settled law that the rule of *lis pendens* is as much applicable to a suit to enforce the right of pre-emption as to any other suit. But the rule applies only to a transfer *pendente lite* and it cannot affect pre-existing rights. If the sale is a transfer in recognition of a pre-existing subsisting right, it would not be affected by the doctrine as the said transfer does not create new right *pendente lite*; but if the pre-existing right became unenforceable by reason of the fact of limitation or otherwise, the transfer though ostensibly made in recognition of such a right in

fact created only a new right *pendente lite*."

23. In view of this authoritative pronouncement of the law by their Lordships, it is clear that in this case, as the sale in favour of the subsequent vendee has been made after the period of limitation prescribed for a suit for pre-emption, the doctrine of *lis pendens* would apply and this sale could not affect the right of the plaintiff. It may be further remarked that in our State the Act is not called the Pre-emption Act but it is called as Act of Right of Prior Purchase, which means that the plaintiff must have a superior right to that of the vendee.

24. About the second proposition namely when the subsequent vendee joins with him in the sale other persons who have got no right of prior purchase as against the plaintiff, can such transfer be held valid so as to affect the pre-emptory rights of the plaintiff.

25. The answer can be only against the subsequent vendee. In a joint sale as in this case, in favour of two persons, no specific rights are vested with respect to any particular portion of the property in either of the vendees. Both the vendees took the property subject to the frailties of such a transfer. The plaintiff has a clear case against one of the vendees, obviously the other vendee by associating with himself a person without any right of prior purchase also becomes as frail and as weak as the second vendee or to use a colloquial expression, each chain is as weak as its weakest link. Therefore, when one of the two or more subsequent vendees has an inferior right to that of the plaintiff, he drags along with himself the other vendee with superior right and neither of them can resist the suit of the plaintiff pre-emptor. But I want to reserve my opinion on one point which strictly does not arise in this case but which has nonetheless been enunciated by my learned brother Hon'ble Justice Jalal-ud-din namely if a pre-emptor joins with him a person having no right to pre-empt, whether the whole suit would be dismissed or not. On this proposition of law when need be, I shall express my opinion in detail. As this point does not arise in this case no detailed comment is necessary at this time on this proposition of law. I, therefore, on the whole agree with my learned brother Hon'ble Mr. Justice Jalal-ud-din about the fate of this case.

Appeal allowed.

AIR 1970 JAMMU & KASHMIR 43
(V 57 C 11)

J. N. BHAT, J.

Subhan Malik, Appellant v. Abdul Ali, Respondent.

Second Appeal No. 89 of 1967 D/- 20-8-1969 against Judgment of Dist. J., Baramulla, D/- 7-10-1967.

Limitation Act (1908), Art. 10—Starting point of limitation under — A's suit based on right of prior purchase against vendee B and vendor C — Sale deed written on 23-11-1962 but registered on 7-1-1963 — B got physical and constructive possession of land in April 1963 — A's suit dated 1-2-1964 held to be within time.

Under Article 10 of Limitation Act the starting point of limitation is when under the sale, sought to be impeached, the possession of the whole property is taken by the vendee or in the alternative the date of the attestation of the mutation. The date of the sale as such whether registered on the same date when it was executed or subsequently has nothing to do with the starting of limitation. If however possession is taken under the sale then limitation would start from the date of the sale. (Para 3)

A suit for possession based on right of prior purchase pertaining to certain agricultural land in a village was instituted by A against the vendee B and the vendor C. Sale deed was written on 23-11-1962 but was registered on 7-1-1963. B got physical and constructive possession of land in April 1963 for the first time. The suit was brought on 1-2-1964. Held that suit was within time. (Para 3)

Cases Referred: Chronological Paras

(1961) AIR 1961 Punj. 296 (V 48) = 63 Pun. L. R. 303, Bai Chander Mani v. Bhagirath 2

(1956) AIR 1956 Nag. 243 (V 43) = ILR (1956) Nag. 116, Sheonandan-prasad v. Kanhaiyalal 2

(1956) AIR 1956 Pepsu 17 (V 43) = ILR (1955) Patiala 494, Phula Wanti v. Kashmiri Lal 2

(1950) AIR 1950 All 290 (V 37) = 1950 All. L. J. 1, Ram Gopal v. Baikunth Nath 2

(1947-48) 6 J. & K. L. R. 113 2

J. N. Bhan, for Appellant; H. N. Dhar, for Respondent.

JUDGMENT:— This is a civil second appeal arising out of the following facts. A suit for possession based on right of prior purchase pertaining to 2 kanals 3 marlas of land comprising Khasra No. 167 village Waripora was instituted by the respondent against Subhan Malik the vendee and Mohammad Abdulla the vendor of this land. The sale deed was written on 23-11-1962 but was registered

on 7-1-1963. The suit was filed by the plaintiff on 1-2-1964. The consideration entered in the sale deed was Rs. 600/-. The plaintiff claimed to be the brother of the vendor. Various pleas were raised in the written statement by the vendee. Two important among the pleas were that the plaintiff had waived the right to pre-empt the sale and secondly that the suit was time barred. The trial Court of Sub-Judge Sopore held that since the plaintiff has waived his superior right to pre-empt the land, dismissed the plaintiff's suit. In appeal before the District Judge Baramulla the plea of waiver was held not proved and the decree for possession on payment of Rs. 600/- was passed in favour of the plaintiff against the defendant vendee. A further appeal was preferred to this court and his Lordship the Chief Justice by his order dated 19th July 1968 remanded the case to the trial Court framing an additional issue which is in the following words:—

"Whether or not the defendants vendees got into physical possession of the land in question constructively or otherwise on 23-11-1962, the date of the execution of the sale deed and if not, about what date did they get into physical possession of the land? O.P.P."

The finding of the trial Court on this issue was that the vendee was not in possession of the suit land before 23-11-1962 and he got physical and constructive possession of the suit land only in April 1963 for the first time and the District Judge endorses this opinion.

2. The only point argued by Mr. Bhan the learned counsel for the appellant before me was that the sale deed was executed on 23-11-1962 but was registered on 7-1-1963. He has referred me to Section 47 of the Registration Act which reads as under:—

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

According to him even though the registration of the sale deed in question took place on 7-1-1963 but since the document was registered, the sale would be deemed to be operative from 23-11-1962, therefore the suit of the plaintiff was time barred. I am afraid this argument of Mr. Bhan has no substance and I shall briefly state why but before I discuss this point I have to revert to the argument of Mr. Dhar, the learned counsel for the respondent. He has argued that this point is concluded by a judgment of the Board of Judicial Advisers, which is reported as 6 J. & K. L. R. 113. He has further referred me to AIR 1950 All 290 which lays down that when a vendee takes possession under a sale deed which is registered subsequently the limitation starts from

the date of taking over possession. He has also referred me to AIR 1956 Nag. 243 in which it was held that in a suit to enforce a right of pre-emption founded on a special contract with respect to the sale of a proprietary share in a village together with Khudkasht lands would be governed by the residuary Art. 120 and not by Art. 10 of the Limitation Act because the subject matter of the sale was not capable of physical possession. In AIR 1961 Punj. 296 it was held that:—

"The terminus a quo for a suit for pre-emption prescribed under the first part of Art. 10 Limitation Act is the date when the purchaser takes under the sale 'physi-

10. To enforce a right of One
prior purchase whether year,
based on law, usage or on
special contract.

We have to read Sec. 29 of the Right of Prior Purchase Act also because that makes a special provision for limitation for suits relating to agricultural land or village immovable property. It lays down that the period of one year shall be computed from the date of attestation (if any) of the sale by a Revenue Officer having jurisdiction in the register of mutations maintained or from the date on which the vendee takes under the sale physical possession of any part of such land or property whichever date shall be earlier. Therefore under Article 10 of the Limitation Act the starting point of limitation is when under the sale, sought to be impeached, the possession of the whole property is taken by the vendee or in the alternative the date of the attestation of the mutation. It will be noticed that the date of the sale as such whether registered on the same date when it was executed or subsequently has nothing to do with the starting of limitation. If however possession is taken under the sale then limitation would start from the date of the sale. It is now held by both the courts below that the vendee did not take possession of the property sold on the date of the sale but in April 1963. The suit was instituted on 1-2-1964, the plaintiff has calculated limitation from the date i.e., 7-1-1963. In this way the period of one year would lapse on 6-1-1964, the suit brought on 1-2-1964 will be within time. The dispute in this case is also, in my opinion, covered by the authority reported as 6 J. & K. L. R. 113 wherein it has been held that:—

"..... The word 'sale' occurring in Section 29 must, in view of Section 138 Transfer of Property Act, be taken to mean a valid and operative sale. Any other interpretation of that term will

cal possession of whole of the property sold'. Hence if the physical possession is not taken 'under the sale' it would not apply. In such cases the second part of Art. 10 would apply if the sale is effected by a registered deed."

To the same effect is the AIR 1956 Pepsu 17. This authority has further held that if the possession was not taken under the sale, nor was the instrument of sale registered, the limitation will be six years.

3. Now we have to examine the bare provision of Art. 10 of the Limitation Act, which lays down:—

When the purchaser takes, under the sale sought to be impeached, physical possession of the whole property sold, or where the subject of the sale does not admit of physical possession, when the registration of the instrument of sale is completed,

mitigate against the spirit, if not also the language of the statute law in force in the State. To make Section 29 applicable it is not necessary that the physical act of taking possession should take place afresh where a vendee has already taken possession in anticipation of a registered instrument. In such a case the mental act of holding the property under a title perfected by registration is tantamount to taking physical possession under the registered deed."

In this case as already indicated possession under the sale was taken in April 1963, therefore the limitation would start from that date. Mr. Bhan however argued that the Board authority has not taken notice of Section 47 of the Registration Act. But as I have remarked earlier the date of the sale as such has no place in computing limitation for exercising a right of prior purchase with respect to agricultural land. The material dates are either a mutation attested or when possession is taken under the sale, and there is ample authority for the proposition that if possession is taken before the date of sale that possession would not be deemed to be under the sale. The Board in such cases interpreted that the date of registration would be the date of taking possession under the sale because on that date at least notionally the nature of possession of the property by the vendee is changed. Till the date of registration, there would be no title in the vendee, mere possession would mean nothing, more so in view of Section 138 of the Transfer of Property Act. The registration would change the character of possession from one of a licensee into a full-fledged owner of the property.

4. No other matter was argued before me.

5. In my opinion this appeal has no merit and is dismissed with costs.

Appeal dismissed.

AIR 1970 JAMMU & KASHMIR 45
(V 57 C 12)

S. M. FAZL ALI, C. J. AND
ANANT SINGH, J.

Sardool Singh and others, Petitioners v. Principal, Medical College, Srinagar and others, Opp. Party.

Writ Petns. 118, 153, 154, 161, 165, 166, 168, 176 to 187, 192, 193, 198, 201, 212, 215, 216, 222 of 1968-69, D/- 16-4-1969.

(A) Constitution of Jammu and Kashmir, S. 103 — Territorial jurisdiction of High Court to issue writs — Selection of candidates by Government for admission to Medical Colleges outside the State — Such Colleges admitting candidates selected by Govt. — High Court exercising its powers under S. 103 cannot redress grievances in admission of candidates as it does not possess any territorial jurisdiction over colleges situated outside State. (Para 8)

(B) Constitution of India, Arts. 14, 15(4), 29(2) — Scope — Reservation of seats in Government Medical College for children of army personnel — Reservation is valid and reasonable.

It is true that Arts. 15(4) and 29(2) do not in so many words contemplate any such classification but these two articles have to be read supplemental to Art. 14 of the Constitution of India which contains generally the law of equality. What Art. 14 forbids is hostile discrimination between persons equally circumstanced, but it does not forbid class legislation or discrimination based on a rational differentia. The members of the defence personnel can undoubtedly be classified as a separate category and cannot be equated with other persons. The children of Army personnel cannot be equated with other classes of citizens, even in the matter of admission to educational institutions because neither Art. 15(4) nor Art. 29(2) excludes the application of Art. 14 of the Constitution of India. AIR 1958 SC 538, & AIR 1966 Mys. 40 & AIR 1968 Andh. Pra. 165, Rel. on; AIR 1968 Pat. 3 (FB), Disting. (Para 11)

(C) Constitution of India, Arts. 14, 15 and 29 — Admissions to Government Medical College by Government of Jammu and Kashmir — Government making reservation for candidates from Ladakh district, declared as socially and educationally backward and for scheduled caste candidates — It cannot be struck down as being violative of Arts. 14, 15 or 29. (Para 18)

Cases Referred: Chronological Paras
(1969) AIR 1969 J & K 136 (V 56) = W. Petns. Nos. 99 and 120 of 1968, Kushma Joshi v. Pro. Vice-Chancellor J. & K. University 12
(1968) AIR 1968 S.C. 1012 (V 55) = (1968) 2 S.C.J. 801, P. Rajendran v. State of Madras 17
(1968) AIR 1968 Andh. Pra. 165 (V 55) = (1968) 1 Andh. Pra. W.R. 116, P. Sagar v. State of Andhra Pradesh 12
(1968) AIR 1968 Pat. 3 (V 55) = ILR 46 Pat. 616 (FB), Umesh Chandra Sinha v. V. N. Singh 15
(1967) AIR 1967 J. & K. 106 (V 54) = 1967 Kesh. L. J. 272 (FB), Subash Mohan Jalali v. Principal Medical College 6, 20
(1966) AIR 1966 Mys. 40 (V 53) = (1965) 2 Mys. L. J. 571, Subhashini v. State of Mysore 11
(1958) AIR 1958 S.C. 538 (V 45) = 1959 SCR 279, Dalmia's Case; Ram Krishna Dalmia v. S. R. Tendolkar 11
T. R. Bhasin J. N. Bhan, D. D. Thakur and R. N. Bhalgotra, for Petitioners; Addl. Advocate General, for Opposite Party.

FAZL ALI, C. J.:— These writ petitions arise out of the admission of candidates to the Medical College at Srinagar. The petitioners are candidates who have been refused admission to the Medical College and have filed these petitions assailing the admission of some of the respondent candidates on the ground of their admission having been tainted with favouritism, nepotism and further that certain reservations made by the State Government were not permissible under Arts. 14, 15 and 29 of the Constitution of India and therefore the petitioners were selected for hostile discrimination by the State. As all these writ petitions involve common questions of law, we propose to decide them by one common judgment indicating individual cases wherever necessary.

2. The facts out of which these petitions arise may briefly be stated thus. By order No. 381 of 67, dated 6-7-67 the Government passed a general order laying down conditions under which admissions to various educational and technical institutions were to be regulated including the Srinagar Medical College. The Government notification further constituted a selection committee which was appointed for the purpose of recommending admission of candidates to the Medical College. In the instant case we are concerned with para 1 of the Notification which refers to the Medical College and which runs thus:—

"In supersession of previous orders on the subject sanction is hereby accorded to the committees for selection of candidates

for various courses of trainings (within and outside the State) comprising of the members shown against each:—

- (1) MBBS/BDS/B. Pharmacy
 - i. Principal, Medical College, Srinagar (Convener)
 - ii. Dr. S. C. Tyagi (Pathology)
 - iii. Dr. Naseer Ahmad (Medicine)
 - iv. Director of Education.

The admission capacity of Medical College Srinagar in the current Session is fixed at 75 seats. The seats which may be allowed to the students from outside the State will be in addition to this number. The committee will draw up list for 75 seats and for such seats as may be allotted to the State in other Medical Colleges."

3. It appears that this Notification was superseded by another Notification dated 4-7-68 being Government Order No. 551 of 68 dated 4-7-68 by which the number of seats for admission to the Medical College Srinagar for 1968-69 session were fixed at 60 to be filled in by the candidates belonging to the State. There were other seats reserved for candidates coming from outside the State. This Notification further laid down a certain standard of reservation for candidates who were permanent residents of the State and who belonged to the Scheduled Caste, the quota for these candidates being fixed at 5 per cent of the total seats. This Notification may be quoted thus:—

"In partial modification of Government Order No. 381 of 1967 dated 6-7-67, it is hereby ordered that:—

1. the number of seats available for admission in the Medical College Srinagar for the Session 1968-69 will be sixty. The seats which may be allowed to the students from outside the State will be in addition to this number.

2. Five per cent of the number of seats specified in clause I above be reserved for the permanent resident Scheduled Caste candidates subject to their selection in inter se merit.

Provided that if the permanent resident Scheduled Caste candidates are not available to fill up all the seats reserved for them, such seats as may remain vacant shall be filled up from amongst the candidates other than the aforesaid Scheduled Castes".

4. Apart from this, there was another Notification dated 20-8-68 which was of a general character and which laid down the criteria and the data on the basis of which certain classes of citizens were declared to be backward. This notification runs thus:—

"Whereas on the basis of the facts, figures and data given in the Census report and those available from other Public records, the Government is of the opinion that the permanent residents of Ladakh dis-

trict and the permanent resident scheduled castes are socially and educationally backward classes of the citizens of the State and it is necessary to make special provision for their advancement;

Now therefore the Government hereby directs that:—

(1) Seats shall be reserved for these classes for technical trainings and higher education in the educational institutions engaged in imparting such trainings or education and maintained by the State or receiving aid out of the funds of the State, which shall as nearly as may be, near such proportion to the total number of seats available for such trainings for education in such institutions as is specified against each such class below; and admission to such institutions for such trainings and education shall be regulated accordingly—

- | | |
|----------------------------------|----|
| (a) Permanent resident Scheduled | |
| Castes | 5% |
| (b) Permanent residents of | |
| Ladakh District | 2% |

(2) The provisions of para I above shall apply mutatis mutandis to selections made by the State against seats allocated to the State for such trainings and education as aforesaid by educational institutions other than those referred to in para I or those which become available to it otherwise.

5. Finally there is a letter which is to be read as supplement to Government order dated 6-7-67 (Supra) which runs as follows:—

Sub: Reservation of seats for the sons of servicemen and ex-servicemen.

Ref: Government Order No. 381 of '67 dated 6-7-67.

I am directed to say that 5% seats from the State quota may be reserved for the sons of servicemen and ex-servicemen forthwith provided that:—

i. The servicemen and ex-servicemen belong to Jammu & Kashmir State; and

ii. the candidates fulfil the minimum prescribed conditions of eligibility for admission to the concerned institutions.

Sd/- Secretary to Govt.,
General Department.

This letter shows that the Government had decided to reserve 5% seats from the State quota for the sons of servicemen and ex-servicemen, i.e., for the children of the present and past members of the defence personnel. It also appears that just as some seats have been reserved in the State Medical College for students from other States on a reciprocal basis the Government had to select candidates belonging to the State for the Medical Colleges in other States. The Selection Committee appointed by the Government by the Notifications cited above was directed to select the candidates to the Medical Colleges outside the State also.

6. The main plank of argument on behalf of the petitioners has been that the selection committee did not make an objective selection, but selected some candidates in a most arbitrary fashion with the result that the candidates who were superior in merit were denied admission to the Medical College at Srinagar and granted admission to colleges outside the State, or in some cases persons of an inferior merit were granted admission to the Srinagar Medical College in preference to candidates of superior merit. The question how the Selection Committee has to make an objective selection came up before this Court in the case of Subash Mohan Jalali v. Principal Medical College, AIR 1967 J. & K. 106 (FB) where a Full Bench of this Court after considering various authorities and circumstances observed as under:—

"It seems to us that the selection of the candidates to technical institutions such as Medical College in the present case, in order to be fair, scientific and objective, may be made in any of the following ways:—

(a) Either the candidates may be selected purely on the basis of aggregate secured by them at the last qualifying examination with or without any interview. This mode of selection for certain class of citizens is laid down by Art. 29(2) of the Constitution of India, but should not exceed the permissible limits of these provisions as held by us in AIR 1966 J. & K. 101;

(b) or by holding an interview by a committee consisting of highly qualified persons and adding the marks allotted at the interview to the aggregate secured by the candidates in the last qualifying examination and selecting them in order of merit thus disclosed;

(c) or by holding interview of only those candidates by a Committee consisting of highly qualified persons, who have secured a particular percentage of marks in the last qualifying examination and allotting marks at the interview for various counts where the academic merit of the candidates as revealed by their performances in the last qualifying examination is given due weight and consideration. If any of these modes of selection is resorted to, the courts of law cannot find fault with the selection made in accordance with such a mode."

7. It was urged by the counsel for the petitioners that neither the selection committee nor the Government had followed the modes of selection laid down by this court in the aforesaid case. In order to test the validity of this argument, we called for all the relevant records of the selection committee showing the marks fetched by the candidates at the last

qualifying examination and those awarded to them at the interview by the selection committee. After an examination of these documents, we find that by and large candidates have been selected for admission to the Medical College purely in order of merit by adding the marks secured by them at the interview to the marks fetched by them at the last qualifying examination. A perusal of these documents would further reveal that the Selection Committee did not try to plump up marks of a particular candidate so as to tilt the scale of one candidate in favour of another. The marks awarded to the candidates appear to be fair and reasonable, and are fully consistent with the aggregate fetched by the candidates during the last qualifying examination. After giving the total marks the committee calculated a percentage and selected all those candidates for admission to the Medical College who had obtained 84.9%. The only departure made by the Selection Committee from this principle was (1) in the case of those candidates who were members of the scheduled caste, (2) those candidates who were children of either present or ex-servicemen, and (3) those candidates who belonged to Ladakh and were declared to be members of the backward class and (4) those candidates who were selected for admission to Colleges outside the State.

8. In the first place we would like to dispose of the grievance of the petitioners regarding the admission of candidates to colleges situate outside the State. To begin with while every candidate has a right not to be discriminated against, no candidate has a right to be admitted to a particular Educational Institution. Once a candidate is selected for admission to an educational institution, the institution to which he is sent is not a matter which falls within his choice. Secondly, since the candidates who had been selected by the Government for colleges outside the State have already been admitted by the management of the colleges situate outside the State, this court exercising its powers under S. 103 of the State Constitution does not possess any territorial jurisdiction over these colleges so as to quash the admissions. Even if the selection of these candidates by the Government be struck down as discriminatory, the writs will be futile because the admission of these candidates to colleges outside the State cannot be challenged or quashed. For these reasons, therefore, the contention of the counsel for those petitioners who have been selected to colleges outside the State on any ground whatsoever does not appear to be tenable at all.

9. We now come to the second ground of attack which is based on the violation of Arts. 14 and 29 of the Constitution of India. The learned counsel for the peti-

tioners have submitted that the reservation made by the Government for the children of servicemen or ex-servicemen is not justified by any provision of the Constitution much less by Arts. 15 and 29 of the Constitution of India. It was urged that the specific Articles which deal with admission to educational institutions are Arts. 15(1), 15(4) and 29(2) of the Constitution of India which may be quoted as follows:—

"15(1). The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

15(4). Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

29(2). No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

10. These Articles provide for reservation for members of the Scheduled Caste, and for socially and educationally backward classes of citizens and not others. The reservation for the children of members of the defence personnel does not fall within the protection of these Articles and is therefore not permissible.

11. The argument is no doubt attractive but in our opinion on a closer scrutiny it is not only not tenable, but is also selfish and callous in character. There cannot be the slightest doubt that members of the defence personnel stand out as a class by themselves. These persons are working for the protection and defence of the country in mountainous terrains, places with difficult weather conditions and in spots situate in the remotest corners of the country far away from their hearth and home. Having regard, therefore, to the delicate and difficult nature of the duties performed and the invaluable services rendered by the members of the defence personnel to our country, are they not justified in asking the Government to give special facilities to their children in the matter of education, training, services and the like so that the members of the defence personnel may be able to discharge their duties fearlessly, boldly and freely, having been fully secured against their domestic and personal worries. Furthermore they have to be transferred from one place to another and sometimes to unknown destinations, most of which are not family stations providing for educational facilities to their children. In fact the very existence of the structure of our country and the integrity of its frontiers is being

protected by these persons and therefore it is only in national interest that they should be treated as a special class so that their children may be afforded a special treatment. It is true that Arts. 15(4) and 29(2) do not in so many words contemplate any such classification but in our opinion these two articles have to be read supplemental to Art. 14 of the Constitution of India which contains generally the law of equality. It is now well settled by a long course of decisions of the Supreme Court as also other High Courts in India that what Art. 14 forbids is hostile discrimination between persons equally circumstanced, but it does not forbid class legislation or discrimination based on a rational differentia. As far back as the *Dalmia's case*, in AIR 1958 SC 538 it was pointed out that where the classification is rational and based on an intelligible differentia which distinguishes persons or things that are grouped together and has a rational nexus or relation with the policies or objects of the law, it is a valid classification. Having regard therefore to the circumstances mentioned above, the members of the defence personnel can undoubtedly be classified as a separate category and cannot be equated with other persons. In fact to provide special educational facilities to the children of the army personnel is the least that the Government of our country can do, in lieu of the supreme sacrifices that these persons are called upon to render in guarding the frontiers of our great country. Thus the children of these persons cannot be equated with other classes of citizens, even in the matter of admission to educational institutions because neither Art. 15(4) nor Art. 29(2) excludes the application of Art. 14 of the Constitution of India. In other words, if a reasonable classification can be made under Art. 14 of the Constitution of India, its sphere can be wide enough to include even the domain covered by Arts. 15(4) and 29(2) of the Constitution of India. We are fortified in our opinion by a recent decision of the Mysore High Court in AIR 1966 Mys. 40 where under similar circumstances reservation of seats for children of army personnel has been held to be a valid classification, being in national interest. In this connection Hegde J. (as he then was) observed as follows:—

"Reservations made in favour of children or wards of the men in armed services, and ex-servicemen including those who were in the armed services during the second World War were challenged as being discriminative in character. The classification made is a valid one. The said reservation is clearly in national interest. The criticism about that reservation shows how short-sighted one could be when blinded by selfishness. The peti-

of a Statute, whether a legislative power conferred on an administrative authority transgresses the permissible limits of delegation, and whether the exercise of the power is beyond the said limits would depend on a number of circumstances and the facts of each case.

This question has been the subject-matter of consideration in many decisions of the Supreme Court. In many modern Statutes, there is a provision like sub-section (10) of Section 45 of the Banking Companies Act empowering the Government to issue necessary orders for removing any difficulty which may arise in giving effect to the provisions of the Statute. Section 12 of the Finance Act 1950 contains such a provision. The validity of an order issued under that Section came up for consideration before the Supreme Court in *Commissioner of Income-tax v. Ram Gopal Mills Ltd.*, AIR 1961 SC 338. But the constitutionality of the Section was not questioned in the above case. Section 37 of the Payment of Bonus Act, 1965 contains such a provision. It reads as follows:

"If any difficulty or doubt arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provision, not inconsistent with the purposes of this Act as appears to it to be necessary or expedient for the removal of the difficulty or doubt; and the order of the Central Government, in such cases, shall be final."

The constitutional validity of the above provision was successfully attacked before the Supreme Court in *Jalan Trading Co. Private Ltd. v. Mill Mazdoor Sabha*, AIR 1967 SC 691. Delivering the majority judgment, Shah J. stated as follows:

"Condition of the applicability of Section 37 is the arising of the doubt or difficulty in giving effect to the provisions of the Act. By providing that the order made must not be inconsistent with the purposes of the Act, S. 37 is not saved from the vice of delegation of legislative authority. The section authorises the Government to determine for itself what the purposes of the Act are and to make provisions for removal of doubts or difficulties. If in giving effect to the provisions of the Act any doubt or difficulty arises, normally it is for the Legislature to remove that doubt or difficulty. Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of S. 37 which purports to make the order of the Central Government in such cases final accentuates the vice in sub-s. (1), since by enacting that provision the Government is made the sole judge whether difficulty or doubt had

arisen in giving effect to the provisions of the Act, whether it is necessary or expedient to remove the doubt or difficulty, and whether the provision enacted is not inconsistent with the purposes of the Act."

Hidayatullah J., with whom Ramaswami J. agreed, dissented from the above view. Dealing with the contention that the above provision amounted to delegation of legislative power, his Lordship stated:

"The functions so exercised are not legislative functions at all but are intended to advance the purpose which the Legislature has in mind. The power to pass an order of this character cannot be used to add to or deduct from that which the Act provides. . . .

Parliament has not attempted to set up another legislature. It has stated all that it wished on the subject of bonus in the Act. Apprehending, however, that in the application of the new Act doubts and difficulties might arise and not leaving their solution to the Courts with the attendant delays and expense, Parliament has chosen to give power to the Central Government to remove doubts and difficulties by a suitable order. The order, of course, would be passed within the four corners of the Parliamentary legislation and would only apply the Act to concrete cases as the Courts do when they consider the application of an Act. The order of the Central Government is made final for the reason that it is hardly practical to give power to the Central Government and yet to leave the matter to be litigated further. The fact that in the Government of India Act, 1935 and in the Constitution such power was and is contemplated and it has been conferred in diverse Acts without a challenge before, shows amply that the argument that the section amounts to conference of legislative powers on the Central Government is erroneous. All other cognate provisions have never been challenged on the ground that they amount to delegation of legislative power. We accordingly hold S. 37 to be validly enacted."

The learned counsel for the plaintiff placed great reliance on the above decision, and submitted that sub-section (10) of Section 45 of the Banking Companies Act should be held to be unconstitutional for the same reasons as stated in the majority judgment. It appears to me, and it is clear from what I have quoted above from the majority judgment, that the reason for holding that Section 37 of the Payment of Bonus Act amounts to delegation of legislative power is that the said provision authorises the Government to determine for itself what the purposes of the Act are and to make provisions for removal of doubts and difficulties, and that the power to remove the doubt or

difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority, which cannot be delegated to an executive authority. The position is entirely different in the case of sub-section (10) of S. 45 of the Banking Companies Act. I have already considered the scope and amplitude of this sub-section, and held that they are very limited. It does not give any power to the Government to determine the purposes of the Act, or to add to or amend any provisions thereof for any purpose. It only empowers the Government to make necessary orders for removing any difficulty that may arise for giving effect to the provisions of the scheme sanctioned under Section 45 of the Banking Companies Act. The working of the scheme is an executive function; and the conference of power to remove difficulties, if any, for working it is corollary to the above function. Conference of such a power on the Central Government does not in my opinion amount to delegation or abdication of the legislative power. I, therefore, hold that sub-section (10) of Section 45 of the Banking Companies Act is valid.

12. In the result, I allow the appeal and decree the suit; directing the defendant to pay to the plaintiff a sum of Rs. 1,600/- together with interest thereon at 6% per annum from 10-1-1961 till date of realisation. The plaintiff-appellant will also get its costs in the suit and also in this appeal.

13. NARAYANA PILLAI, J.: I agree.
Appeal allowed.

AIR 1970 KERALA 50 (V 57 C 11)

P. T. RAMAN NAYAR

AND M. MADHAVAN NAIR, JJ.

C. V. Madhava Mannadiar, Petitioner v. District Collector and Addl. District Magistrate, Palghat, and others, Respondents.

O. P. No. 4024 of 1968, D/- 31-10-1968.

Public Safety — Preventive Detention Act (1950), S. 3 (2) (b) — Expression "specially empowered" under — Meaning of — State Government can specially empower not only particular individual Additional District Magistrate but also entire class of such Magistrates, under the section — Criminal P. C. (1898), S. 39 — Madras General Clauses Act (1 of 1891), S. 15. AIR 1951 Mad 1159 & AIR 1956 Sau. 73, Dissented from.

The words "specially empowered" in a statute do not necessarily imply a special selection of a particular person for the conferment of the power. Special empowerment with reference to a particular

power can be of a class of persons. AIR 1915 Mad. 1159 and AIR 1956 Sau. 37, Dissented from. (Case law discussed.)

(Paras 9, 10)

The words, "specially empowered" in S. 3 (2) (b) mean specially empowered with reference to the power conferred and this is emphasized by the words "in this behalf" that follow. The legislative intent is clear. Ordinarily the power is to be exercised by District Magistrate (or by the officers mentioned in clauses (c) and (d) of the sub-section) but, Additional District Magistrates also can be trusted with the power, and if the exigencies of the situation demand that, the State Government may specially empower Additional District Magistrates (all or any as it chooses) to exercise the power. And this, of course, it might do (since the word "specially", referring as it does to the power rather than to the person empowered, cannot in the least be regarded as express provision to the contrary within the meaning of section 15 of the General Clauses Act) either by name or by virtue of office. The power has to be specially conferred on Additional District Magistrate if they are to exercise it—it is not one of their ordinary powers — and, once it is so conferred, whether on particular individual Additional District Magistrate or on all Additional District Magistrates as a class they would all be "specially empowered in this behalf" within the meaning of the section.

(Para 6)

It is misleading to go to S. 39 of the Criminal P. C. for the purpose of ascertaining whether a special empowerment implies the selection of a particular specified person for the conferment of the power. That would depend on what the statute concerned requires, in other words, on what expressions like, "specially empowered" mean in the context in which they are used, although, where the expression is followed by expressions like, "in this behalf" that would be a clear indication that it is the purpose and not the person that has to be special. Even what S. 39, says is that a special empowerment in other words, the conferment of the special powers can be on persons specially by name or in virtue of their office or on classes of officials generally by their official titles.

(Para 7)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1532 (V 54) =

1967 Cri LJ 1396, S. L. Choithram

Parasram v. State of Gujarat

(1963) 1963 (2) Cri LJ 226 = 40 Mys

LJ 930, State of Mysore v. Kash-

ambi

(1956) AIR 1956 Sau 73 (V 43) =

1956 Cri LJ 1231, Polubha v.

Tapu Ruda

- (1953) AIR 1953 Assam 35 (V 40)=
1953 Cri LJ 395 (FB), State v.
Judhabir 10
(1953) AIR 1953 Trav-Co 402 (V 40)=
1953 Cri LJ 1613, K. N. Vijayan
v. State 10
(1948) AIR 1948 Bom 156 (V 35)=
49 Cri LJ 165, Emperor v. Savala-
ram 9
(1933) AIR 1933 All 676 (V 20) =
35 Cri LJ 218, Sunder Lal v.
Emperor 10
(1915) AIR 1915 Mad 1159 (V 2)=
16 Cri LJ 268, Md. Kasim v.
Emperor 10

K. Chandrasekharan and T. Chandra-
sekhar Menon, for Petitioner; Advocate
General, for Respondents.

RAMAN NAYAR, J.: The point that falls to be determined in this application for a writ of habeas corpus questioning the detention of the petitioner under Section 3, sub-section (1) (a) (iii), of the Preventive Detention Act, 1950 (the Act, for short) is whether the 1st respondent, described as the District Collector and Additional District Magistrate, Palghat who ordered the detention (by means of Ext. P-1 dated 30-9-1968) had the authority to do so. For the rest, the ground for the detention as disclosed by the memorandum, Ext. P-2, of the same date, duly served on the petitioner as required by S. 7 of the Act, namely, that the petitioner was habitually engaging himself in the unlawful transport of paddy from the district of Palghat to the adjoining areas of the Madras State, and that he was thus hindering the procurement of paddy in the district the purpose of equitable distribution under the scheme of rationing thereby prejudicing the maintenance of supplies essential to the community, is obviously a good and sufficient ground for the detention. If the petitioner's grievance is that he has not been furnished with sufficient particulars to enable him to make his defence, then he should ask for further particulars. And, if his grievance is that there are no materials justifying the conclusion on which the ground is based, then he should urge that before the Advisory Board constituted under Section 8 of the Act by means of a representation made under Section 7, not before us.

2. Ext. P-1 was made by Shri G. Gopalakrishna Pillai, the District Collector of Palghat, in his capacity as Additional District Magistrate, Palghat. That, in June 1967, Shri G. Gopalakrishna Pillai was duly appointed by the State Government under section 12 of the Criminal Procedure Code to be a Magistrate of the first class in the district of Palghat, and, under section 10 (2), to be Additional District Magistrate of the district with all the powers of a District

Magistrate is not disputed. What is disputed is that he has been "specially empowered" within the meaning of clause (b) of sub-section (2) of section 3 of the Act.

3. On the 21st October 1967, the State Government made the following order which was notified in a Gazette Extraordinary of the same date:

"Under clause (b) of sub-section (2) of S. 3 of the Preventive Detention Act, 1950 (Central Act 4 of 1950), the Government of Kerala hereby specially empower the Additional District Magistrates in the State (District Collectors) to exercise the powers under sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of the said section."

We are told that all District Collectors in the State as also their personal Assistants have been appointed Additional District Magistrates under section 10 of the Code, and that the meaning of the above notification is that such of these Additional District Magistrates as are District Collectors (but not the rest) are specially empowered to exercise the power under sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of section 3 of the Act. That that is the meaning of the notification (although, perhaps, it could have been more artistically expressed) admits of little doubt, but it is contended that the words, "specially empower" notwithstanding this is in truth a general empowerment of all Additional District Magistrates who are District Collectors and not the special empowerment required by clause (b) of sub-section (2) of section 3 of the Act.

4. This sub-section runs as follows:

"(2) Any of the following officers, namely:

- (a) district magistrates,
- (b) additional district magistrates specially empowered in this behalf by the State Government,
- (c) the Commissioner of Police for Bombay, Calcutta, Madras or Hyderabad,
- (d) Collectors in the territories which, immediately before the 1st November, 1956, were comprised in the State of Hyderabad,

may, if satisfied as provided in sub-clauses (ii) and (iii) of clause (a) of sub-section (1), exercise the power conferred by the said sub-section."

The question, as we have already indicated, is whether in view of the notification of the 21st October 1967, Shri G. Gopalakrishna Pillai, who is undisputedly an Additional District Magistrate and a District Collector, can be regarded as having been "specially empowered in this behalf" within the meaning of clause (b) of the sub-section.

5. We think he can. The word, "specially" in the clause in question qualifies the word, "empowered"; and, doubtless, the expression, "specially empowered" qualifies the expression, "additional district magistrates". But it does not necessarily follow that a particular Additional District Magistrate must be specified (either by name or by office) in order that there might be a special empowerment. That will depend on whether, in the context, "specially empowered" means empowered with specific reference to the particular magistrate on whom the power is conferred (which would involve the selection of a particular magistrate from among the class of magistrates mentioned), or, empowered with specific reference to the power that is conferred, namely, so far as we are here concerned, the power under sub-clause (iii) of clause (a) of the sub-section. If it is the latter, the notification of the 21st October 1967 must pass muster as a special empowerment within the meaning of the sub-section; if it is the former, it cannot.

6. We consider that, in the context, the words, "specially empowered" means specially empowered with reference to the power conferred and this we think is emphasized by the words, "in this behalf" that follow. The legislative intent seems to be clear. Ordinarily the power is to be exercised by District Magistrates (or by the officers, mentioned in clauses (c) and (d) of the sub-section); but, Additional District Magistrate also can be trusted with the power, and if the exigencies of the situation demand that, the State Government may specially empower Additional District Magistrates (all or any as it chooses) to exercise the power. And this, of course, it might do (since the word, "specially," referring as it does to the power rather than to the person empowered, cannot in the least be regarded as express provision to the contrary within the meaning of Section 15 of the General Clauses Act) either by name or by virtue of office. The power has to be specially conferred on Additional District Magistrates if they are to exercise it — it is not one of their ordinary powers — and, once it is so conferred, whether on particular individual Additional District Magistrate or on all Additional District Magistrates as a class — "additional district magistrates specially empowered", not "an additional district magistrate specially empowered", is what the section says—they would all be "specially empowered in this behalf" within the meaning of the section.

7. With great respect we think it misleading to go, as some decisions have done, to section 39 of the Criminal Procedure Code for the purpose of ascertaining whether a special empowerment

implies the selection of a particular specified person for the conferment of the power. That would depend on what the statute concerned requires, in other words, on what expressions like, "specially empowered" mean in the context in which they are used, although, as we have already indicated, where the expression is followed by expressions like, "in this behalf" that would be a clear indication that it is the purpose and not the person that has to be special. What section 39 of the Code does is to prescribe the mode of conferring powers thereunder. Such powers, it says, may be conferred on persons specially by name or in virtue of their office, or on classes of officials generally by their official titles. With reference to the persons empowered, an empowerment by name or in virtue of office would be a special empowerment, (the reference by office being as good a specification of the person empowered as a reference by name) while an empowerment of classes of officials by their official titles would be a general empowerment. But this does not help us to find out whether a particular statute uses the words, "specially empowered" with reference to the persons on whom the power is to be conferred or with reference to the power to be conferred. Indeed, it seems to us that the Code itself uses the words, "specially empowered in this behalf" as synonymous with, "empowered in this behalf", both meaning that there must be an empowerment with specific reference to the power conferred — compare sections 108, 110, 144, 164, 167, 186, 190, 260 and 562 on the one hand with sections 143, 174, 206, 407, 435 and 524 on the other. The former set of sections, it would appear, no more require the specification of the particular person on whom the power is conferred than the latter. Section 39, it seems to us, clearly shows that a special empowerment within the meaning of the former set of sections, in other words, the conferment of the special powers under these sections, can be on persons specially by name or in virtue of their office or on classes of officials generally by their official titles.

8. Powers may be conferred generally on a particular person. For example, there can be an empowerment by which a particular named District Magistrate is given all the powers that can under any law be conferred on a District Magistrate. That would be a special empowerment so far as the person is concerned but a general empowerment so far as the powers conferred are concerned. Or, a particular power conferrable on District Magistrates may be given to all District Magistrates. That would be a general empowerment so far as the person on whom

the power is conferred is concerned, but a special empowerment so far as the power conferred is concerned. Or again, a particular power may be conferred on a particular named District Magistrate. That would be a special conferment both with regard to the person and with regard to the power conferred. Whether a particular conferment satisfies the requirements of the statute concerned will depend entirely on what the statute requires. It may require a special conferment both with regard to the power and the person; or it might require it only with regard to the person; or only with regard to the power. In the case on hand we consider that what the statute requires is a special conferment of the power in question and that that requirement is satisfied by the notification of the 21st October 1967, because it specifically refers to the power conferred, namely, the power under sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of Section 3 of the Act. Had the notification, on the other hand, purported to confer on all Additional District Magistrates, or even on a particular named Additional District Magistrate, all the powers that may under any law be conferred on Additional District Magistrates, that would not be, "specially empowering in this behalf" within the meaning of clause (b) of sub-section (2) of Section 3 of the Act, even though the chosen Additional District Magistrate might be said to have been specially selected, and, in that sense specially empowered.

9. That the words, "specially empowered" do not necessarily imply a special selection of a particular person for the conferment of the power seems to be clear from the decision of the Supreme Court in *S. L. Choithram Parasram v. State of Gujarat*, AIR 1967 SC 1532. There it was held that a notification of the 22nd January, 1955 by the State Government specially empowering (among others) the Deputy Superintendent of Police, Porbandar to perform certain functions under the Bombay Prevention of Gambling Act, 1887 made the person holding that office in June 1964 a "Deputy Superintendent of Police specially empowered by the State Government in this behalf" within the meaning of section 6 (1) (i) of that Act. That means that any person occupying the position of Deputy Superintendent of Police, Porbandar, irrespective of his individual merits, would be a person "specially empowered in this behalf" within the meaning of the section. No such consideration as that only specially selected persons, on whom the power in question could be safely conferred, would be posted as Deputy Superintendent of Police, Porbandar was as much as urged before their Lordships,

although such a consideration seems to have influenced the decision in *Emperor v. Savalaram*, AIR 1948 Bom 156 which their Lordships approved. If the empowerment of the Deputy Superintendent of Police, Porbandar is a special empowerment satisfying the requirements of the statute, then we should think that a notification enumerating all the Deputy Superintendents of Police in the State and empowering all of them to exercise the power in question would also be a special empowerment within the meaning of the statute. And, if that be so, why should not a notification empowering all the Deputy Superintendents of Police in the State without enumerating them be a sufficient empowerment? That, however, was a question that did not arise in the case before them, and their Lordships expressly refrained from expressing any opinion thereon.

10. For the reasons stated above we are in respectful agreement with the view taken in *Sundar Lal v. Emperor*, AIR 1933 All 676, *K. N. Vijayan v. State*, AIR 1953 Trav-Co 402, *State v. Judhabir*, AIR 1953 Assam 35 (FB) and *State of Mysore v. Kashambi*, 1963 (2) Cri LJ 226 (Mys) that special empowerment with reference to a particular power can be of a class of persons although it might, perhaps, be said that some of these cases equate an empowerment of a class of officials as a whole by their official titles, which would be a general empowerment so far as the persons empowered are concerned within the meaning of Section 39 of the Code, with an empowerment of a person ex-officio which would be a special empowerment. And, with equally great respect, we are unable to subscribe to the view taken in *Md. Kasim v. Emperor*, AIR 1915 Mad 1159 and in *Polubha v. Tapu Ruda*, AIR 1956 Sau 73 that it can only be of particular specified persons.

11. It is pointed out with reference to numerous notifications under the Code, and under various special and local laws, that the invariable practice in this State has been to effect a special empowerment with specific reference by name to the person empowered and that the instant notification is the only exception. But that that has been the practice does not mean that that is essential under the law, although, we might observe, that that is doubtless the safer, and, therefore, the wiser course. Why the State Government should have thought fit to depart from this safer and wiser course in this particular instance — and that in a matter of such importance — we do not know unless it be that the submission by the learned Advocate General that, having now given thought to the matter, the Government has issued revised notifications specially empowering by name

all Additional District Magistrates who are District Collectors, furnishes a clue.

12. As we have already said, the statute does not require an Additional District Magistrate to be specially selected for the conferment of the power. It seems to proceed on the basis that Additional District Magistrates also may be entrusted with the power but that ordinarily it should not be necessary to do so. Ordinarily, it should be sufficient if the District Magistrates are given the power. But, if having regard to the prevailing conditions, the State Government thinks that necessary, Additional District Magistrates also may be given the power, the power being specially conferred on them. If this implies a selection apart from the selection necessarily involved in appointing a person to hold the office of Additional District Magistrate, by itself a responsible office, then we should think that even that is satisfied in this case. For, it is not all Additional District Magistrates that have been specially empowered. Only such of them as hold the very responsible position of District Collector have been empowered. And, if the State Government thinks that all persons selected by them for the very responsible position of District Collectors can be safely entrusted with the power in question, can it be blamed? Has there not been a selection of the particular Additional District Magistrates on whom the power is to be conferred?

13. In this connection we may point out that the statute was enacted before the separation of the judiciary from the executive, when, throughout the country, District Collectors (Deputy Commissioners as they are called in some States) were also District Magistrates, while Additional District Magistrates were officers subordinate in rank to the District Collectors. But the District Collectors of this State are officers of the same rank as the District Magistrates referred to in clause (a) of sub-section (2) of section 3 of the Act — their Personal Assistants would be of the rank of the Additional District Magistrates referred to in clause (b). They are certainly not inferior in rank to the Collectors of the territories comprised in the former State of Hyderabad on whom clause (b) of sub-section (2) of section 3 of the Act directly confers the power in question.

14. In the result we dismiss this petition but make no order as to costs.

Petition dismissed.

AIR 1970 KERALA 54 (V 57 C 12)

T. C. RAGHAVAN, J.

A. I. Iyppu, Calicut, Petitioner v. State of Kerala and others, Respondents.

O. P. No. 2989 of 1968, D/- 4-11-1968.

Civil Services — All India Services Act (1951), S. 3 — Indian Forest Service (Cadre) Rules (1966), Rr. 3 and 4—Indian Forest Service (Fixation of Cadre Strength) Regulations (1966), Schedule — Establishment of Forest Service Cadre for State of Kerala — Fixation of strength at 19 senior posts under State Government and 2 senior posts under Central Government — State Government has no power to create ex-cadre post of conservator of forests — Intention of Legislature in fixing 19 cadre posts was to bring about more efficient service — There was no intention to confer power on State Government to create ex-cadre post of Conservator of Forests as that would create parallel services of State cadre and All India Cadre having same functions — Fact that at the time of the constitution of IFS there were four Conservators of Forests in Kerala of which three alone were included in the cadre cannot be a reason for holding that the State can create more posts of Conservators ex-cadre. (Para 9)

S. Easwara Iyer, V. Sivaraman Nair, V. M. Nayanar, K. C. Sankaran and T. V. Ramakrishnan, for Petitioner; Government Pleader, for Respondents (Nos. 1 and 3); G. Viswanatha Iyer and K. M. Devadathan, for Respondent (No. 4).

ORDER: By Ex. P-2 dated 10th July 1968 the State Government, the first respondent, promoted and appointed the fourth respondent as Conservator of Forests on Rs. 1000-1300 in the newly created Working Plan and Research Circle provisionally pending selection of a suitable officer by the Departmental Promotion Committee. The fourth respondent was a Deputy Conservator of Forests. The petitioner, another Deputy Conservator of Forests who is senior to the fourth respondent and who has also been selected for IFS, impugns the said order in this writ petition. The second respondent is the Union of India and the third respondent the Chief Conservator of Forests.

2. Before the formation of IFS in 1966, the petitioner, three others and the fourth respondent were all in the State Forest Service as Deputy Conservators of Forests. On the formation of IFS, a selection was made for IFS, wherein the petitioner and the three others were selected and the fourth respondent was not selected. The fourth respondent was also dismissed from service once by the State Government, but, the dismissal was

altered into removal from service. Subsequently, since this Court opined that the punishment inflicted on him was too severe, the Government reconsidered the matter and modified the punishment into one of reduction in rank by two places. The petitioner alleges that the State Government has no power to create another post of Conservator of Forests ex-cadre; and that even if the State has such power, the fourth respondent should not have been posted to the same, but the petitioner should have been posted, since his lien in the State Service has not been cut by approving his probation in IFS.

3. At the time of the formation of IFS, there were five posts of Conservators of Forests in Kerala; and the number was reduced to four. Three of these posts were made cadre posts under the Indian Forest Service (Fixation of Cadre Strength) Regulations of 1966 leaving the fourth one alone with the incumbent thereof. The stand of the State Government is that they have power to appoint Conservators of Forests outside the cadre strength of three for IFS. Their claim is that the fourth place existing at the time of the formation of IFS and the present post created by them are ex-cadre posts and State Service personnel may be promoted to those posts.

4. Under the All India Services Act of 1951, the Indian Forest Service (Cadre) Rules of 1966 were promulgated by the Central Government. Under Rule 3 the IFS cadre was established for the State of Kerala; and taking power under Rule 4 the strength and composition of the cadre were also fixed under the Indian Forest Service (Fixation of Cadre Strength) Regulations of 1966 as below:

| | |
|---------------------------------|----|
| Chief Conservator of Forests. | 1 |
| Conservators of Forests. | 3 |
| Deputy Conservators of Forests. | 15 |

The other posts we are not concerned with.

5. The first question to be considered is whether the State Government can create a post of Conservator of Forests ex-cadre. The power to constitute all India services like IFS is drawn from Art. 312 of the Constitution, which states that if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services, etc. IAS and IPS were already all-India services in 1947; and in 1951 the All-India Services Act was passed providing that, with effect from such date as the Central Government may by notification appoint, there shall be constituted the following all-India services:

The Indian Service of Engineers;
The Indian Forest Service; and
The Indian Medical and Health Service.

6. By virtue of this Act the Indian Forest Service (Cadre) Rules of 1966 were promulgated and also the Indian Forest Service (Fixation of Cadre Strength) Regulations of 1966. Under the latter Regulations the strength of the IFS cadre for Kerala was fixed in the Schedule annexed to the Regulations at 19 senior posts under the State Government as already indicated and two senior posts under the Central Government. At that time there were five Conservators of Forests in Kerala, of which three were made cadre posts, one was abolished and the fourth, which was already manned by a State Service Officer, was also retained. Now, the Government have passed Ex. P-2 creating a fifth post of Conservator of Forests and appointed the fourth respondent to that post claiming that the fourth respondent is the seniormost Deputy Conservator of Forests in the State Service.

7. The strength of the cadre of IFS is to be fixed under sub-rule (1) of rule 4 of the Cadre Rules by the Central Government in consultation with the State Government; and sub-rule (2) of the same rule provides that the Central Government shall, at the interval of every three years, re-examine the strength and composition of each such cadre in consultation with the State Government and may make such alterations therein as they deem fit. The first proviso to sub-rule (2) lays down that the Central Government's power to alter the strength and composition of any cadre at any other time is not affected. The second proviso then says that the State Government may add for a period of not exceeding one year and with the approval of the Central Government for a further period not exceeding two years to the cadre one or more posts carrying duties and responsibilities of a like nature. Rule 8 lays down that every cadre post shall be filled by a cadre officer; and rule 9 provides for temporary appointment of non-cadre officers to cadre posts. Sub-rule (1) of rule 9 provides that the State Government may fill a cadre post by a non-cadre officer, if the vacancy is not likely to last for more than three months or if there is no suitable cadre officer available. Sub-rules (2), (3) and (4) provide the procedure the State Government and the Central Government have to follow in such cases.

8. The question whether the State Government has power to create non-cadre posts in IFS similar to the cadre posts has not been considered so far by the Central Government nor have they issued any instructions on the matter.

Such a question appears to have arisen in the case of IAS/IPS, the two all-India services which were in existence in 1947. At pages 16-17 of the All-India Services Manual corrected upto 1st May 1967 appear the instructions of the Government of India on this matter. Instruction 1.2 at p. 17 states that at the time of the constitution of IAS/IPS in 1947, it was decided to include the following categories of posts in the IAS cadre:

(a) All superior posts in the administrative departments of and above the rank of District Officers, i.e. Collectors, Commissioners, Members, Board of Revenue, Secretaries, Deputy Secretaries, etc. (We are not concerned with the rest). Therefore, it is clear that in the case of IAS and IPS, all superior posts of and above the rank of District Officers were included in the all-India cadre. I do not think that in the case of IFS the intention could have been different, namely, not to bring into the all-India cadre all superior posts. What was done in the schedule to the Indian Forest Service (Fixation of Cadre Strength) Regulations when it stated that the senior posts under the State Government like Chief Conservator of Forests, Conservators of Forests, Deputy Conservators of Forests (fixing the number at 19) to be cadre posts must also be the same. The intention appears to be clear (this is clear from Art. 312 of the Constitution as well) that the constitution of the all-India services was in the national interest and for bringing about a more efficient service. If the contention of the State is accepted, it is quite likely that there will be parallel services of the State cadre and the all-India cadre having the same functions. This does not appear to be the intention of the legislature, nor the intention of Art. 312 of the Constitution.

9. It is urged by the Government Pleader that the fact that at the time of the constitution of IFS there were four Conservators of Forests in Kerala of which three alone were included in the cadre shows that the fourth place of Conservator and more of them if created later must be ex-cadre. In other words, the argument is that all the posts of Conservators of Forests were not intended to be included in the all-India cadre. This argument may, at the first blush, appear to have some force, but on closer scrutiny, it will appear to have no force. At the time of the formation of the all-India service, there were five posts of Conservators of Forests and four of them were manned. The fifth was abolished and it was only to provide for the fourth incumbent who was already there and who was not selected to IFS that the fourth place was retained, though the strength of the cadre of Conservators of Forests

in IFS was fixed at three. After the then-incumbent in the fourth post retires, the question will probably have to be taken up by the Central Government under their powers to review the position once in three years or earlier and the question will then have to be decided whether a fourth place is necessary or not. This is thus no reason for holding that the State can create more posts of Conservators ex-cadre.

10. The next argument is that even if the State had the power to create such a post of Conservator ex-cadre, the posting of the fourth respondent to the new post should not have been done. Ex. P-2 says that a temporary non-cadre post of Conservator of Forests on Rs. 1000-1300 for the newly created Working Plan and Research Circle is created. The order states further that the fourth respondent, who is the seniormost Deputy Conservator of Forests among the State Forest Service Officers, is provisionally promoted as Conservator of Forests pending selection of a suitable officer by the Departmental Promotion Committee "in case the Government decide to fill up the post by a non-IFS Officer." The next sentence in Ex. P-2 may also be noted, which, according to me, shows the purpose of Ex. P-2:

"Government have decided that the two posts of Conservators of Forests will be reserved to be filled up by State Service personnel".

This shows that the State Government's attempt is to see whether the Government can create a service parallel to that of IFS; and if Ex. P-2 is upheld, the position will be that there will hereafter be three IFS Conservators of Forests and two non-IFS Conservators. The argument of the counsel of the petitioner is that the petitioner's lien in the State Service has not yet been severed though he has completed his probation successfully. The State Government has recommended his confirmation in IFS, but his confirmation has not yet been made by the Central Government. Under rule 8 of Part II of the Kerala State and Subordinate Service Rules of 1958, absence of a member of a service from duty whether on leave, on foreign service or on deputation or for any other reason and whether his lien in a post borne on the cadre of such service is suspended or not, shall not, if he is otherwise fit, render him ineligible in his turn, inter alia, for promotion from a lower to a higher category in such service. Therefore, as long as the petitioner is not confirmed in IFS, his claim to promotion has to be considered before another person like the fourth respondent, who is junior to him, is considered. Ex. P-2 has not considered the claim of the petitioner. It is stated that

the fourth respondent is the seniormost in the State Forest Service, which cannot be correct in view of the fact that the petitioner is not yet confirmed in IFS.

11. The petitioner's counsel further points out that if Ex. P-2 is allowed to stand, the petitioner will be prejudiced in another manner. Under rules 8 and 9 of the Indian Forest Service (Recruitment) Rules of 1966, a third of the number of senior duty posts borne on the cadre has to be filled up by promotion from the State Forest Service. The petitioner's counsel points out that if the fourth respondent is appointed Conservator of Forests before the petitioner is appointed and if he gets his chance to be promoted under the promotion quota to IFS, the fourth respondent might claim seniority over the petitioner. The possibility cannot also be ruled out.

12. It is urged by Mr. G. Viswanatha Iyer, the counsel of the fourth respondent, as well as the Government Pleader that if the petitioner was appointed to the newly created post, the moment his confirmation in IFS is approved, he may have to leave the post and that may seriously affect the work in the new post. It is also argued that the creation of the present post is only temporary and the posting of an officer of the State Service to a temporary post does not give him any claim prejudicial to the claim of the petitioner. Firstly, Ex. P-2 does not indicate for what period the temporary post is created or is likely to continue. Secondly, it does not indicate that the reason for not appointing the petitioner to the new post is the one suggested by Mr. Viswanatha Iyer and the Government Pleader. Ex. P-2 proceeds on the ground that the post created is ex-cadre and only those who are members of the State Service can be posted there. This, as I have already indicated, is not justified. The fourth respondent does not appear to have any special qualification better than or superior to that of the petitioner. It may even be that he is inferior.

13. For the above reasons, the State Government should not have created an ex-cadre post like this and should not have also appointed the fourth respondent to the post without considering the claims of the petitioner. The writ petition is allowed and Ex. P-2 is quashed. However, I pass no order regarding costs.

Writ petition allowed.

AIR 1970 KERALA 57 (V 57 C 13)

P. NARAYANA PILLAI, J.

Puthan Veetil Sankaran Nair, Appellant v. Poomulli Manakkal Moopil Sthanam Parameswaran Namboodiripad, Respondent.

Second Appeal No. 463 of 1966 and C. R. P. Nos. 83 and 90 of 1968, D/- 10-1-1969, from order of Dist. J., Palghat, D/- 21-3-1966.

Civil P. C. (1908), S. 152, O. 20, Rr. 3, 6, 7—Inherent power of Court to amend decrees or orders — Exercise of — Limitations — AIR 1924 Cal. 895 and AIR 1933 Cal 627, Dissented from.

Where the decree drawn is not in conformity with the judgment, the Court can in exercise of jurisdiction under Section 152 order correction in the decree even when the decree has been executed and fully satisfied, provided neither the innocent third parties have acquired any rights under the erroneous decree nor any principle of equity is offended. When the decree has been fully satisfied the Court may be *functus officio* in respect of the execution but not with regard to power of correction. (Paras 12, 21)

As regards correction by court the word used in S. 152 is only 'may'. That implies that even if all the conditions laid down in the Section are satisfied the Court may not also in some cases order correction. It is clear that the power of correction under Section 152 of the C. P. C. is only discretionary. (Para 17)

A reading of the provisions of S. 152 and Order 20, Rules 3, 6 and 7 shows that insistence is not on judgments being in accordance with decrees but vice versa and that corrections of both judgments and decrees can be made "at any time." The time factor does not control amendments under Section 152 because that factor applies only to acts of the litigants and not of Courts. The only limitation on the exercise of the power of amendment is the scope of Section 152 under which that power is exercised. Section 152 is based on two important principles. The first of them is the maxim that an act of the Court shall prejudice no man and the other that Courts have a duty to see that their records are true and that they represent the correct state of affairs. It is because these are considered to be some of the highest duties of courts that in S. 152 of the C. P. C. it has been provided that even in the absence of any move on the part of the parties the court can of its own motion make the correction. (Paras 15, 17)

There is no exception to the rule embodied in S. 152. The discretion to be exercised under S. 152 is judicial. Before

exercising or refusing to exercise that jurisdiction, care has to be taken that no injury is caused to the suitors, the equitable rights acquired by the innocent third parties are not affected and that correct state of affairs is represented by the records of the Court. AIR 1924 Cal 895 and AIR 1933 Cal 627, Dissented from.

(Paras 19, 20)

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- (1963) AIR 1963 Madh Pra 158
(V 50)=1964 Jab LJ 668, Narayandas v. Vishnu 6, 13
- (1962) AIR 1962 Pat 116 (V 49)=
1962 BLJR 622, Shyamal Bihari v. Girish Narain 6, 12
- (1960) AIR 1960 All 385 (V 47),
Jai Narain v. Chheda Lal 14
- (1953) AIR 1953 All 485 (V 40)=
1953 All LJ 355, Beche Lal v. Hem Singh 6, 12, 13, 14
- (1936) AIR 1936 Mad 516 (V 23)=
37 Cri LJ 909, Rathnasabapathy Goundan v. Public Prosecutor 12
- (1933) AIR 1933 Cal 627 (V 20)=
ILR 60 Cal 753, Midnapore Zamin-dary Co. Ltd. v. Abdul Zalil 18
- (1933) AIR 1933 Oudh 466 (V 20)=
ILR 9 Luck 90, Raghubir Singh v. Rani Rajeswari Devi 6, 10, 11
- (1932) AIR 1932 Cal 563 (V 19)=
36 Cal WN 97, K. C. Mukerjee v. Ainaddin 17
- (1926) AIR 1926 Mad 516 (V 13)=
50 Mad LJ 655, Munuswami Pillai v. Hussain Khan Sahib 6, 9, 11, 12, 13
- (1925) AIR 1925 All 187 (V 12)=
ILR 47 All 44, Kishori Mohan v. Chhanga 6, 7, 11, 17
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23 All LJ 518, Pitam Lal v. Balwant Singh 6, 8, 11, 12, 13
- (1924) AIR 1924 Cal 895 (V 11)=
=28 Cal WN 873, Chandra Kumar Mukhopadhyaya v. Sm. S. B. Debi 17, 18
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- (1915) AIR 1915 Cal 24 (V 2)=19
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910, Surendra Nath Roy v. Girija Nath Roy 17
- (1905) 9 Cal WN 605, Menat Ali v. Amdar Ali 17
- (1894) ILR 21 Cal 259, Kalu v. Latu 17
- (1892) 1892 AC 547 = 62 LJ PC
24 = 67 LT 722= 1 R 1, Hatton v. Harris 18
- (1887) ILR 11 Bom 284, Shivappa v. Shivpanch Lingapa 17
- (1885) 30 Ch D 239, In re, Swire, Mellor v. Swire 16

In S. A. No. 463 of 1966.

M. C. Sen, for Appellant; T. S. Venkiteswara Iyer and R. C. Plappally, for Respondent.

In CRP Nos. 83 and 90 of 1968.

T. S. Venkiteswara Iyer, R. C. Plappally and P. K. Balasubramanian, for Petitioner; M. C. Sen, for Respondent.

JUDGMENT: The 6th defendant in O. S. 474 of 1954 on the file of the Munsif, Alatur, is the appellant in S. A. 463 of 1966. The plaintiff in that suit is the petitioner in C. R. P. 90 of 1968. He is also the plaintiff in another suit, O. S. 391 of 1951, on the file of the same court. C. R. P. 83 of 1968 is a revision petition filed by him from an order passed in O. S. 391 of 1951. The Second Appeal is from an order passed by the Munsif adjourning the case for confirmation of the sale which was held in execution. The Revision Petitions relate to orders passed by him in the 2 suits amending the decrees in those cases.

2. The facts necessary for the disposal of the appeal and the revision petitions are as follows: The plaint schedule properties in the 2 suits are identical and they belong to the plaintiff. On the date of the 2 suits they were outstanding on lease with the sub-tarwad of defendants 2 to 5 and 7. Defendants 3 to 5 and 7 are the children of the 2nd and 6th defendants, the 6th defendant being the husband of the 2nd defendant. During the pendency of the suits the 2nd defendant died. The two suits are for recovery of rent due in respect of the plaint properties for different periods. While O. S. 391 of 1951 is for recovery of rent for the year 1126 M. E. O. S. 474 of 1954 is for recovery of rent for the years 1129 and 1130 M. E. The 6th defendant was impleaded in the suits on the allegation that he was in possession of the properties on behalf of his wife and children. He contended that he was in possession of the properties as a sub-lessee of the 2nd defendant. That contention was found against and a decree was passed in O. S. 391 of 1951 directing the defendants to pay on or before 15-2-1963 from and out of the sub-tarwad properties of defendants 3 to 5 and 7 an amount of Rs. 347-81 to the plaintiff. In O. S. 474 of 1954 a decree for the arrears of rent claimed in that suit was passed against all the defendants in that suit.

3. In O. S. 391 of 1951 when the plaintiff applied for execution the 6th defendant objected on the ground that he was not in any manner liable for the decree amount. His objection was dismissed on 17-8-1965 with the observation that his remedy was to get the decree amended. In execution the plaintiff attached the crops standing on the properties. Then the 6th defendant on behalf of defen-

dants 3 to 5 and 7 deposited the decree amount. Thereafter he filed a claim petition. That was dismissed. Appeals filed by him from that order to the District Court, Palghat, and this Court were also dismissed. On 15-9-1965 he filed an application for amendment of the decree in O. S. 391 of 1951. As the decree stood he was also liable for the decree amount in that case. According to him the decree was not in conformity with the judgment which had made it clear that he was not liable for the arrears of rent claimed in the suit and therefore the decree deserved to be amended excluding his liability for the amount decreed. The learned advocate appearing for the plaintiff submitted when the Second Appeal and the Revision Petitions were heard that the Munsif passed an order on 15-11-1965 allowing the plaintiff to withdraw from court the amount deposited by the 6th defendant in O. S. 391 of 1951, that pursuant to that order the plaintiff withdrew that amount from Court and that thereafter satisfaction of the decree was recorded. After recording satisfaction of the decree the Munsif proceeded with the application for amendment of the decree and on 17-10-1967 allowed it. It is from that order that C. R. P. 83 of 1968 has been filed by the plaintiff.

4. In O. S. 474 of 1954 also when the plaintiff applied for execution the 6th defendant objected on the ground that he was not liable for the decree amount. The Court dismissed his objections on 17-8-1965 stating that he was at liberty to apply for amendment of the decree. On 28-8-1965 the 6th defendant applied in O. S. 474 of 1954 for amendment of the decree. On 19-10-1965 he also applied for stay of execution of the decree until the disposal of the application for amendment. On 20-10-1965 the application for stay of execution was dismissed and properties were sold to the plaintiff in Court auction for Rs. 1001. On 22-10-1965 the Court adjourned the case to 20-11-1965 for confirmation of the sale. From that order the 6th defendant filed an appeal before the District Court, Palghat. That appeal was dismissed. Then the 6th defendant filed the present Second Appeal before this Court. On 17-10-1967 after due inquiry the Munsif allowed the 6th defendant's application in O. S. 474 of 1954 for amendment of the decree. C. R. P. 90 of 1968 relates to it.

5. The Second Appeal can first be dealt with. The order appealed against is the one passed on 22-10-1965 and it reads as follows:

"Property sold to decree-holder for Rs. 1,001. For confirmation adjourned to 20-11-1965."

Neither the order whereby the court ordered sale of the property nor the sale

conducted on 20-10-1965 was challenged by the 6th defendant. His application for stay of execution was dismissed. As the decree then stood he was also liable for the decree amount. On the date of the sale nothing prevented the court from conducting the sale. After the sale was conducted the case had to be adjourned for confirmation of the sale and that was what was done by the order appealed against. There is no merit in the Second Appeal. It has only to be dismissed.

6. Turning now to the revision petitions the question to be considered is whether after the decrees had been satisfied, in O. S. 391 of 1951 by the withdrawal from court by the plaintiff of the amount deposited by the 6th defendant in court and in O. S. 474 of 1954 by the sale held in execution on 20-10-1965 the learned Munsif was justified in ordering amendment of the decrees. While the learned counsel appearing for the plaintiff relied upon the decisions in *Kishori Mohan v. Chhanga*, AIR 1925 All 187; *Pitam Lal v. Balwant Singh*, AIR 1925 All 556; *Munuswami Pillai v. Hussain Khan Sahib*, AIR 1926 Mad 516 and *Raghubir Singh v. Rani Rajeshwari*, AIR 1933 Oudh 466, in support of the stand he took the learned counsel appearing for the 6th defendant relied upon the decisions reported in *Shyamal Bihari v. Girish Narain*, AIR 1962 Pat 116; *Beche Lal v. Hem Singh*, AIR 1953 All 485 and *Narayandas v. Vishnu*, AIR 1963 Madh Pra 158.

7. AIR 1925 All 187, is a decision of Mukerji and Dalal, JJ. In that case the decree of the Subordinate Judge ordered payment of a larger sum than was really due on a proper calculation of the amount payable by the defendant to the plaintiff. It was that mistake that was sought to be rectified by the defendant by his application for amendment of the decree. There was an appeal by the plaintiff to the District Judge from the decree of the Subordinate Judge. The appeal was dismissed. When execution was taken out the defendant without demur paid the decree amount and thus the decree was satisfied. It was thereafter that he applied for amendment of the decree. That application was dismissed.

8. AIR 1925 All 556, is a decision of Sulaiman and Daniels, JJ. In that case 3 years after a mortgage decree for sale was satisfied and the case was struck off the defendant applied for amendment of the decree on the ground that it was not in agreement with the judgment. That application was dismissed. Sulaiman, J. rested his decision on the ground that correction of the decree was within the discretion of the court and that in the circumstances of that case the discretion

could not be exercised in favour of the defendant. Daniels, J. went a step further and held that the court was functus officio when a decree for money was satisfied and that thereafter the court could not entertain an application for amendment of the decree.

9. AIR 1926 Mad 516, is a decision of Spencer, J. In that case on 5-12-1923 the decree was entered as satisfied. About 10 months thereafter on 24-9-1924 an application for amendment of the decree was filed for altering the amount payable under the decree from Rs. 615-6-10 to Rs. 756-1-0. That was dismissed.

10. AIR 1933 Oudh 466, is a decision of Raza and Allsop, JJ. In that case the decree provided that if the net proceeds of the sale of the mortgaged property were not sufficient to pay the decree amount the plaintiff could apply for a personal decree for the amount of the balance. In execution of the decree when the property was put up for sale it was purchased by the plaintiff. But the sale amount covered only a portion of the total decree amount. It was after that sale that the defendants applied for amendment of the decree. The amendment sought for was to declare in the decree that if the decretal amount was not satisfied out of the sale proceeds the decree-holder would have no power to realise the balance from the other properties of the defendants. The amendment prayed for was refused.

11. In AIR 1925 All 187; AIR 1925 All 556 and AIR 1926 Mad 516 the applications for amendment were filed after the decrees had been satisfied. In AIR 1933 Oudh 466 the learned Judges who decided that case were not prepared to accept the contention of the defendants that the decree was not in conformity with the judgment. The facts in those decisions vary enormously from the facts here. In O. S. 391 of 1951 the application for amendment of the decree was filed long before the plaintiff withdrew from court the amount deposited by the 6th defendant and satisfaction of the decree was entered. In O. S. 474 of 1954 the application for amendment of the decree was filed before sale was conducted for the decree amount. Admittedly the plaintiff properties were outstanding on lease with the sub-tarwad of defendants 2 to 5 and 7 and the 6th defendant was not a member of that sub-tarwad. The correctness of the statement in the order sought to be revised in C. R. P. 83 of 1968 that paragraph 24 of the judgment made it clear that no relief was granted against the 6th defendant and the statement in the order sought to be revised in C. R. P. 90 of 1968 that the judgment showed that there was no decree against the 6th defendant was not challenged at any time

during the hearing of the Second Appeal and Revision Petitions by the learned counsel appearing for the plaintiff. In these circumstances, the decrees in the two suits have to be taken as not in conformity with the judgments in those cases. The applications for amendment were filed in both the suits before the decrees were satisfied. For these reasons the decisions cited by the learned counsel appearing for the plaintiff cannot be applied to the facts of the present case. Further the decisions in AIR 1925 All 556 and AIR 1926 Mad 516 have been expressly dissented from in some of the later decisions.

12. The decisions cited on behalf of the 6th defendant can now be considered. AIR 1962 Pat 116 is a decision of Raj Kishore Prasad, J. In that case after the sale in execution but before confirmation of the sale the plaintiff applied for amendment of the decree. That was allowed. The decisions in AIR 1926 Mad 516 and AIR 1925 All 556 were distinguished in that case on the ground that in those cases the applications for amendment were made after the decrees were satisfied. After distinguishing them the decision in AIR 1953 All 485 was followed. That was a decision of Agarwala, J. In that case after the sale of property for the decree amount and the whole decree had become satisfied an application was filed for amendment of the decree and all subsequent proceedings including the sale certificate. The trial court ordered amendment of the decree but not of the sale certificate and the other subsequent proceedings. The High Court refused to interfere with that order in revision. It was observed by Agarwala J. in that case that where the decree was not in agreement with the judgment the court could correct the decree to bring it into conformity with the judgment even when the decree had been executed and fully satisfied. According to him when the decree had been fully satisfied the court may be functus officio in respect of the execution but not with regard to the power of correction. He said this in his judgment:

"As regards the contention that, after a decree is satisfied, the Court becomes 'functus officio', it may be conceded that, after a decree has been executed and satisfied, there is an end of the decree in the sense that nothing more remains to be done by way of execution and the Court is 'functus officio' in the sense that having executed the decree, it has nothing more to do and its authority is at an end. But the authority, which is so terminated is the authority to execute the decree and not the authority to correct accidental slips and errors or to review its own orders. A Court is not in the

same position, as for example, an arbitrator. An arbitrator having given his award may not have the power to modify or correct it but a Court has inherent power to correct accidental slips or errors."

And a little later on he said:

"In S. 152, Civil P. C. no time limit is fixed for making an amendment in a judgment or decree which has been occasioned by an accidental slip or error. Such an amendment may be made at any time subject, of course, to equities which may have arisen in favour of the party against whose interest the amendment is to be made."

Following that decision Raj Kishore Prasad J. observed as follows in AIR 1962 Pat 116:

"I however, expressed my respectful dissent to the observation of Daniels, J., in AIR 1925 All. 556, that where a decree for money had been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment under Section 152 of the Code. The above dictum, as stated also in Sheo Prasad Rai v. Dharam Sen Rai, 49 Ind Cas 948=AIR 1919 Pat 141 reproduced in Rathnasabapathy Goundan v. Public Prosecutor, AIR 1936 Mad 516, at p. 517, has not found complete favour in subsequent decisions.

In my opinion, where a decree has been executed and satisfied and the execution thereof dismissed on full satisfaction, the court may be *functus officio* with respect to the execution of the decree, but it is not *functus officio* with respect to its power to correct its judgment, decree or order, if there is any clerical or arithmetical mistake, or, any error due to accidental slip or omission therein. The fact that the decree has already been executed and satisfied, and, therefore it is dead, is of no consequence, and of no importance whatsoever, so far as the question as to whether its amendment asked for should be allowed or not. The fact that the decree has been executed and satisfied does not take away the inherent power of the court to allow the amendment asked for its judgment, decree or order, if it is fit to be allowed, in view of the provisions of Sections 151 and 152 of the Code, irrespective of the consideration as to how the plaintiff will proceed so far as the execution of the same is concerned after its amendment sought for is made."

13. AIR 1963 Madh Pra 158 is a decision of Newaskar J. In that case also the application for amendment of the decree was resisted on the ground that after the decree had become satisfied the court was *functus officio*. In respect of that position the decisions in AIR 1925 All 556 and AIR 1926 Mad 516 were cited. The learned Judge did not follow them but follow-

ed the later decision in AIR 1953 All 485 and allowed the application for amendment.

14. In *Jai Narain v. Chhedalal*, AIR 1960 All 385 Dhavan, J. followed the decision in AIR 1953 All 485 and said:

"In my opinion, this Court, as a court of record, owes a duty to itself to ensure that its record is free from any blemish or error. If any such error is brought to its notice in any manner whatsoever and at any time whatsoever, it has the power to correct errors of a clerical nature. To hold otherwise would mean that this Court is powerless even after discovering that a particular sentence in a judgment is grammatically incorrect or absurd. I am, therefore, inclined to agree respectfully with Agarwala, J. that after the satisfaction of the decree, the Court may become *functus officio* as regards the execution of the decree but it retains the power to correct obvious errors in its own records. It goes without saying that the Court will not make any correction if it leads to injustice and in any case not without hearing the parties whose interests are likely to be affected."

15. It will be appropriate at this stage to have a close look at the statutory provisions. Order 20, Rule 3 of the Civil Procedure Code, hereinafter referred to as the C. P. C., provides that except as provided under Section 152 or on review a judgment should not after it is pronounced be altered or added to. The portion in that Rule material for the present purpose reads as follows:

"The judgment. . . . when once signed, shall not afterwards be altered or added to, save as provided by Section 152 or on review."

Order 20, Rule 6 of the C. P. C. makes it obligatory that the decree should conform to the judgment. The relevant portion of it reads thus:

"R. 6 (1) The decree shall agree with the judgment; . . ."

It is the Judge himself who prepares the judgment. In the case of a decree nothing prevents a Judge from drawing it up but it is usually drawn up by a ministerial officer on the staff of the court. It has not to be pronounced in open court unlike a judgment. In the case of subordinate courts the Judge has only to sign it after he is satisfied that it has been drawn up in conformity with the judgment. The relevant portion of Order 20 Rule 7 which deals with it says:

". . . . when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree." The proviso to it added by the amendment made by this Court reads thus:

"Provided that the decrees of the High Court may be signed by the officer empowered in that behalf." Section 152 of the C. P. C. which embodies what is usually called the slip rule reads thus:

"S. 152. Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

A reading of all these provisions shows that insistence is not on judgments being in accordance with decrees but vice versa and that corrections of both judgments and decrees can be made "at any time". The time factor does not control amendments under Section 152 of the C. P. C. because that factor applies only to acts of the litigants and not of courts. The only limitation on the exercise of the power of amendment is the scope of the Section under which that power is exercised.

16. I shall now refer to some provisions in England regarding correction of judgments and decrees and a decision which is considered important on the subject. The 103rd General Order of 1843 which declared the practice and rule then prevailing in Equity and which is usually called the slip order provided that

"any clerical mistake in a decree, or any error arising from any accidental slip or omission, may at any time be corrected on motion or petition."

Order 28, Rule 11 of the English Rules of the Supreme Court which embodies the slip rule is identical with Section 152 of the C. P. C. In *In re Swire, Mellor v. Swire*, (1885) 30 Ch D 239, Cotton, L. J. said:

"... it is only in special circumstances that the Court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced."

Lindley, L. J.:

"This case has raised a discussion of some importance, because it was contended that when once the order of the Court was passed and entered it could not be put right, even although as drawn it did not express the order as intended to be made. I protest against any such notion. There is no such magic in passing and

entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal. According to the old practice there was no difficulty, because the ordinary practice in the Chancery Division was, that after a decree or order had been passed and entered, any error could be put right by an application to rehear, unless the order had been enrolled. After enrolment the Court had no power over its decree. But even then there was power to vacate the enrolment on proper grounds, and when that had been done the Court again had power over its own decree. Now, rehearing has been abolished, and enrolment has become obsolete, but does it follow from that that the Court cannot correct a blunder of the kind I have assumed? I maintain that it has such a power, and I am glad to find that Lord Penzance and the House of Lords have asserted it. It appears to me, therefore, that if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not."

and Bowen, L. J.:

"I think the true view is, as stated by the Lord Justice Cotton, that every Court has inherent power over its own records as long as those records are within its power, and that it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice. The Lord Justice Lindley has pointed out that this power which we are now asserting is a power which was always possessed by the Courts of Chancery under the old system. On that point I say nothing. But I venture to add this, that it is a power which has been exercised for hundreds of years by the Common Law Courts, and it would indeed be strange if the power were found to have disappeared when the Court of Appeal was created by the Judicature Act. Lord Penzance, speaking as a common law lawyer, was well justified, as one would expect from a Judge of his great distinction, in saying that at common law it was always under-

stood that the Court had the power to make these corrections. When there was any mistake which could be ascribed to the officers of the Court, judgments at common law could always be amended in the term, and in some cases after the term in which they were pronounced."

17. I pause here to consider whether correction under S. 152 of the C. P. C. is discretionary or obligatory. In this connection it is useful to refer to the two important principles on the basis of which S. 152, C. P. C. has been enacted. The first of them is the maxim that an act of the court shall prejudice no man and the other that courts have a duty to see that their records are true and that they represent the correct state of affairs. It is because these are considered to be some of the highest duties of courts that in S. 152 of the C. P. C. it has been provided that even in the absence of any move on the part of the parties the court can of its own motion make the correction. In *Chandra Kumar Mukhopadhyaya v. Sm. S. B. Debi*, AIR 1924 Cal 895, Suhrawardy, J. said that if the conditions laid down in S. 152 of the C. P. C. were satisfied it was obligatory on the part of the court to order correction and that it was not a mere discretionary power that was embodied in that Section. He said:

"The word 'may' in the section does not make it discretionary with the Court to order the correction, but merely enlarges the power of the Court by providing that such correction can be done 'at any time'; or in other words, the section simply emphasises that no lapse of time would disentitle the Court to make the correction. As has been observed the intention of the law is to make it obligatory upon the Court whenever any such mistake is discovered to correct it, and section 152 merely emphasises that duty of the Court by saying that it may be done at any time without limitation. This view, namely, that it is the duty of the Court to amend the decree when it is brought to its notice that it does not agree with the judgment, is supported by a number of cases of which reference may be made to the cases of *Shivappa v. Shivpanch Lingappa*, (1887) ILR 11 Bom 284, *Kalu v. Latu*, (1894) ILR 21 Cal 259, *Menat Ali v. Amdar Ali*, (1905) 9 Cal WN 605, *Basanta Kumar Bose v. Khulna Loan Co.*, 19 Cal WN 1001=26 I. C. 197 = 20 Cal LJ 1 = AIR 1915 Cal 24 and *Surendra Nath Roy v. Girija Nath Roy*, (1912) 15 Cal LJ 658 = 15 Ind Cas 910."

In *K. C. Mukerjee v. Ainaddin*, AIR 1932 Cal 563 the same learned Judge explained in the following way the position he took in the earlier case:

"What is meant by saying that it is the duty of the Court or it is incumbent upon

the Court to bring the decree in conformity with the judgment is that in all cases where no equitable considerations intervene to induce the Court to refuse to exercise its power of amendment which is necessary for the ends of justice, the Court should, or to put it in stronger language, must amend the decree. The discretion, if it has any in the matter, should be exercised judicially and should not be refused except where it will be inequitable to do so."

In the same decision *Graham, J.* disagreed with the views of *Suhrawardy, J.* He said:

"O. 20, R. 6, Civil P. C., provides that 'the decree shall agree with the judgment.' At the same time S. 152 of the Code, which deals with the amendment of decrees and orders, is in its language discretionary, and it cannot in my judgment be laid down as a hard and fast rule that amendment must be allowed as a matter of course in every case regardless of its particular facts."

In AIR 1925 All 187 it is observed as follows:

"Under S. 152 of the Civil Procedure Code, there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the court and the discretion has to be exercised in view of the peculiar facts of each case."

As regards correction by court the word used in Section 152 is only 'may'. That implies that even if all the conditions laid down in the Section are satisfied the Court may not also in some cases order correction. It is clear that the power of correction under S. 152 of the C. P. C. is only discretionary."

18. Some of the important decisions dealing with the circumstances under which the court may not make corrections can now be dealt with. In *Hatton v. Harris*, 1892 AC 547 Lord Herschell said:

"There is one observation which I ought to make, and it is this, that there may possibly be cases in which an application to correct an error of this description would be too late. The rights of third parties may have intervened, based upon the existence of the decree and ignorance of any circumstances which would tend to show that it was erroneous, so as to disentitle the parties to the suit or those interested in it to come at so late a period and ask for the correction to be made. There might be a ground of that description which would induce the tribunal to say 'No; although this is a slip, and one which would have been corrected at the time, you have delayed so long

that you have allowed rights to grow up which it would now be unjust to prejudice, and it is impossible to make the correction."

And Lord Watson said:

"When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce."

In AIR 1924 Cal 895 Suhrawardy, J. said that there was only one exception to the rule that corrections under Section 152 of the C. P. C. could be made at any time and that that was when the amendment would offend against principles of equity as when the rights of third parties had intervened. He said:

"The only exception to this general rule is that the Court will refuse to make the amendment where it offends against the principles of equity; for instance, it may not be desirable to amend the decree where the interest of a third party (who may be a bona fide transferee for valuable consideration) may be jeopardised. ((1892) A. C. 547=62 LJ P. C. 24=67 LT 722=1 R. 1). A reference to the reported cases on this point shows that amendment has been allowed even long after the passing of the decree without limit of time."

The same view was taken by Mitter, J. in Midnapore Zamindary Co. Ltd. v. Abdul Zalil, AIR 1933 Cal 627. He said:

"The first contention of the appellant has really no substance, for it is now well settled that a decree could be brought into conformity with the judgment even after the lapse of years and that the only limitation is that the Court may deem it inexpedient or inequitable to exercise its powers where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous: see 1892 A. C. 547=62 LJ PC 24=67 LT 722".

19. With great respect to the learned Judges who have decided otherwise it is not possible to take the view that there is any exception whatsoever to the rule embodied in Section 152 of the C. P. C. That is simply because no exception to that rule is mentioned either in that Section or anywhere else in the C. P. C. No doubt equitable principles like the acquisition of rights by innocent third parties under the erroneous decrees ought to be taken into account before the

discretion is exercised but that is different from saying that they are exceptions to the rule in S. 152. There are no iron rails through which alone judicial discretion should pass. If iron rails are set for its run it ceases to be discretion. That does not mean that it can be exercised according to the whims and fancies of each individual judge. The discretion to be exercised is judicial, and that is certainly a limitation because there are natural limitations implicit in the exercise of judicial discretion.

20. I may now summarise my conclusions as follows:

(1) The power of correction under Section 152 of the C. P. C. is discretionary;

(2) There is no time limit for its exercise. It can be exercised at any time even after the decree has been fully satisfied and recorded also as such;

(3) The only limitation for its exercise is the scope of the Section within which it functions; and

(4) Before exercising or refusing to exercise it, it has to be borne in mind that to take care to see that none of its acts causes any injury to any of the suitors and to see that its records are true, are two of the important duties of all courts and that at the same time it would be inequitable to order amendment when rights have been acquired under the erroneous decree by innocent third parties or when any other principle of equity is offended. As to which of those considerations should be given greater importance than the others and which of them should prevail in cases of conflict are matters for the exercise of sound judicial discretion which in turn depends on the facts and circumstances of each case.

21. In the instant cases the decrees are not in conformity with the judgments. Innocent third parties have not acquired rights under the erroneous decrees. No other principle of equity is also offended by the amendments. In exercising his jurisdiction under S. 152 of the C. P. C. and ordering correction of the decrees in the two cases the learned Munsif acted properly.

22. In the result the Second Appeal and the Revision Petitions are dismissed but in the circumstances without costs.

Order accordingly.

public in general, which would serve to justify such an exception to the rule regarding sufficiency of consideration. The conclusion is, then, that either the performance, or the promise of performance, of an act which is already obligatory towards a third party constitutes a good consideration."

[Principles of the English Law of Contract, 1967 Edition, page 100].

22. Cheshire and Fifoot discuss the same question in their treatise on the Law of Contract (1964 Edition) at pages 88 to 92. Referring to the two leading cases, they observe:

"If this interpretation be correct, English Judicial authority, as far as it goes, is unanimous in holding that the performance of an outstanding contractual obligation is sufficient consideration for a promise from a new party, while there is no decided case, at least since the dark years of the early seventeenth century, upon the validity of a promise of such performance.

How far is this distinction between executory and executed consideration to be regarded as relevant? Sir Frederick Pollock thought that, in principle at least, it should be decisive. In his opinion the promise might be good consideration, for it involved the promisor in two possible actions for breach of contract instead of one, and thus was a detriment within the meaning of the law." (Page 91)

Concluding the authors observe:

"It would seem, therefore, reasonable to accept the three cases in the nineteenth century as deciding, as a matter of concrete law, that the performance of an outstanding contractual obligation is sufficient consideration for a promise by a new party, and to assume, as does the great bulk of juristic opinion, that the promise of performance is equally valid." (Page 92)

In our opinion, it is thus clear, both on principle and authority, that the promise of Mohammad Hussain to perform his part of the executory contract for sale of the Mills, which he had already contracted with a third party so to do, constituted good consideration for the promissory note executed by Indermal who, upon subsequent performance of the promise, admittedly recovered out of the price realised by the sale of the Mills a sum of Rs. 3,25,000/-.

23. The further submission that the consideration of the promissory note is illegal or opposed to public policy may be shortly disposed of. It was argued that Mohammad Hussain demanded Rs. 30,000/- to exercise his influence over the co-sharers, whom he represented in the transaction, in favour of the proposed sale and thus secured the promissory note. In this connection, the learned counsel

invited our attention to illustration (j) under Section 23 of the Contract Act. Here there is no evidence at all to show that the money was demanded for such a purpose. What is more, the specific plea contained in paragraph 13(5) of the written statement of Indermal is that he wanted the money for himself (Swayam Ke Liye). Further, there is neither any plea nor any evidence to support the argument that the promissory note was secured by practising on the co-sharers, whom Mohammad Hussain represented, any fraud by concealment. In this situation, the lower Court rightly rejected this contention.

24-25. Their Lordships then held that the case of the appellant that there was an adjustment of the amount due on the promissory note was not substantiated by evidence. Their Lordships further held that the presumption under S. 166 of the Negotiable Instruments Act that the endorsement was for consideration was not rebutted and observed that a bare finding that the endorsement was for consideration was enough to sustain the claim decreed by the lower Court.

26. In view of the discussions in the foregoing paragraphs and the reasons therein given, this appeal fails and is dismissed. Costs throughout shall follow that event. Hearing fee in this Court according to schedule.

Appeal dismissed.

AIR 1970 MADHYA PRADESH 49 (V 57 C 14)

R. J. BHAVE, J.

Union of India, Applicant; through General Manager, South-Eastern Railway, Calcutta v. S. V. Krishna Rao, Non-applicant.

Civil Revn. No. 314 of 1967, D/- 6-9-1967, against order of Addl. Dist. J. Ambikapur, D/- 20-1-1967.

(A) Arbitration Act (1940), Ss. 20, 8 — Applicability — Reference under S. 20 — S. 8 cannot be relied upon — Purposes of S. 8 and S. 20 are different.

When a reference is made under S. 20 of the Arbitration Act, 1940, the Court is not entitled to rely on the provisions of S. 8 of the Act. The purposes of S. 8 and S. 20 are altogether different. In those cases where the parties have agreed at the time of entering into a contract that any dispute arising out of it shall be settled by arbitration and where no arbitrators have been named and where the parties do not agree on the choice of the arbitrator, S. 8 comes into operation. It gives power to the Court to appoint an arbitrator. Once the arbitrator is so appointed, the function of the Court comes

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to an end. The reference is not made by the Court but it is left to the parties to make the reference to the arbitrator nominated by the Court. On the other hand, under S. 20 what the Court has to decide is as to whether the arbitration agreement should be filed before it or not. When the Court comes to the conclusion that a dispute has arisen between the parties, then the Court is required to make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise. It is only when no arbitrators have been appointed in the agreement or no procedure has been prescribed in the agreement for appointment of such arbitrators and when there is no agreement between the parties before the Court about the choice of the arbitrators that the Court gets an authority of nominating the arbitrators itself. The provisions of S. 20(4) must be interpreted in this manner. Not only the agreement to refer the dispute to arbitration, but also the agreement regarding arbitration by the named persons is also to be enforced. (Para 10)

It is the duty of the Court to satisfy itself as to why it is not just to make a reference to the arbitrators named in the agreement or to the arbitrators to be selected by following the procedure prescribed in the agreement and whether an objection to the persons named in the agreement by any party is just. There is nothing in law to prevent a party from agreeing to arbitration by the other party to the contract or by its nominee: AIR 1964 All. 477 & AIR 1965 Cal. 404 & AIR 1961 SC 1285, Rel. on. (Para 11)

(B) Arbitration Act (1940), S. 8 — Application for appointment of arbitrator — Party in default does not lose its right of being consulted by Court: AIR 1961 Pat. 228 Dissent. from. (Para 13)

Cases Referred: Chronological Paras

(1965) AIR 1965 Cal. 404 (V 52),
Union of India v. Himco (India)
Pvt. Ltd. 14

1964 AIR 1964 All. 477 (V 51)=ILR
(1964) 1 All. 564, Union of India v.
Gorakh Mohan Das 14

(1961) AIR 1961 SC 1285 (V 48)=
1961-3 SCR 1020, D. Gobindram
v. M/s. Shamji K. and Co. 12, 14

(1961) AIR 1961 Pat. 228 (V 48)=
Union of India v. D. P. Singh 13

N. L. Mukerji, for Applicant; Gulab
Gupta, for Non-applicant.

ORDER:— This revision is by the Union of India through the General Manager, South-Eastern Railway, Calcutta (hereinafter referred to as the 'Railway Administration') against the order of the lower Court, dated 20-1-1967, passed under Section 20 of the Arbitration Act appointing Shri N. S. Tayabji, Chief Engineer (Construction), Eastern Railway, Calcutta, as the arbitrator.

2. The facts of the case are that the non-applicant S. V. Krishna Rao (hereinafter referred to as 'the contractor') had entered into a contract dated 2-12-1963 with the Railway Administration for carrying out certain work at Manendra-garh Station. The contractor was also required to undertake certain additional work, the details of which are given in the application filed by the contractor under Section 20 of the Arbitration Act. It is the case of both the parties that the General Conditions of contract framed by the Railway Administration formed part of the contract dated 2-12-1963. Condition No. 62 of the General Conditions provides that all disputes or differences of any kind arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decision thereon in writing. This condition further provides that the decisions and the directions issued by the Railway Administration shall be final. Condition No. 63 then provides for arbitration. That condition is in the following terms:

"63-(1) If the Contractor be dissatisfied with the decision of the Railway, on any matter in question, dispute or difference, on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to or if the Railway fails to make a decision within a reasonable time, then and in any such case but except in any of the Excepted Matters referred to in Clause 63 of those conditions the Contractor may within 10 days of the receipt of the communication of such decision or after the expiry of the reasonable time as the case may be, demand in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railway by the Contractor and shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other shall be referred to arbitration.

(2) Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings provided however it shall be open for the arbitrator or arbitrators to consider and decide whether or not such work should continue during arbitration proceedings.

(3) (a) Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to:

(i) A sole Arbitrator who shall be the General Manager or a person nominated by him in that behalf in cases where the claim in question is below Rs. 50,000/- and in cases where the issues involved are not of a complicated nature. The General Manager shall be the sole judge to decide whether or not the issues involved are of a complicated nature.

(ii) Two Arbitrators, who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid down in Clause 3(b) for all claims of Rs. 50,000/- and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matter under dispute will be referred to an Umpire to be appointed in the manner laid down in Clause 3(b) for his decision. (b) For the purpose of appointing two arbitrators as referred to in sub-clause (a)(ii) above, the Railway will send a panel of more than three names of officers of the appropriate status of different departments of the Railway to the contractor, who will be asked to suggest a panel of three names out of the list so sent by the Railway. The General Manager will appoint one Arbitrator out of this panel as the contractor's nominee, and then appoint a second arbitrator of equal status as the Railway's nominee either from the panel or from outside the panel, ensuring that one of the two arbitrators so named is invariably from the Accounts Department. Before entering into reference, the two Arbitrators shall nominate an Umpire to whom the case will be referred in the event of any difference between the two Arbitrators. (c) The Arbitrator or Arbitrators or the Umpire shall have power to call for such evidence by way of affidavits or otherwise as the Arbitrator or Arbitrators or Umpire shall think proper, and it shall be the duty of the parties were (sic) to do or cause to be done all such things as may be necessary to enable the Arbitrator or Arbitrators or Umpire to make the award without any delay. (d) It will be no objection that the persons appointed as Arbitrator, Arbitrators or Umpire are Government servants, and that in the course of their duties as Government servants they have expressed views on all or any of the matters in dispute. (e) Subject as aforesaid, Arbitration Act 1940 and the Rules thereunder and any statutory modification thereof shall apply to the Arbitration proceedings under this clause."

3. The case of the contractor is that during the working of the contract certain disputes arose which the Railway Administration failed to decide. It is alleged

that not only the disputes were not decided but the Railway Administration took over the work from the contractor and started completion thereof departmentally. In these circumstances, the contractor again asked the Railway Administration to refer the dispute in terms of Condition No. 63. No heed was paid by the Railway Administration to the said request and hence the contractor served the Railway Administration with a notice under Section 80 of the Code of Civil Procedure calling upon the Railway Administration to initiate arbitration proceedings under Condition No. 63. After waiting for a reasonable time, the contractor filed an application under Section 20 of the Arbitration Act. In the application the contractor has given details as to the point in dispute and the various claims put forth by him. It is not necessary to reproduce them here.

4. In the written statement filed by the Railway Administration it has been stated that the contractor was not carrying out the work diligently and even after reminders the speed was not increased. Ultimately, the contractor abandoned the work and in those circumstances the Railway Administration was required to take it over for completing it departmentally. All the facts and circumstances alleged by the contractor were controverted. On the point of failure to act under Condition No. 63, the plea of the Railway Administration was that so long as the work was not completed, it was not possible to determine the amount of work that was left unfinished by the contractor and his claim till that stage was reached could not be properly determined. It was stated that the Railway Administration was always willing to take action under Condition No. 63 but was only waiting till the completion of the work. It was again reiterated before the Court that till the work was finished it was not possible to refer the matter for arbitration. In other words, the plea of the Railway Administration was that the application was premature.

5. At this stage, the contractor made an application on 17-11-1966 stating therein that inasmuch as the Railway Administration had failed to appoint an arbitrator the Court should appoint an arbitrator out of the panel of three persons submitted by the contractor. In reply, the Railway Administration raised an objection that the panel submitted by the contractor could not be accepted, as it was contrary to Condition No. 63. The Railway Administration, therefore, submitted a panel of five persons in terms of Condition No. 63. The contractor's plea was that all the five persons named in the panel submitted by the Railway Administration were the employees of the

Railway Administration and he was not, therefore, impelled to accept that panel. On his turn, he again submitted a list of two other persons, one of whom is Shri N. S. Tayabji. The lower Court overruled the objection of the Railway Administration and appointed Shri Tayabji as the arbitrator. The present revision is directed against that order.

6. In the impugned order dated 20-1-1967 the learned Judge observed that in response to the notice issued under Section 80, Civil Procedure Code, by the contractor, the Railway Administration failed to satisfy his claim or take action under Condition No. 63 within two months of the receipt of the notice. The period of two months was reasonable period, and yet the Railway Administration did not take any action. The Railway Administration has, therefore, forfeited its right of challenging the application under Section 20 of the Arbitration Act. The learned Judge further observed that the contractor is not prepared to accept any of the names out of the panel submitted by the Railway Administration, as all the persons in the panel are servants of the Railway Administration, and appointment of any of them as arbitrator would be altogether improper. The learned Judge, therefore, rejected the panel submitted by the Railway Administration. As to Shri Tayabji, the learned Judge observed that he was the Chief Engineer in the service of the Eastern Railway and as such there could not be any objection to his appointment by another Railway Administration. The learned Judge, therefore, directed the appointment of Shri Tayabji as arbitrator. In doing all this, the learned Judge appears to have acted under Section 8 of the Arbitration Act.

7. Shri Mukerjee, learned counsel for the Railway Administration, urged that in appointing Shri Tayabji as arbitrator, the lower Court acted in excess of jurisdiction. His contention is that under Section 20 of the Arbitration Act a party to the arbitration agreement can make an application for getting the arbitration agreement filed and securing a reference through the Court in terms of the arbitration agreement. The Court, before which the application under Section 20 is filed, is not free to set at naught the arbitration agreement and make a reference to an arbitrator contrary to the arbitration agreement. He, therefore, urged that the procedure prescribed under Condition No. 63 should have been followed by the lower Court. He pointed out that admittedly the claim in dispute is for more than Rs. 50,000/-. In such a case, the procedure prescribed under clause (3) of Condition No. 63 ought to have been followed. This is the reason

why the Railway Administration had submitted a panel of five persons for the contractor to make his choice in terms of clause (3) of Condition No. 63. Shri Mukerjee submitted that the contractor had no right to submit his own panel; nor had the Court any authority to reject the panel submitted by the Railway Administration and to appoint a person named by the contractor.

8. Shri Gupta, learned counsel for the contractor, on the other hand, submitted that as soon as an application under Section 20 of the Arbitration Act was entertained, other provisions of the Arbitration Act were attracted, including Section 8 thereof, and that the Court had authority to appoint any person as an arbitrator if there was no agreement between the parties as to the selection of the arbitrator. Shri Gupta, therefore, supported the action of the lower Court. He also urged that the lower Court had appointed a really competent person as the arbitrator, who is also in Railway service, though of different division, and as such there could not be any objection to his appointment as the arbitrator. He urged that in exercise of revisional powers by this Court, in the circumstances of the case, no interference is warranted.

9. Had there been an objection to the desirability of appointing Shri Tayabji as the arbitrator, I would have, without hesitation, overruled the same. The objection is to the legality of that appointment and to the jurisdiction of the Court to make the said appointment. I will have, therefore, to consider the objection on merits.

10. In the Arbitration Act provisions have been made for three eventualities, namely, (i) arbitration without the intervention of the Court; (ii) arbitration with the intervention of the Court; and (iii) arbitration in suits. Section 20 deals with arbitration with the intervention of the Court where there is no suit pending. Section 20 reads thus:—

"20. (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as

plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

Sub-section (1) of Section 20 provides that instead of proceeding under Chapter II (which contains provisions for arbitration without the intervention of the Court) any party to an arbitration agreement, when a dispute has arisen, may apply to the Court with a prayer that the agreement be filed. Sub-section (3) then provides that on receipt of the application the Court shall issue a notice calling upon the other side to show cause why the agreement should not be filed. Sub-section (4) then provides that where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. Sub-section (5) then says that after this the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of the Act, so far as they can be made applicable. From sub-section (5) it is quite clear that the stage of application of the other provisions of the Arbitration Act is reached when the reference for arbitration is made. It, therefore, follows that before a reference is made the Court is not entitled to rely on the provisions of Section 8 of the Arbitration Act, and the lower Court was in error in relying on Section 8. The purposes of Section 8 and Section 20 are altogether different. In those cases where the parties have agreed at the time of entering into a contract that any dispute arising out of it shall be settled by arbitration and where no arbitrators have been named and where the parties do not agree on the choice of the arbitrator, Section 8 comes into operation. It gives power to the Court to appoint an arbitrator; in other words, to make a choice for the contesting parties. Once the arbitrator is so appointed, the

function of the Court comes to an end. The reference is not made by the Court but it is left to the parties to make the reference to the arbitrator nominated by the Court. On the other hand, under Section 20 what the Court has to decide is as to whether the arbitration agreement should be filed before it or not. In other words, it has first to decide whether the necessary conditions for making a reference to an arbitrator are available or not, that is to say, whether any dispute between the parties has really arisen or not. When the Court comes to the conclusion that a dispute has arisen between the parties, then the Court is required to make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise. It is thus clear that the reference is to be made to the arbitrator appointed by the parties in the agreement itself or by any other method provided in the agreement. That alone can be the meaning of "or otherwise". It is only when no arbitrators have been appointed in the agreement or no procedure has been prescribed in the agreement for appointment of such arbitrators and when there is no agreement between the parties before the Court about the choice of the arbitrators that the Court gets an authority of nominating the arbitrators itself. The provisions of sub-section (4) of Section 20 must be interpreted in the manner I have done for the reason that what the parties seek from the Court is the enforcement of the agreement for referring the dispute to the arbitrator through the Court. When the agreement is being enforced, it cannot be logically said that only the agreement to refer the dispute to arbitration is to be enforced and not the other part of the agreement, namely, the arbitration by the named persons or the persons to be selected by following the previously agreed procedure. The provision under sub-section (4) empowering the Court to appoint an arbitrator of its choice can come into operation only when no arbitrators have been appointed under the agreement or no procedure has been prescribed and the parties cannot agree upon any arbitrator.

11. Even if it is assumed that the Court has a right either to refer the dispute to the arbitrators nominated by the parties or to a person of its own choice, that power cannot be allowed to be exercised arbitrarily. It is the duty of the Court to satisfy itself as to why it is not just to make a reference to the arbitrators named in the agreement or to the arbitrators to be selected by following the procedure prescribed in the agreement and whether an objection to the persons named in the agreement by any party is just. This, in my view, the lower Court has not done in this case. The observa-

tion of the lower Court that it is altogether unjust to appoint a person as an arbitrator who is in service of one of the contracting parties is unwarranted. There is nothing in law to prevent a party from agreeing to arbitration by the other party to the contract or by its nominee. Such agreements are always upheld by the Court. There was, therefore, no justification for not following the procedure prescribed under Condition No. 63 of the General Conditions when the parties had agreed to abide by it. I may also observe that the lower Court did not follow the proper procedure. On the cause being shown by the defendant, the Court ought to have first record a finding as to whether the cause shown was proper or not. On recording such a finding, the Court ought to have asked the parties to nominate the arbitrators as provided under Condition No. 63. At that stage, the Court could have taken into consideration any valid objections raised by the parties to the nomination of any of the persons from the panel. Those objections could be any other objections than the objection which found favour with the lower Court. If there was any other just and sufficient cause, then only the Court could have appointed any other person as an arbitrator and could have made a reference to him. In this view of the matter also the order of the lower Court cannot be sustained and must be set aside.

12. In *M/s D. Gobindram v. M/s Shamji K. and Co.*, AIR 1961 SC 1285 at pp. 1293-94, their Lordships of the Supreme Court observed:

"But the crux of the argument is that the provisions of sub-section (4) of S. 20 read with sub-section (1) *ibid*, cannot apply, and the Court, after filing the agreement, will have to do nothing more with it, and this shows that S. 20 is not applicable. This argument overlooks the fact that this is a statutory arbitration governed by its own rules, and that the powers and duties of the Court in sub-section (4) of S. 20 are of two distinct kinds. The first is the judicial function to consider whether the arbitration agreement should be filed in Court or not. That may involve dealing with objections to the existence and validity of the agreement itself. Once that is done, and the Court has decided that the agreement must be filed, the first part of its powers and duties is over. It is significant that an appeal under S. 39 lies only against the decision on this part of sub-section (4). Then follows a ministerial act of reference to arbitrator or arbitrators appointed by the parties. That also was perfectly possible in this case, if the parties appointed the arbitrator or arbitrators. If the parties do not agree, the Court may be required to make a deci-

sion as to who should be selected as an arbitrator, and that may be a function either judicial, or procedural, or even ministerial; but it is unnecessary to decide which it is. In the present case the parties by their agreement have placed the power of selecting an arbitrator or arbitrators (in which we include also the umpire) in the hands of the Chairman of the Board of Directors of the East India Cotton Association, Ltd., and the Court can certainly perform the ministerial act of sending the agreement to him to be dealt with by him. Once the agreement filed in Court is sent to the Chairman, the Bye-laws lay down the procedure for the Chairman and the appointed arbitrator or arbitrators to follow, and that procedure, if inconsistent with the Arbitration Act, prevails. In our opinion, there is no impediment to action being taken under S. 20(4) of the Arbitration Act."

These observations clearly indicate that the first part of sub-section (4) enjoins a judicial function on the Court of deciding the dispute as to whether the agreement should be filed or not. Once that decision is taken by the Court, the latter part consists of merely a ministerial act of referring the dispute to the arbitrators named in the agreement. In that particular case, the parties, by their agreement, had placed the power of selecting an arbitrator or arbitrators in the hands of the Chairman of the Board of Directors of the East India Cotton Association Ltd. Their Lordships did not find anything wrong in such an agreement and no argument was advanced before their Lordships against the validity of such an agreement. This case thus indirectly supports the view I have taken. This case was relied on by the learned counsel for the contractor in support of his contentions. I do not find anything in that case supporting his view.

13. The other case, relied on by the learned counsel for the contractors, is *Union of India v. D. P. Singh*, AIR 1961 Pat. 228. In that case, the power to appoint a sole arbitrator was given to one of the parties. That party made a default. The other party made an application under Section 8(1)(a) of the Arbitration Act for appointment of an arbitrator. The objection raised was that the application was not tenable. The argument was that clause (a) of Section 8(1) comes into operation where one or more arbitrators are to be appointed by consent of parties and they do not agree in such appointment. Where the arbitrator was to be appointed by one party alone, the provision of clause (a) was not attracted. That contention was repelled by the learned Single Judge by observing that in such cases it is inherent in the arbitration agreement itself that the nomination

of the arbitrator by the party, who is given the power to appoint him, shall be deemed to have been made by the consent of both the parties and hence it was not necessary to make any express provision that the appointment should be made by the consent of the parties. It was further observed in that case that under clause (2) of Section 8 the Court had discretion to make its own appointment and no duty was cast on the Court to consult the defaulting party and give him an opportunity to make an appointment even where the defaulting party has the sole power under the arbitration clause to appoint the sole arbitrator. Shri Gupta cannot derive much assistance from this case for the simple reason that the proceedings, in that case, were not initiated under Section 20 of the Arbitration Act. I have already pointed out that Section 8 and Section 20 operate under different circumstances and cannot be mixed up together. Apart from this, with due respect, I am not prepared to accept that a party in default loses its right of being consulted by the Court when an application under Section 8 is made for appointment of an arbitrator. It may be that even after consulting the party the Court may not accept the person nominated by the party for valid reasons; but the discretion of the Court cannot go to the extent of denying the right to the other party of making its submissions as to the choice of an arbitrator.

14. In *Union of India v. Gorakh Mohan*, AIR 1964 All. 477, it was held that where the contract between the Railway and the Contractor provided for the appointment of two arbitrators, one to be selected by the Railway as the contractor's nominee out of a panel of three names to be suggested by the Contractor, and the other to be appointed by the Railway, in which appointment the Contractor had no voice at all, it cannot be said that the arbitrators are to be appointed by consent of parties so as to attract the applicability of Section 8. In that case, it was also pointed out:

"The province of Section 8 and Section 20 is quite distinct. The former confers power upon the Court to appoint an arbitrator on an application under Section 8 where the parties do not concur in the appointment of an arbitrator and the latter entitles party to apply for filing the arbitration agreement in Court and empowers the Court to make an order of reference to the arbitrator appointed by the parties and, in the absence of such appointment, to the arbitrator appointed by it."

This decision clearly indicates the scope of Section 20, namely, that under that section the Court has power to refer the matter to arbitration of persons appointed by the parties and only where

such appointment is not made that the Court makes its own choice. I respectfully concur with this decision. I may also refer to the decision of the Calcutta High Court in *Union of India v. Himco (India) Private Ltd.*, AIR 1965 Cal. 404 at pp. 407, 408, wherein Bachawat J., delivering the judgment of the Court, observed:

"The arbitration agreement contains adequate and exhaustive machinery for appointment of arbitrators including substitutional appointments in case the appointed arbitrator refuses to act etc. The fact that the appointed arbitrator has not yet signified his willingness to act as arbitrator does not debar the Court from making an order of reference of the dispute to him. If he subsequently refuses to act as the arbitrator the procedure laid down in the arbitration agreement will prevail and will have to be followed: see the observation in paragraph 26 read with paragraphs 6, 7 and 23 in the judgment of the Supreme Court in AIR 1961 SC 1285".

This decision also emphasises the fact that the procedure prescribed under the agreement, which is directed to be filed in an application under Section 20 of the Arbitration Act, is required to be followed in selecting or appointing the arbitrators to whom the reference is to be made. This decision also indicates that the decision of the Supreme Court was interpreted by the Calcutta High Court in the same manner in which I have interpreted it.

15. For the abovesaid reasons, I am of the view that the lower Court was in error in appointing Shri Tayabji as the arbitrator in derogation of the procedure prescribed under Condition No. 63 for appointment of arbitrators. The revision is, therefore, allowed, the order of the lower Court is set aside and the Court is directed to refer the dispute to the arbitrators selected after following the procedure prescribed under Condition No. 63. The applicant shall get the costs of this petition. Hearing fee Rs. 200/-.

Revision allowed.

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T. C. SHRIVASTAVA AND
A. P. SEN, JJ.

Union of India, representing Northern Railway Administration, N. Delhi and another, Appellants v. *Hukumchand* and others, Respondents.

First Appeal No. 71 of 1964, D/- 20-4-1968, against decree of the Addl. Dist. J., Damoh, D/- 27-4-1964.

(A) Railways Act (1890), S. 72 (old) — Goods accepted for carriage — Nature of

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duty of the Railways — Proof of care taken by it. — Mere fact that rain water entered the wagon and caused damage, held, would not fix liability on Railways. (Contract Act (1872), Ss. 151, 152 and 161) — (Evidence Act (1872), Ss. 114, 101-104).

The responsibility of a Railway administration for the loss or destruction of goods delivered to the administration is, by virtue of S. 72 of the Railways Act, that of a bailee under Ss. 151, 152 and 161 of the Contract Act. The Railway administration is not in the position of an insurer or a common carrier. S. 152 of the Contract Act, provides that a bailee, in the absence of any special contract, is not responsible for the loss etc., of the thing bailed, if he had taken the amount of care of it described in Sec. 151, that is, as much care of the goods as a man of ordinary prudence would under similar circumstances, take of his own goods of the same quality as the goods bailed. The burden, therefore, lies upon the railway that it had taken that much care. When the goods are carried at 'railway risk', the special facts and circumstances under which the consignment was handled are only known to the Railway administration, and, therefore, it is for them to place that material before the Court for forming its opinion on the question whether it had taken as much care of the goods as is required of them. It follows that the railway administration has the duty of producing all the relevant material and their non-production may justify the raising of an adverse inference against them.

(Para 5)

Therefore, where the Railway had placed sufficient material to show that proper and requisite precautions were taken by them to provide against any damage as may result from rainfall, the mere fact that rain-water did enter into the wagon and caused damage to the consignment is itself not sufficient to infer that adequate precautions were not taken and that it was on account of the negligence on the part of the railway administration or its servants.

On the facts, it was held that the damage was caused due to natural causes by percolation of rain-water during a long journey from Bareilly to Damoh. In the absence of proof by the plaintiff that not only was the wagon was found to be defective at the arrival station but also that it was on account of the Railway servants that it was or became defective, held, they could not succeed. AIR 1957 Nag. 59 and AIR 1957 Madh. Pra. 157 and AIR 1917 P.C. 173, Foll. (Paras 5 to 7)

(B) Railways Act (1890), S. 72 (old) — Negligence — Wagon certified as 'water-tight' by visual test — Wagon found leaking after a long journey — 'Shower room'

test not performed — Absence of 'shower room' test, held, did not prove negligence — 'Visual test' was also a proper one — Word 'water tight', a mere descriptive term — It did not mean that wagon was actually water tight — (Words and Phrases — 'Water tight'). AIR 1933 Nag. 1, Foll. (Para 8)

(C) Railways Act (1890), S. 72 — Care to be taken by Railways — Goods sent by sealed wagon — Railway not bound to inspect during transit. AIR 1937 Cal. 410, Foll. (Para 8)

(D) Railways Act (1890), S. 72 (old) and Rr. 31(2) and 47 of the General Rules for Acceptance, Carriage and Delivery of Goods Rules — Damages — Railway not bound to give open delivery — Remedy of consignee stated.

A Railway administration is not bound to give open delivery on demand of the consignee, nor has the consignee any right to insist that the consignment should be inspected before he can be called upon to take delivery, nor has he a right to insist that there should be an endorsement made in the Delivery Register as regards the actual condition of the goods, nor can he refuse to take delivery, if the Railway authorities fail so to do. The remedy of the consignee is to take the delivery of the goods in the condition in which they are found after giving notice to the officer giving delivery as to their condition and then sue the railway administration for shortage or damage, if any. Further, Rr. 31(2) and 47 of the General Rules of Acceptance, Carriage and Delivery of Goods confirm the above. AIR 1931 Nag. 29 & AIR 1948 Nag. 65 & AIR 1959 Madh. Pra. 276 & AIR 1966 Madh. Pra. 52, Foll. (Paras 9 and 10)

(E) Railways Act (1890), Ss. 72 and 56 — Damages — Railway cannot insist on party's accepting its assessment of damage — Non-delivery for non-acceptance of Railway's terms, held, amounted to misconduct — Goods, not unclaimed property.

The Railway authorities insisted that the consignee should unconditionally accept their assessment of damage and take delivery of the goods. The party felt that if they should accept and take delivery of the goods they would be prevented from claiming any further sum for the loss suffered by them and therefore they did not take delivery of the goods.

Held, that the Railway could not insist on such an acceptance by the party and its non-delivery under the circumstances amounted to misconduct. (Para 14)

Held further, that the Railway could not treat the goods as unclaimed and sell it, especially when the consignee (as in this case) had paid the freight charges. (Para 14)

(F) Railways Act (1890), Ss. 55 and 56 — Railway's right to sell goods con-

signed — Prior demand for payment of a fixed sum necessary.

The right of the Railway administration to sell the goods consigned under S. 55(1) of the Railways Act on account of failure to pay demurrage, wharfage or other charges due to the Railways, does not arise in the absence of a demand for payment of a fixed sum. Therefore, notices by railway to the effect that if they did not hear anything in the matter of taking delivery of the goods consigned to the party, the notices should be treated as those issued under Ss. 55 and 56 of the Act, is not sufficient compliance with the provisions and the sale of goods by a Railway under those circumstances is invalid. There should also be publication of the proposed sale in local newspapers as required under S. 55(2). AIR 1927 All. 220 & AIR 1938 P.C. 12 & AIR 1958 Mad. 321, Foll. (Paras 14 & 15)

Cases Referred: Chronological Paras
(1966) AIR 1966 Madh. Pra. 52 (V 53)

=1965 Jab. L. J. 1001, Union of India v. Ibrahim Gulaba Tobacco Merchant

(1959) AIR 1959 Madh. Pra. 276 (V 46)=1959 M.P. L.J. 701, Managing Agents (Martin & Co.) v. Seth Devakinandan

(1958) AIR 1958 Mad. 321 (V 45)=ILR (1958) Mad. 342, G. P. Venkataraman & Co. v. Union of India

(1957) AIR 1957 Madh. Pra. 157 (V 44)=1957 M.P. L.J. 153, Natwar Lal v. Union of India

(1957) AIR 1957 Nag. 59 (V 44)=1956 Nag. L. J. 337, Asaram v. Union of India

(1948) AIR 1948 Nag. 65 (V 35)=ILR (1947) Nag. 335, Jusuf & Ismail Co. v. Governor General in Council

(1938) AIR 1938 P.C. 12 (V 25)=65 Ind. App. 21, Secy. of State v. Sunderji Shivji and Co.

(1937) AIR 1937 Cal. 410 (V 24), Bengal Nagpur Railway Co. v. M/s. Haji Lauj Abdulla

(1933) AIR 1933 Nag. 1 (V 20)=144 I. C. 204, Secretary of India v. Seth Laxmi Narain

(1931) AIR 1931 Nag. 29 (V 18)=27 Nag. L. R. 230, G.I.P. Railway Co. v. Firm of Manekchand Premji

(1927) AIR 1927 All. 220 (V 14)=ILR 49 All. 300, Bengal and North-Western Railway v. Matru Ram

(1917) AIR 1917 P.C. 173 (V 4)=20 Bom. L. R. 735, Dwarkanath v. R. S. N. Co. Ltd.

K. V. Tambey and P. R. Padhye, for Appellants; H. S. Verma and J. L. Verma, for Respondents.

A. P. SEN, J.:— This appeal, filed by the Union of India, as representing

Northern and Central Railways, is directed against a decree of the Additional District Judge, Damoh, dated 27th April 1964, decreeing the plaintiffs' claim for damages due to non-delivery of goods occasioned by their alleged negligence and/or misconduct.

2. The relevant facts are these. M/s. H. R. Sugar Factory Ltd., Bareilly consigned 182 bags of crystal sugar Ex-Bareilly, on the Northern Railway, on 13th June 1955, for their carriage to Damoh, on the Central Railway, under R/R No. 355490, at Railway risk. The goods were consigned to self, and the railway receipt endorsed to the plaintiffs, being their purchasers for value. The consignment reached its destination on 28th June 1955, and was unloaded the same day, by the unloading Foreman in the presence of one of the plaintiffs. They found that some of bags were damaged by rain. Their immediate reactions were different. The plaintiffs, through their representative Gajraisingh, served a notice on Station Master, Damoh, making a demand for open delivery after assessment alleging that all the bags of sugar were damaged by wet, while the Unloading Foreman in his Damage and Deficiency message stated that some of the bags were damaged. In consequence, the Assistant District Commercial Inspector, Sagar, as per Assessment Memo dated 10th July 1955, assessed the damages at Rs. 244.37 P. but the plaintiffs signified their non-acceptance of assessment and unwillingness to accept any delivery unless they were allowed to enter in the Delivery Register that all goods were drenched wet. The Assistant District Commercial Inspector, Sagar, then sent a letter dated 11th July 1955 asking the plaintiffs to take delivery within 3 days failing which the consignment was to be treated as lying at their risk subject to payment of wharfage. The plaintiffs did not favourably react to this. The District Commercial Superintendent reached Damoh a few days later, and after inspection of the goods, offered Rs. 450/- as damages to the plaintiffs but they did not accept this offer and, instead, served notices under Section 77 of the Railways Act, read with Section 80 of the Civil Procedure Code. The District Commercial Superintendent, made a re-assessment of damages at Rs. 655.50 P., as per Assessment Memo, dated 23rd September 1955. The plaintiffs, however, refused to accept this assessment, saying that all the bags were damaged by wet and that their loss was to the extent of Rs. 2000/- and made endorsements to that effect both in the original assessment memo and also on the copy delivered to them.

The Divisional Commercial Superintendent sent them notice dated 26th Septem-

ber 1955 asking the plaintiffs to effect delivery within 15 days on reasonable assessment, and failure of which, they should treat it as a notice under Sections 55 and 56 of the Railways Act. It also stated that the railways would not permit making of an entry in the Delivery Register by the plaintiffs indicating the extent of their loss. In response to this, the plaintiffs by their reply dated 20th October 1955, made a grievance that the Railway station authorities, at Damoh, were not allowing the making of an endorsement in the Delivery Register and unless this was allowed, they would be unwilling to take delivery.

As a result, the Claims Inspector of the Central Railways, Bombay, came down to Damoh, for the sole purpose of effecting a settlement. Samples of both goods and damaged stuff were taken from the consignment lying in the Goods shed, Damoh, and shown to local merchants. It was found that good stuff would sell Rs. 30/- and damage stuff Rs. 20/- per Bengali maund. He accordingly made an offer of Rs. 1500/- as damages in full and final settlement of the claim but this offer was unreasonably turned down and his attempt to effect a settlement proved to be abortive. The plaintiffs, instead, remitted railway freight amounting to Rs. 777.78 P., to the General Manager, Central Railways, Bombay, by a bank draft, but the same was returned on the ground that it should have been made to the order of the Chief Cashier, Central Railway, Bombay, or paid to the Station Master, Damoh. After a further correspondence, the goods were ultimately despatched to the Unclaimed Goods Office, Wadi Bunder, for sale by auction, and they were eventually sold for Rs. 12,300/- on 20th March 1956.

The plaintiffs then served notices under Section 77 of the Railways Act, read with Section 80 of the Civil Procedure Code, on 24th and 26th April 1956, but their claim went unsettled. The Superintendent of Claims, Central Railway, by a notice of demand dated 1st June 1956, asked them to pay Rs. 14,497/- as freight and wharfage charges. On these facts, the plaintiffs claimed Rs. 19,000/- as damages for non-delivery of the goods, which comprised of these items, namely price, loss of profits at 20%, interest and other charges. The Northern & Central Railways filed a joint written statement disputing the claim. The Railways alleged that the plaintiffs themselves were responsible for non-delivery of the goods as they were unreasonably insisting on their right to make an entry in the Delivery Register as regards their actual loss. They asserted that the plaintiffs should have withdrawn their claim to take open delivery, and instead, taken delivery without assessment after paying the

freight due. The Railways claimed that the non-delivery was the result of plaintiffs' own wrongful conduct and they were, therefore, not entitled to claim any damages. As regards the proceeds of the sale of the unclaimed goods, it was asserted that Rs. 14,497/- were due to the Railways on account of (i) freight, from Bareilly to Damoh, Rs. 777.87 P., (ii) wharfage charges, Rs. 12,627.50 P., and freight, from Damoh to Wadi Bunder, Rs. 1,091.62 P., and after adjustment of these items, nothing was due and payable to the plaintiffs.

3. This Court had remanded the suit for a retrial after framing certain additional issues, in First Appeal No. 88 of 1958, dated 22nd September 1961. The findings now reached by the trial Court are these. (i) damage to the consignment was due to leakage of rain-water into the wagon during its transit from Bareilly, (ii) although the wagon in which the goods were loaded by the Northern Railway was certified to be "W.T.W.", it was, in fact, a leaking and not water-tight wagon, and there were openings in its roof through which water had leaked, (iii) that in certifying a defective wagon as water-tight, that railway administration was guilty of negligence and/or misconduct, (iv) its negligence lay in testing the wagon by a visual test and not in a shower room, (v) the plaintiffs were not justified in insisting upon their right to an open delivery after assessment of proper damages and in making an entry in the Delivery Register as regards the actual condition of the goods, (vi) the Central Railway was also not right in imposing a condition that delivery should be taken on acceptance of assessment as made by its servants, and, therefore, the non-delivery was due to its misconduct, (vii) the sale of the goods as unclaimed goods by auction, at Wadi Bunder, was in violation of the requirements of Sections 55 and 56 of the Railways Act and, therefore, invalid, (viii) no wharfage of Rs. 12,629.50 P. was payable due to want of a notice of demand nor was Rs. 1,091.62 P. payable as freight from Damoh to Wadi Bunder; (ix) plaintiffs were, however, liable to pay Rs. 777.87 P., on account of freight from Bareilly to Damoh. As a result of these findings the trial Court has decreed the plaintiffs' claim for Rs. 16,029.50 P., inclusive of profits at 12% on the total outlay as reasonable damages.

4. At the very outset, the learned counsel appearing on behalf of the Union of India, rightly tried to confine the appeal to a consideration of the question, whether the non-delivery of the goods was the result of the plaintiffs' own wrongful conduct, or, was it due to the railways' arbitrarily imposing condi-

tions on taking of delivery. That really is the only question that arises in the suit itself. It is a suit for damages for non-delivery resulting from alleged refusal by the railways to give delivery except on terms imposed by them. The cause of action alleged in the notices under Section 80 of the Civil Procedure Code, is also of that nature. The rest of the facts stated are only statements of fact leading to the claim. Nevertheless, we think it necessary and desirable to deal with all aspects of the claim, as reflected in the issues framed, in view of the directions contained in this Court's judgment in First Appeal No. 88 of 1958, dated 22nd September 1961, remanding the suit for retrial on certain additional issues.

5. The first question for consideration is, whether the damage to the consignment was due to the negligence of the Northern Railway administration in loading the goods in a defective wagon at the starting station, or, was it due to circumstances beyond their control. The responsibility of a Railway administration for the loss or destruction of goods delivered to the administration is, by virtue of Section 72 of the Railways Act, that of a bailee under Sections 151, 152 and 161 of the Contract Act. The Railway administration is not in the position of an insurer or a common carrier. Section 152 of the Contract Act, provides that a bailee, in the absence of any special contract, is not responsible for the loss etc., of the thing bailed, if had taken the amount of care of it described in S. 151, that is, as much care of the goods as a man of ordinary prudence would under similar circumstances, take of his own goods of the same quality as the goods bailed. The burden, therefore, lies upon the railway that it had taken that much care. When the goods are carried at 'railway risk', the special facts and circumstances under which the consignment was handled are only known to the Railway administration, and, therefore, it is for them to place that material before the Court for forming its opinion on the question whether it had taken as much care of the goods as is required of them. (See, *Asharam v. Union of India*, AIR 1957 Nag. 59). It follows that the railway administration has the duty of producing all the relevant material and their non-production may justify the raising of an adverse inference against them.

6. The learned Judge is not right in observing that the fact that rain-water did enter into the wagon and caused damage to the consignment was itself sufficient to infer that adequate precautions were not taken. There is, however, no justification for drawing any such inference in this case because the railways have placed sufficient material

showing that proper and requisite precautions were taken by them to provide against any such contingencies. The damage to the goods was not attributable to any negligence on the part of the railway administration or its servants, but it was caused due to natural causes by percolation of rain-water during a long journey from Bareilly to Damoh.

In like circumstances, this Court in *Natwarlal v. Union of India*, 1957 M.P. L.J. 153=(AIR 1957 M.P. 157), held that no liability can be fastened on the railway administration merely on account of damage due to water percolating during rains in a long journey stating:

"They were, therefore, bound to take only the amount of care which has been enjoined on a bailee under Section 151 of the Indian Contract Act, 1872. As has been held in *Dwarkanath v. R. S. N. Co., Ltd.*, AIR 1917 P.C. 173, the burden of proving negligence on the part of the servants of the carrier is on the plaintiff. There is no proof of any such negligence on their part. In the absence of evidence of want of due diligence, the mere fact that great damage was done to the goods cannot raise an inference of negligence, when it could be caused in the long course of the journey on account of natural forces."

7. The Railway administration having discharged the burden of showing that it had taken as much care of the goods as was required of them, it became necessary for the plaintiffs to have established that not only that the wagon was found defective at the arrival station, but also that it was on account of negligence of the servants of the Northern Railway administration that it was or became defective. But this they have not proved. They have examined the consignor's representative, Har Govind, (P.W. 15), but he does not say that the wagon was not in a good condition. On the other hand, the evidence on the side of the defendant, of R. D. Saxena, Goods Clerk, Bareilly, (D.W. 5), is that the loading of the goods into the wagon was done by the consignor at its factory-siding, and there was no protest that a defective wagon had been supplied. He further states that one Jageshwari Prasad, the consignor's agent was present and the wagon after a thorough check-up in his presence, was certified to be "water-tight". The Forwarding note, Ex. D-5, executed by Jageshwari Prasad, on behalf of the consignor and the Goods Clerk, R. D. Saxena contains an entry to the following effect:—

"Wagon jointly examined and found water-tight by visual test." This evidence does not seem to have been challenged or contradicted on behalf of the plaintiffs. It is, therefore, clear that

there is evidence that the wagon was in a good condition when it left Bareilly, but it was found in a leaky state when it arrived at Damoh. The defect in the wagon that was discovered at Damoh might be due to causes other than negligence of the railway company. Unless the plaintiffs succeed in definitely establishing that the injury to their goods was due to want of care of the railway servants and that the cause of such injury was their negligence and nothing else, they are not entitled to succeed on mere surmise.

8. The trial Court has held the Northern Railway administration liable for its alleged negligence and/or misconduct, in certifying a defective wagon to be water-tight. It was of the view that negligence lay in employing a "visual test" when the wagon should really have been taken to a "shower-room", stating:

"It is so very surprising that the learned counsel for the defendants vehemently argued that this was the only test possible and that no other test was available throughout the Railways in India. It is conceivable, if this statement of the learned counsel for the defendants is true, that the Railway Administration does not have "shower" rooms for testing the wagons. If it is so, it is high time that this glaring deficiency is removed."

We find no warrant for the view that the "visual test" was not a proper test, and there appears no basis for holding that the railway administration to be negligent in not testing the wagon in a "shower-room". The term "water-tight" is used as descriptive of a type of wagon and it is not to be understood as a guarantee that it is actually water-tight, although it is supposed to be so. (See, *Secretary of India v. Laxmi Narain*, AIR 1933 Nag. 1). The learned Judge assumes that the goods were loaded in a leaky wagon. As we have pointed out, there is no evidence in support of this finding. If, there is any evidence upon this point it is just the other way. The goods were sent in the midst of rainy-season, and they took nearly 15 days to arrive at their destination. It is possible that the wagon got damaged on the way by the elements or by some other cause not referable to the negligence of the railway servants. When the wagon was a sealed wagon it was no part of their duty to cause inspection of the goods during transit (see, *Bengal Nagpur Railway Co. v. M/s Haji Lauj Abdulla*, AIR 1937 Cal. 410). Nor is the learned Judge right in suggesting that their liability arises by reason of their failure to paint the words, "W.T.W." outside the wagon because the painting of these letters would not have prevented the rain-water from percolating into the wagon through crevices. We, accordingly,

hold that the alleged damage to the goods was not attributable to any negligence and/or misconduct on the part of the Northern Railway administration, or its servants but the damage was due to natural causes by percolation of rain-water during the long journey from Bareilly to Damoh.

9. The next question is, whether the non-delivery of the goods was the result of the plaintiffs' own wrongful conduct. The law is clear on the subject. This Court has repeatedly stated that a railway administration is not bound to give open delivery on demand of the consignee, nor has the consignee any right to insist that the consignment should be inspected before he can be called upon to take delivery, nor has he a right to insist that there should be an endorsement made in the Delivery Register as regards the actual condition of the goods, nor can he refuse to take delivery, if the railway authorities fail so to do. The remedy of the consignee, is to take the delivery of the goods in the condition in which they are found after giving notice to the officer giving delivery as to their condition and then sue the railway administration for shortage or damage, if any. (See, *G.I.P. Railway Co. v. Firm of Manekchand Premji*, 27 Nag. L. R. 230 = (AIR 1931 Nag. 29); *Jusuf & Ismail Co. v. Governor General-in-Council*, ILR (1947) Nag. 335 = (AIR 1948 Nag. 65); *Managing Agents (Martin and Co.) v. Seth Deokinandan*, AIR 1959 Madh. Pra. 276; and *Union of India v. M/s Ibrahim Gulaba Tobacco Merchant*, AIR 1966 Madh. Pra. 52).

10. The next question for consideration is, whether the non-delivery of the goods was as a result of the plaintiffs' refusal to take delivery, or, was it due to the unwillingness of the defendants to give delivery without attaching any specific condition. We have already indicated that a consignee of the goods is not entitled, as of a right, to claim open delivery. The trial Court has held that while that plaintiffs were justified in informing the authorities about the damaged condition of the goods and asking for an assessment, they certainly were not justified in refusing to take delivery of the damaged goods on the pretext that they were not allowed to make an entry in the Railway Register of their own assessment. Apart from the authorities cited, that conclusion is irresistible from the terms of Rule 31(2) and Rule 47 of the General Rules for Acceptance, Carriage & Delivery of Goods. Under Rule 31(2), a consignee is bound to take delivery within the time indicated therein, under normal circumstances, i.e., within reasonable time. The reasonable time may vary in individual and special cases. Normally, as per the rule, the reasonable time with-

in which delivery should be taken, would be the free time allowed for demurrage and wharfage on railways. Rule 47 provides that the consignee is bound to take delivery of the entire consignment even though part of it is found damaged.

11. The trial Court then proceeds to fix the responsibility for non-delivery of the defendants, stating that they had forgotten to offer an "unencumbered" or rather "unconditional" delivery to the plaintiffs, in terms of Paras 161-I and 161-II of the Rules relating to Reporting of Damages, Deficiencies, or loss of Goods. It was of the view that the "advent of the Claims Department in the picture" created a new problem and this problem was created more by carelessness than by malice or forethought, by their offering delivery on certain conditions. Since such conditions offered, namely, their agreeing in writing to the assessment was not acceptable, the plaintiffs could not take delivery. With regard to the correspondence that passed on the subject, it has observed:

"The trend of the correspondence clearly reveals that it was only after the plaintiffs agreed to the assessment of the railway authorities, that the delivery would be effected, or, rather the arrangement would be made to effect the delivery. It is thus, clear that the defendants were never willing to give delivery, or offer delivery of the goods to the plaintiffs, without specific conditions."

It then proceeds to consider Exs. P-23, 24 and 25 relied upon by the railway for showing that they were always ready to give delivery but the plaintiffs were adamant and had defaulted. After consideration of this material, the Court holds that these letters do not constitute an unconditional offer to give delivery but were meant to make the giving of delivery conditional upon the plaintiffs entering in the Delivery register that the assessment has been accepted by them. Eventually, the Court reached the conclusion that the defendants were never willing to give delivery unless and until the plaintiffs agreed to accept their assessment of the damages. In that view, the plaintiffs were held to have been justified in refusing the delivery since they did not agree with the assessment made by the authorities. It also held that the defendants could not treat the goods as unclaimed property and take it to Wadi Bunder for sale, and, therefore, could not claim any wharfage or freight from Damoh to Wadi Bunder from the plaintiffs.

12. The learned counsel for the appellant, challenges the finding on the ground that it proceeds on a mis-reading of these documents out of their context. It is urged that these letters were written

in response to the plaintiffs' letters and unless they were read in that sequence, the real import of these 3 documents, Exs. P-23, P-25 and P-26, cannot be appreciated. We have already referred to the sequence of events, with advertence to the correspondence, at the beginning of this judgment and it is needless for us to set them out again in detail. Suffice it to say, that even though Exs. P-23, P-25 and P-26 were in response to the plaintiffs' letters, these documents clearly betray the mind of the railway authorities that they were not prepared to give delivery except on their terms. The construction placed by the learned Judge on the terms of these letters is clearly borne out by the language employed.

13. When the plaintiffs were compelling the railway administration to grant them open delivery after a proper assessment of damages on their being permitted to make an entry in the Delivery Register as regards the actual condition of the goods, they were insisting on some thing to which they were not, in law, entitled. This action of the plaintiffs was not justified because there is no provision in law or rule which alleges the Railway administration to make, or allow to be made in its Delivery register any entry of this kind alleging that the goods consigned are received in damaged condition. When the plaintiffs found that the railway administration was not willing to accept their terms, their only alternative was to withdraw their claim to take open delivery, and instead, to have taken delivery without any assessment of damages after payment of freight under Rule 58 of the General Rules.

14. Nevertheless, Central Railway administration was not, thereby, exonerated of its liability. It was equally unreasonable in detaining the goods and refusing to give delivery to the plaintiffs except on its terms, i.e., on unconditional acceptance of the assessment. That was not a forthright attitude to be adopted by the railway administration. By its insistence on the terms imposed, the railway administration deliberately misled the plaintiffs into thinking that there was no other manner of taking delivery except on the terms suggested. It should have, when it found that the plaintiffs were being unreasonable in their attitude, asked them to take delivery without any assessment of damages on payment of freight. For these reasons, we uphold the finding reached by the trial Court that the non-delivery was due to the misconduct of the Central Railway administration in refusing to give delivery except on the terms arbitrarily imposed by them. In these circumstances, the finding that the defendants could not treat the goods as unclaimed property and take it to Wadi

Bunder for sale, must also be affirmed. It necessarily follows that they cannot claim wharfage or freight from Damoh to Wadi Bunder from the plaintiffs.

15. Even otherwise, the question then is, whether the Central Railway administration can disclaim all liability by falling back on their powers under Sections 55 and 56 of the Railways Act. It is well settled that the right to sell under Section 55(1) on account of the failure to pay demurrage, wharfage or other charges, due to the railways, does not arise in the absence of a demand for payment of a fixed sum. (See, *Bengal and North-Western Railway v. Matru Ram*, AIR 1927 All. 220). Now, the Assistant District Commercial Inspector's letter, Ex. P-23, dated 11th July 1955, the District Commercial Superintendent's letter, Ex. P-25, dated 26th September 1966, and the Superintendent of Claims' letter, Ex. P-26, dated 21st November 1955, merely stated that full wharfage would be chargeable if they did not hear within 3 days anything in the matter, or, that these letters should be treated notices under Sections 55 and 56 of the Railways Act, and that if there was a failure to effect delivery within 15 days, the consignment was to be disposed of under the provisions of those sections. Nowhere had the Central Railway administration claimed any specific ascertained sum by way of wharfage charges, and without serving any notice of demand for payment of a specific sum, the Central Railways appear to have transferred the goods from Damoh to their Unclaimed Goods Office at Wadi Bunder, despite protests of the plaintiffs and without reference to them, and eventually sold them by public auction for Rs. 12,300/- on 20th March 1956. The plaintiffs were first intimated of this fact after the sale, by the Superintendent of Claims' letter, Ex. P-27, dated 31st May 1956, in response to their notice under Section 50 of the Civil Procedure Code claiming Rs. 1900/- as damages for non-delivery of the consignment.

The sale could not be for recovery for unpaid freight because the plaintiffs had already tendered Rs. 777.87 P., by their Bank draft dated 31st October 1955. At any rate, there was no failure on their part to pay the freight on demand made. As regards the wharfage charges, the right to sell would not arise merely because wharfage became payable, but there had to be an actual demand for payment of a definite amount by way of wharfage. The sale was, therefore, not in terms of Section 55.

16. In 27 Nag. L. R. 230=(AIR 1931 Nag. 29) (supra) *Staples, A. J. C.*, after stating that a consignee has no right to make any remarks in the Railway Com-

pany's delivery books, held that if he refuses to take delivery, "he cannot sue the railway company for wrongful conversion of the goods if the Company sells the goods after giving notice under Section 55 of the Railways Act." The portion extracted clearly implies that the giving of a notice of sale to the consignee is mandatory.

In *Secretary of State v. Sunderji Shivji and Co.*, AIR 1938 P.C. 12, their Lordships of the Privy Council stated:—

"A notice under Sections 55 and 56 of an intention to sell at a public auction cannot be sufficient effective unless it specifies time of public auction and, the nature of goods intended to be sold and all other particulars necessary to enable the members of public to appreciate which is intended to be put for sale at the public auction".

Admittedly, the alleged auction sale at Wadi Bunder on 20th March 1956, had been held without notice as required by Section 56(1), and, without publication in local newspapers as enjoined by Section 55(2).

We must, accordingly, hold that the alleged sale was not valid, and the Central Railways cannot rely on the protection given by the Act. In that view, the sale being contrary to the provisions of statute, was without legal authority and wrongful and the Central Railway administration is, therefore, guilty of conversion. (See, *G. P. Venkataraman and Co. v. Union of India*, AIR 1958 Mad. 321). The measure of damages for conversion would be the value of the goods as received at Damoh in a damaged condition.

17. Thus the plaintiffs are entitled to recover the bijak price Rs. 14,208.69 P. of bags of crystal sugar purchased by them from M/s N. R. Sugar Factory, Bareilly, less Rs. 1980.50 P., representing the extent of damage to the goods suffered during transit as found by the trial Court which must fall on them, according to the finding reached by us, and less freight Rs. 778.81 P., from Bareilly to Damoh which, in any event, is payable by them under the contract of carriage. Besides, they are also entitled to recover Rs. 26.81 P., and Rs. 28.44 P., paid towards both commission and interest. Their claim for Rs. 3059.44 P., as profits at 20% of the total outlay is, however, disallowed because they were equally responsible for this unfortunate trend of events and for this reason also they must be disallowed their costs throughout. They are further not entitled to reimbursement of any Octroi duty or cartage or labour charges because none was incurred nor any notice and other charges. The resultant nett claim works out like this:—

| | |
|----------------------------|--------------------------|
| "Bijak price | Rs. 14,208.69 |
| Bank Commission | 26.81 |
| Bank interest | 28.44 = Rs. 14,263.94 P. |
| Less (i) Extent of damage. | 1,980.50 |
| (ii) Freight. | 777.81 = Rs. 2,758.31 P. |
| Nett claim | Rs. 11,505.63 P. |

18. The result is that the appeal partly succeeds and is allowed. The decree of the trial Court is modified, by decreeing a nett claim of the plaintiffs to the extent of Rs. 11,505.63 P., as worked out in the foregoing paragraph, but their cross-objection is disallowed. The costs shall be borne by the parties themselves as incurred.

Appeal partly allowed.
Cross-objections dismissed.

AIR 1970 MADHYA PRADESH 63
(V 57 C 16)

SHIV DAYAL AND R. J. BHAVE, JJ.

Nowrozabad Colliery Mazdoor Sangh, Petitioner v. F. Jeejeebhoy and another. Respondents.

Misc. Petn. No. 445 of 1966, D/- 17-2-1969.

(A) Constitution of India, Art. 226 — Industrial Disputes Act (1947), Ss. 10-A and 10 — Arbitrator under S. 10-A — He is 'person' within Art. 226 — Writ can be issued against him.

An arbitrator appointed under S. 10-A of the Industrial Disputes Act is a 'person' within the meaning of Art. 226 of the Constitution and is therefore amenable to the writ jurisdiction of the High Court and a certiorari will issue to quash his award on well settled principles; for instance, where he acts without jurisdiction or in excess of jurisdiction, or where there is an error apparent on the face of the record, or there is violation of the principles of natural justice.

(Para 14)

The Constitution gives wide powers to the High Court to issue directions, orders or writs to any person or authority, and is not conditioned or limited by the requirement that writs can be issued only against orders of Courts or Tribunals. Thus, although an arbitrator appointed under Section 10-A is neither a Tribunal nor is he a statutory arbitrator within the definition given by Lord Goddard, C. J. in 1953-1 All. E. R. 327, yet having regard

to the statutory provisions an arbitration under Section 10-A of the Act has all the attributes of a statutory arbitration under Section 10. The appointment of an arbitrator under Section 10-A depends on a mutual agreement of the parties and the choice of the arbitrator is also entirely theirs, but the rest is regulated by the Act and the statutory rules. The proceedings before him are quasi-judicial in nature. He has to function within the limits of his powers as defined by the Act and the statutory rules. Therefore, he is a statutory arbitrator in this sense.

AIR 1963 Ker. 324, Foll. (Paras 12, 14)

(B) Industrial Disputes Act (1947), Ss. 10-A and 10 — Reference under S. 10 to Tribunal — Reference withdrawn by consent of parties — Withdrawal of reference held tantamount to its having not made at all — Arbitration under S. 10-A thereafter is not illegal — Party taking part in proceedings without objecting to jurisdiction of arbitrator — Party is estopped from taking plea that the Arbitrator had no jurisdiction to make an award — (Evidence Act (1872), S. 115) — (Constitution of India, Art. 226).

(Para 16)

(C) Industrial Disputes Act (1947), Ss. 10-A and 10 — Reference under S. 10 — Parties can withdraw reference, and refer dispute to arbitration under S. 10-A.

When a reference is made to a Tribunal under S. 10 of the Act, the Tribunal is not bound to decide it on merit and it has jurisdiction to allow the parties to withdraw the reference.

(Para 17)

If the Tribunal can act on a compromise, there is nothing in the Act to exclude the particular kind of compromise under which the parties amicably decide upon the machinery and the arbitrator of their own choice for resolving their differences, and seek the sanction of the Tribunal for the withdrawal on such a basis. No doubt, the Tribunal must be satisfied before such a joint request is accepted that there is nothing unfair, improper or unjust. AIR 1960 Ker 31, Foll.

(Para 17)

Cases Referred: Chronological Paras (1969) AIR 1969 Madh. Pra. 200

(V 56)=1969 M.P. L. J. 33, Sital

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 (1969) 1969 Lab. I. C. 725=1968 M. P. W. R. 733, K. P. Singh v. S. K. Gokhale
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 (1924) 1924-1 K. B. 171=93 L. J. K. B. 390, Rex v. Electricity Commr. 12
 (1925) 1925-1 K. B. 641=94 L. J. K. B. 433, R. v. Powell 9
 S. K. Pachori, for Petitioner; R. S. Dabir and I. M. Nanawati, for Respondents.

SHIV DAYAL, J.:— This is a petition under Articles 226 and 227 of the Constitution for a writ of certiorari to quash and set aside the award made under Section 10-A of the Industrial Disputes Act (hereinafter called the "Act") by Shri F. Jeejeebhoy, the sole arbitrator (respondent No. 1), which award was published in the Gazette of India, Part II, Section 3(ii) dated June 11, 1966.

2. The petitioner, Nowrozabad Colliery Mazdoor Sangh is a Trade Union, registered under the Trade Unions Act. Respondent No. 2, the Associated Cement

Co. Ltd., Nowrozabad Colliery, (hereinafter called the 'Company'), is a company incorporated under the Companies Act. The Company installed a coal washing plant (shortly called the "washery") for the purpose of washing coal raised from its Nowrozabad and Kotma Collieries and commissioned the same some time in August, 1960.

3. It appears that a notice dated March 12, 1963, was published by the Company to the effect that the washery would run without the assistance of 18 workmen named therein (Ishwardas and 9 others, who are concerned with this petition, and Ramadhar and 7 others, who are concerned with M.P. No. 588 of 1966, which is being decided simultaneously). On May 6, 1963, all the 18 workmen filed a complaint under Section 33-A (complaint No. 9/1963) before the Central Government Industrial Tribunal, Bombay, (hereinafter referred to, for the sake of brevity, as CGIT, Bombay). On September 30, 1963, Ishwardas and 9 others (who will hereinafter be called "workmen") were discharged. On October 9, 1963, the workmen filed a complaint under Section 33-A of the Act before the CGIT, Bombay.

4. On January 18, 1965, a joint application was filed before the CGIT, Bombay, for withdrawing various references and complaints, which were pending before it, with a view to refer the disputes to arbitration of Shri Jeejeebhoy, Ex-president, Labour Appellate Tribunal of India, Bombay, under Section 10-A of the Act. On January 27, 1965, the CGIT, Bombay, made an "award" disposing of these disputes pending before it "as withdrawn in terms recorded in the annexure hereto, which shall form part of this award". This "award" was published by the Central Government in the Gazette of India, Part II, Section 3(ii) dated February 13, 1965. On January 28, 1965, an agreement was entered into between the parties to refer to the arbitration of the said Shri F. Jeejeebhoy, under Section 10-A of the Act, their dispute whether the complaints were maintainable.

5. On June 2, 1965, an arrangement was arrived at between the parties that in case the references are rejected on the preliminary contention that the complaints under Section 33-A are not maintainable, the company would be forthwith entitled to execute ejectment decrees. But, if the parties agree that the arbitrator should also decide the merits of the disputes even if the complaints are not maintainable, the agreement not to execute ejectment decrees would continue until an award on merits of the dispute is given by the arbitrator and published by the Government. On November 3, 1965, an application was made to the arbitra-

the recovery of its person from strangers into whose custody she has delivered it, and if her choice of a home would be beneficial to the interests of the child, the Court will order it to be delivered up in order that it may go to such new home; but this right of the mother is not absolute".

In my opinion, even this statement does not support the case of the petitioner that it is the settled principle of English law that in the case of an illegitimate child, it is the mother who is the natural guardian.

10. On the other hand, Trevelyan's *The Law relating to Minors*, 5th Edn. states at pages 60-61:

"Neither the father nor the mother has any absolute legal right to the custody of their illegitimate child. The Court would, however, in the interests of the child ordinarily prefer the mother, at any rate during the period of nurture, and will primarily consider her wishes as to the custody of the child; but it must in each case be guided by a consideration of what is best in the interests of the child. After the mother, the Court will prefer the putative father to the mother's relatives".

The statement of law, as contained in Simpson's *"A Treatise on the Law and Practice relating to Infants"* 4th Edn. at page 100, is :—

"In the eye of the law an illegitimate child is *filius nullius*, and consequently has no legal guardians, not even the mother or the putative father. The mother's legal rights as to its custody are not the same as those of the father of a legitimate child; but though the mother may have had no legal right to the possession of the child, yet if it was within the age of nurture, and the putative father took it out of the mother's possession, by force or fraud, even a Court of law on habeas corpus directed it to be delivered to her; and the Court will prefer the mother to the father; but there is no case deciding that, if the father had the custody fairly the Court would deprive him of it. While the child is within the age of nurture, it seems doubtful whether the father has any right to take it from the custody of any one with whom it may be. The mother has a natural right to its custody, which will be regarded by the Court, and after her death, the putative father will be preferred to her relatives".

The law in respect of the relationship between an illegitimate child and its putative father on the one hand and its mother on the other has been stated in Halsbury's *Laws of England*, 3rd Edn., Vol. 3, at page 108, as follows:—

"The father of an illegitimate child so long as the child remains illegitimate is not generally recognised by the law of England for civil purposes. He is under no obligation to provide for the child in the absence of any affiliation order, unless he has adopted

it *de facto* or obtained an adoption order. But he may make a binding contract with the mother to contribute towards its maintenance; this is terminated by the death of the mother." At page 109, it is stated:—

"Unless he has obtained an adoption order the father has no right to the custody of the child, even though he is in a better position to maintain it, and he cannot appoint a guardian for it by will. Whenever he is in lawful custody of the child the Court will protect his right."

At pages 106-107 it is stated as follows:—

"A mother is bound to maintain her illegitimate child until the child attains the age of sixteen. If the child is committed to the care of a fit person or sent to an approved school (as, for example, where the child is in need of care or protection or is a juvenile offender) or if the child is received into the care of a local authority, the mother is liable to make contributions towards the upkeep of the child until the child attains the age of sixteen. The mother's obligation to maintain involves a right to the child's custody, which the Court will protect by habeas corpus and in determining any question as to custody the Court will have primary regard to the wishes of the mother even as against the father. She has also the right to determine the religion of her child, so long as her duty to support the child remains; and her consent is required to the marriage of the bastard child while an infant unless she has been deprived of the child's custody by order of the Court, or a resolution of a local authority is in force assuming parental rights. She may have the right to certain allowances and benefits in respect of the child".

No doubt, the above statement of law has taken note of the statutory provisions in force in England. However, I must point that no decision of any Court in England or any recognised text book has been brought to my notice, which has held that the mother is the natural guardian of an illegitimate child under the English law.

11. The position, as emerged from the decisions of Courts in England, was summarised by Slessor, L. J., in *In re J. M. Carroll*, an infant, 1931-1 KB 317, 356, as follows:—

"In the eye of the law such a child is *filius nullius* and has no legal guardians: *R. v. Felton*, 1758-1 Bott PL.C. (Const) 478. The mother's legal rights as to custody are not entirely the same as those of the father of a legitimate child; *Barnardo v. McHugh*, 1891 AC 388; *Rex v. Walker*, 1912-28 TLR 342. Yet nevertheless, while the child is under the age of nurture the mother has a right to its possession; generally in such a case the Court will prefer the mother to the putative father if there be conflicting claims; *Ex parte Knee* 1804-1 B and P (N. R.) 148. Though the mother of an illegitimate child is thus not a legal guardian her claim upon

the child has always been recognised in equity. The mother has a natural right to its religious education and custody which will be recognised (and) regarded by the Court; *Reg v. Nash*, 10 QBD 454 (See Blackstone's Commentaries Vol. 1, pp. 453, 458). She has by law obligations imposed upon her in respect of the child: 1891 AC 388; a contract between her and another person for the transfer to that person of her rights and liabilities is invalid: *Humphrys v. Polak*, 1901-2 KB 385".

The present question with reference to S. 25 of the Guardians and Wards Act specifically arose in *Mst. Parm Kaur v. Banaridas*, ILR 15 Lah 630=(AIR 1984 Lah 1003). That related to a petition filed by a putative father under Section 25 of the Guardians and Wards Act for the custody of his three illegitimate children from his mistress, the mother of the children. The point urged before the Court was that the putative father had no locus standi to present an application under Section 25 of the Guardians and Wards Act as the children being on his own admission, illegitimate, the mother and not he was the lawful guardian. The learned Judge who decided the question after referring to *Ma Mya v. Felix Slym*, 1912-17 IC 926 observed:—

"The personal law of the children concerned in that case was considered to be obscure and the case was decided on the equitable principles of English law. It was remarked that under English law, an illegitimate child is regarded as nobody's child and neither the father nor the mother has any absolute right to the custody of their illegitimate children, but it was also held on the authority of the well-known case 1891 AC 388, decided by the House of Lords, that the desire of the mother of an illegitimate child was primarily to be considered in the matter of its custody. In the Burma case there was nothing against the character of the mother, while the father was said to be living in adultery. Consequently, the father's petition to be appointed a guardian was dismissed. Now taking this authority at its best, it does not establish that the mother is the lawful guardian of her illegitimate children. All that it says is that her desire as to their custody should be primarily considered. A reference to the case 1891 AC 388, 391, will show that there also the contest was between the mother of an illegitimate child and a third party. That case arose out of a petition for a writ of habeas corpus and was decided according to the rules of equity which established that the wishes of the blood-relations, viz., the mother, the putative father, and the relations on the mother's side were entitled to consideration (Vide 1882-10 QBD 454 and 1891 AC 388). It is not clear whether the putative father of the boy was alive but in any case he did not appear and there was no occasion to consider his claims or wishes.

The question whether the mother was entitled to guardianship according to common law also did not arise in that case and the case was decided according to rules of equity. The proposition was advanced in that case that the mother of an illegitimate child has the same rights as the father of legitimate children, but this position was not accepted (vide pages 394, 396, 397). It was remarked in the course of the judgment (though the point was not decided) that the obligation cast upon the mother to maintain her illegitimate children till the age of 16 under the Poor Laws Act would involve a corresponding right to custody (Vide 1891 AC 388, 395, 398) and the old view that an illegitimate child was *filius nullius* and therefore the mother has no right to its custody cannot be maintained It seems to me, therefore, that none of the authorities cited really establish that the appellant as the mother of 'illegitimate' children is their 'lawful guardian'. Hence, I must hold that it has not been established before me that under the English law, the petitioner herein as the mother of her illegitimate child is the natural guardian of the said child.

12. There arises the further question whether, notwithstanding the fact that the petitioner is not the natural guardian of her illegitimate daughter, she could obtain custody of her daughter by getting herself appointed or declared as guardian of her child. As a preliminary to obtaining custody, the present petition itself contains a prayer for the petitioner being declared as the guardian of the person of the minor in question. In my opinion, the petitioner cannot get herself declared as the guardian of her minor daughter. The declaration that may be made by the Court is merely a recognition of a pre-existing right and this is made clear, when Section 7 of the Guardians and Wards Act, 1890, provides separately for appointment of a guardian and declaration of a person as a guardian. When the person who wants to be declared a guardian does not in fact occupy the position of a guardian pursuant to any power recognised by law, the question of the Court declaring such a person as a guardian does not arise. As a matter of fact, where a person happens to be the natural guardian of a minor under the law applicable to the parties, the question of such a person getting himself or herself appointed or declared as a guardian under the provisions of the Guardians and Wards Act, does not arise, since such an appointment or declaration is wholly unnecessary for such a guardian to exercise his powers and discharge his duties as the law itself designates him or her as the guardian of the minor concerned and pursuant to such designation, the guardian acquires the rights and incurs the obligations relevant to such a status. Only where a guardian has been appointed by a will or other instrument, the question of

such a guardian getting himself or herself declared by the court may possibly arise. In this case, the petitioner has not been appointed by will or other instrument and even assuming that a natural guardian also can be declared as guardian under Section 7 (1) (b) of the Act, I have already held that the petitioner herein is not the natural guardian of the minor child. Therefore, the petitioner cannot get any declaration of guardianship with regard to the person of the minor under the provisions of the Guardians and Wards Act, 1890.

13. Now, I proceed to consider whether the petitioner can be appointed as a guardian under the provisions of the said Act, since the same was argued before me. As a matter of fact, the petition itself does not contain any prayer for appointing the petitioner as a guardian of the person of the minor child. However, if the petitioner had applied for amendment of the petition by including a prayer for appointing her as the guardian, I would have allowed such an amendment and therefore without reference to the technical point that the petition itself does not contain any prayer for appointing the petitioner as a guardian, I proceed to consider whether the petitioner can be appointed as a guardian.

Mr. K. S. Varadachari, learned Counsel for the respondent, raised an objection more or less in the nature of a preliminary objection that the petitioner being a permanent resident of England cannot be appointed as the guardian of the person of the minor who is an Indian citizen and residing in India and relied for this purpose on two Bench decisions of this Court. In the petition, the petitioner herself has stated that she is permanently residing at No. 33, Alkham Road, Stoke, Newton, London N-16.

14. In *Batcha Chetti v. Ponnuswami Chetti*, (1911) 22 Mad LJ 68, a Bench of this Court was considering an appeal from an order of a learned Judge of this Court in an application by a father living in the Civil and Military Station, Bangalore, to declare him as the guardian of his minor girl aged about 5 years, then in the custody of her deceased mother's mother and father living in Madras. The learned Judges, while reversing the order of the learned Judge, made in favour of the father, considered whether the father was entitled to have the order made in his favour. In coming to the conclusion that the father was not entitled to such an order, one of the factors taken into account by the learned Judges was the fact that the father was residing beyond the limits of the jurisdiction of this Court and it would not be easy for the Court to control his conduct as guardian. The judgment of a Bench of this Court in *Subbaratnammal v. Seshachala Naidu*, 60 Mad LJ 615=(AIR 1931 Mad 478) is a very short one and it is:—

"In this case, it appears that the appellant is a resident of Mysore. It is clearly against the intention of the Guardians and Wards Act, that any one residing outside British India should be appointed guardian of a minor's person, as over such a guardian the court could not exercise its proper control — See (1911) 22 Mad LJ 68. The appellant, therefore, cannot herself be appointed guardian of the minor under the Act. For this reason, without going into any of the other questions raised we find it unnecessary to interfere in the appellant's favour with the order of the learned District Judge. This will not preclude the appellant from seeking any other remedy open to her. The appeal is dismissed."

Thus, whatever may be said of the decision in *Batcha Chetti's* case (1911) 22 Mad LJ 68, the decision of the Bench in *Subbaratnammal's* case, 60 Mad LJ 615=(AIR 1931 Mad 478) is directly in point and is binding on me. The learned Counsel for the petitioner contended that the statement contained in the judgment in *Batcha Chetti's* case is only an obiter dicta and the learned Judges who decided the case of *Subbaratnammal* did not consider the point in detail and simply proceeded on the basis of the obiter dictum contained in *Batcha Chetti's* case and there are decisions of other Courts taking a different view. It is in this context reliance was again placed on 1885-30 Ch D 324.

15. In this context, the learned Counsel drew my attention to the decisions of Lahore High Court in *Mt. Nazir Begum v. Ghulam Quadair Khan*, AIR 1937 Lah 797, *Ghulam Qadar v. Allahdin*, AIR 1942 Lah 162=44 Pun LR 186=201 Ind Cas 137, and the decision of the Allahabad High Court in *Beniprasad v. Mt. Parwati*, AIR 1933 All 780 and the decision of the Bombay High Court in *Chimanlal Ganpat v. Rajaram Maganchand Oswal*, AIR 1937 Bom 158. In these decisions, the provisions of the Guardians and Wards Act, have been elaborately considered and it has been held that there is nothing in the Act to disqualify a person resident outside the jurisdiction of the Court to be appointed as a guardian of the person of a minor. It has been pointed out in these cases that the control over the guardian may be exercised by the Court requiring the guardian appointed to furnish security with a surety resident within the jurisdiction of the Court so as to ensure the orders of Court being carried out. It has also been pointed out that Section 39 (h) of the Act which provides that the Court may remove a guardian appointed or declared by the Court for ceasing to reside within the local limits of the jurisdiction of the Court is only an enabling provision and does not compel the Court to remove a guardian as soon as he ceases to reside within the local jurisdiction of the Court. It has been pointed out again—

"If the law were that only a person living within the jurisdiction of the Court could be appointed a guardian then in some cases the consequences may be disastrous, as it may permit an unscrupulous person to prevent the well-wishers of the minor from being appointed guardian, by inducing the minor to remove himself and his property from the district in which his friends and relatives most competent to act as his guardian reside."

Whatever may be the criticism of the decision of this Court in Subbaratnammal's case that being the decision of a Bench of this Court, I am bound by that decision and on the basis of that decision, I must hold that the petitioner being a permanent resident of England cannot be appointed as guardian of the minor so as to enable her to obtain custody of her minor child from the respondent under Section 25 of the Guardians and Wards Act, 1890.

16. Then arises the question whether, independent of the provisions contained in the Guardians and Wards Act, 1890, this Court is competent to grant the prayer of the petitioner. No doubt Clause 17 of the Letters Patent preserves the jurisdiction of this Court over infants which it had inherited from the Supreme Court at Madras and Section 3 of the Guardians and Wards Act, itself preserves that jurisdiction. Even though the petition itself does not invoke Clause 17 of the Letters Patent of this Court for the purpose of getting the relief it prays, Mr. K. S. Varadachari, learned Counsel for the respondent, fairly stated that he is not standing on any technicalities and contended that even on the basis of Clause 17 of the Letters Patent, the petitioner is not entitled to any relief. Das, J., in the matter of Lovejoy Patel, AIR 1944 Cal 433, has stated—

"That in exercise of the jurisdiction under Clause 17 Letters Patent of 1865, this Court shall follow the principles adopted by the Court of Chancery in England and that this jurisdiction of the High Courts has been expressly preserved by Section 3 of the Guardians and Wards Act, 1890. This does not, however, mean that I should ignore the principles embodied in the last mentioned Act. To my mind, the provisions of that Act in effect adopt the cardinal principles upon which the Court of Chancery in England used to act. Where the Act is silent or the provisions thereof are contrary to or inconsistent with the principles of the Court of Chancery, this Court in appropriate cases will act on the principles on which the Court of Chancery in England would act in similar circumstances".

Venkataramana Rao, J., in *Raja of Vizianagaram v. Secretary of State for India*, ILR 1937 Mad 383=(AIR 1937 Mad 51), has pointed out that it has been held by the High Courts of Bombay, Calcutta and Allahabad that apart from the Guardians and

Wards Act, the High Court has jurisdiction to appoint a guardian for the minor and referred to the decisions of those Courts at pages 457-459. Even with reference to these pronouncements, the argument of Mr. K. S. Varadachari is that there has not been any decision by the Court of Chancery appointing a guardian so as to enable him to take away the minor outside the jurisdiction of the Court. In this context, he relied on the statement contained in Simpson on 'A treatise on the law and practice relating to infants' 4th Edn. pages 102 to 112 summarised by Das, J. in the matter of Lovejoy Patel, AIR 1944 Cal 433 already referred to. The statement contained in that book may be summarised thus—

"The grounds on which the High Court, exercising the jurisdiction and following the practice of the Court of Chancery, will interfere with the rights of a father to the custody of his children may be conveniently considered under several heads, though in most cases there has been more than one reason for the Court to interfere; the object of the interference being of course the benefit of the children; not the punishment of the father.

First, the father may be interfered with on the ground of unfitness in character and conduct.

Secondly, on the ground of unfitness in external circumstances.

Thirdly, on the ground of waiver of his rights.

Fourthly, on the ground of agreement.

Fifthly, where the father is, or intends to go, out of the jurisdiction".

It is on the last ground Mr. K. S. Varadachari, learned Counsel for the respondent, strongly relied and also invited my attention to the observations of Venkataramana Rao, J., in ILR 1937 Mad 383, already referred to. The learned Judge stated in that case—

"It is a recognised principle of English Courts that an infant should not be sent out of their jurisdiction. Of course, it is not an inflexible rule and there are exceptions to it. But it is an invariable rule; Vide *Mountstuart v. Mountstuart*, 1801-6 Ves Jun 363=31 ER 1095. In *Campbell v. Mackay*, 1837-2 My & Cr. 31; 40 ER 552, Lord Cottenham, L. C., delivered himself to the same effect at page 553 (40 ER).

In the case of 1801-6 Ves Jun 363, Lord Eldon appears to have said that the Court never makes an order for taking the infant out of the jurisdiction. Subsequent decisions show that exceptions are sometimes made to the rule, but such exceptions are and ought to be very rare. Since I have held that Great Seal I have had reason to lament that the rule has not been more strictly adhered to".

17. Bearing these principles in mind, I must now consider whether any exceptional circumstances have been brought to my notice so as to justify the appointment of the petitioner as guardian of the person of the minor in question enabling her to take away the child to England. In her evidence, the petitioner merely explains what she has already stated in her petition as a justification for her prayer for the return of the custody of the child to her. She stated in her evidence that the minor is living in a very unhealthy surrounding that she has no discipline, that she did not have any regard for the petitioner or for her mother, that the respondent drinks alcohol and when he drinks he gets into a temper and he used to beat the petitioner and ill-treat her and all that that she herself left India only for the welfare of her child and during the four and odd years she had been away, she had been making herself secure financially so that she could provide a comfortable home for the minor and that she wanted to do what she had not been able to do for her all these years. I have observed the petitioner in the box and watched her demeanour. I cannot accept her statements about the conduct and behaviour of the respondent as true or constituting her genuine opinion about him. I must say that she is extremely fickle-minded and her judgment of men and things fluctuates widely and wildly. She is highly unstable in her attitude and approach to men and matters. The various statements made by her in the petition as well as in her evidence before the Court regarding the character and conduct of the respondent are completely falsified and negated by a letter written by her to the respondent on 3-2-1968, from England, which has been marked as Ex. R.1. The said letter was produced by the learned counsel for the respondent, when the respondent, was in the box. Since the examination of the petitioner was already over and she would not have any opportunity to explain anything contained in that letter, I asked the learned Counsel for the petitioner whether she had any objection to the production of the letter at that stage and whether the petitioner admits having written that letter. After getting instructions from the petitioner, the learned Counsel represented to me that the petitioner admitted having written such a letter and she has no objection to the letter being produced and marked at that stage. As a matter of fact, with reference to this letter, the learned Counsel for the petitioner put the following question to the respondent in his cross-examination and the respondent gave the following answer:—

“Q: The letter written to you on 3-2-1968 by the petitioner is full of affection and it was written because she wanted to cajole you to get the minor and she tried all her best?”

A: The letter will speak for itself, and it will speak that I am an innocent man will-

ing to give the child and in spite of that I am troubled”.

18. I must straightway mention at this stage that notwithstanding the points of law raised by the learned Counsel for the respondent in the course of his arguments, in his evidence, the respondent stated that he had no objection to hand over the child to the petitioner, but the child is not willing to go with the petitioner to England and he could not force or compel the child to go with the petitioner. I may also point out straightway that the suggestion contained in the question of the learned Counsel for the petitioner that the letter was written in the particular manner so as to cajole the respondent to get the minor is utterly untenable. The petitioner who came to India in December 1967 and returned to England in January 1968 went back with the assurance of the respondent that he would send the minor to England for a holiday and the petitioner herself admitted that before the child could obtain the passport and complete the other emigration formalities for going to England, she must obtain a declaration of sponsorship in England and send it to the respondent herein. I have already mentioned the fact that the declaration of sponsorship is dated 31-1-1968, and it is clear from Ex. R.1. that on 3-2-1968, when that letter was written, the declaration had not been sent by the petitioner to the respondent, since the letter states that she would be ‘sending it by register’. Thus, on 3-2-1968, there is nothing to show that the respondent went back on his previous agreement to send the child to England for a holiday and therefore he needed any cajoling from the petitioner. Hence, I must conclude that the letter Ex. R.1 was written by the petitioner to the respondent expressing her normal and natural feelings. Having said so much, I must now point out what that letter, Ex. R.1, contains. As I pointed out already, it is a letter addressed by the petitioner to the respondent and it states inter alia—

“You know I am anxious to hear from you. Have you forgotten me so soon? I miss you a lot and am terribly fretting over leaving you and Noonu (Noonu is a pet name of the minor in question). Life seems to be so empty now and nothing seems to be alright now. I was so happy while in India and treasure every minute I was with you. I only wish I had spent more time with you and did not worry about what anyone said or thought. I feel so terribly bitter at being married and wish I had not, because it did not make me happier at all. I know I was hasty at times with you although I knew I would not be with you long, but hope you understand, when I was hasty tempered at times. Marriage does not seem to matter now but only the one you loved and still love. I feel responsible for all your troubles

and unhappiness and also for your health, since it is because I left you so you became uninterested in life, and I really do not like to say it. Why is life so bitter to us some times? I wish and pray I could see you and be with you again at least sometimes. Dear Pat try not to feel too much and please do not drink too heavily, but remember what I told you to look after your health. I would not wish to see you looking ill, but really good. Oh dear, I wish we can be like before I so much love to be with you again. I hope and pray you come here but I do not know how to get you here. I feel so unhappy ever after seeing you again. It seems silly me writing this but my feelings for you have returned and I feel the same way, I suppose I never did stop loving you. It is wrong to say this but it was too long I was with you for me to forget you completely. I hope you forgive me writing all this. I am heart-broken now and do not want to go on living. Do try and come here as you will make me happier. I hope to die as I feel so terribly hurt and unhappy."

As the respondent has stated in his evidence, the letter speaks for itself. This letter may be contrasted with her deposition before this Court, where she said so many bad things about the respondent, and certain statements contained in the letters written by her from England to her mother and other relations wherein she has stated that the wretched and miserable past still haunted her.

The learned Counsel for the petitioner sought to impress upon me the fact that the respondent is used to drinking, that notwithstanding the receipt of salary of Rs. 800/- p. m. he was adjudged an insolvent in I. P. 43 of 1966, though as per order dated 26-6-1967, he has been discharged absolutely, and that in Ex. P. 8, letter dated 18-2-1967, the respondent's wife had written to the petitioner about their poor financial circumstances, even going to the extent of stating that she could not write earlier, since she could not get even the stamps and on the other hand, the petitioner was earning about £ 17-15, a week and she could afford to look after her child well. With regard to the various allegations made against the respondent I am of the view that they did not make out sufficient ground to justify this Court appointing the petitioner as guardian to enable her to take away the minor child to England. It is nothing unusual that the respondent belonging as he does to the Anglo-Indian community drinks and he frankly stated in his evidence "I do drink sometimes. We Anglo-Indians do drink." The minor from the date of birth has been living with the respondent, his wife and their son and is being maintained by the respondent and taking into account the fact that the respondent and his wife have no daughter of their own, I am not inclined to

accept the allegation of the petitioner that the minor is not properly looked after and treated well in the home of the respondent and is not being shown any affection by the respondent, his wife or his son. It appears that the minor had some trouble with her tooth and the respondent took her to a dentist for attending to it and the learned Counsel in the course of the cross-examination of the respondent wanted to make much out of it, suggesting that the trouble in the tooth was due to the neglect on the part of the respondent. I do not consider that this allegation deserves any consideration whatever. The respondent has explained as to how he came to be adjudged an insolvent and his wife has explained the circumstances under which she came to write the letter in question to the petitioner. That the respondent is earning Rs. 800/- p. m. was not disputed before me. Taking all these circumstances into account, including the fact that the parties belong to the Anglo-Indian community and the attitude and nature of the petitioner, as revealed by Ex. R.1 and the other evidence, I do not consider that the present is a case which can be said to constitute an exception to the rule that an infant should not be allowed to be taken out of the jurisdiction of the Court and I am not satisfied that it will be in the interest and for the welfare of the minor to appoint the petitioner as the guardian of the person of the minor to enable her to take away the minor to England.

19. I may here mention one further and important fact. The minor has completed the age of 13 years and I examined her in my Chambers in the presence of the parties and their respective counsel. She frankly told me that she does not want to go with the petitioner and that too to England and prefers to live with the respondent and his family. I do not consider that the minor was tutored to say any such thing. It is natural for a child who has been brought up for a period of 13 years by the respondent and his wife in their residence to be unwilling to cut off completely all her association and connection with them and from that home and to go to a foreign country along with the petitioner, who had been away from her for the last five years. If she grows up further, she may be in a position to make up her mind more intelligently, boldly and competently whether it would be to her benefit to go to England and stay with the petitioner and any unwillingness on her part at this stage to leave the home where she was born and brought up so long and to go to a foreign country is easily understandable. I am of opinion that it will not do any good to the minor to compel her at this stage to go with the petitioner to England.

20. One other fact also may be mentioned here. Because the petitioner gave birth to the child, when she was a spinster as a

result of illicit connection with the respondent, she naturally did not want the child to address her as "mummy" and the child has all along been addressing only the wife of the respondent as "mummy" and this itself must have created a somewhat significant impression on the mind of the child with reference to her attitude towards the wife of the respondent as well as the mother and the child herself gave expression to the same before me. Though I do not consider this fact as disqualifying the petitioner from claiming any right in respect of custody of the child, I cannot ignore this fact in understanding the attitude of the minor herself.

21. Taking all these circumstances into account, I am of opinion, that no case has been made out for appointing or declaring the petitioner as the guardian of her minor illegitimate child and for directing the respondent to hand over custody of the child to the petitioner so as to enable her to take away the child to England. Hence, the petition fails and is dismissed. There will be no order as to costs.

Petition dismissed.

AIR 1970 MADRAS 103 (V 57 C 26)

SPECIAL BENCH

M. ANANTANARAYANAN, C. J.,
RAMAKRISHNAN AND
NATESAN, JJ.

Jayaraj Anthony, Petitioner v. Mary Seeni Ammal, Respondent.

Matrimonial Case No. 3 of 1967, D/- 11-2-1969.

Divorce Act (1869), Sections 18 and 19 (1) — Impotency — Evidence — Wife deliberately refusing to give reason for not consummating marriage — Also refusing to submit to medical examination — Subsequent offer by her to consummate marriage found not genuine — Inference of impotency held could be drawn — (Evidence Act (1872), Section 114).

In a husband's petition for declaration of a nullity of marriage on the ground of wife's impotency, the wife's consistent refusal to consummate the marriage and also her refusal to submit herself to medical examination, are strong circumstances from which a legitimate inference of her impotency at the time of the marriage and also at the time of the institution of the proceedings against her, within the meaning of Section 19 (1), of the Divorce Act, can be drawn. (Para 5)

Where, on remand of the matter by the High Court for fresh evidence the wife most unwillingly appeared before the Court and offered to consummate the marriage but refused to give any reason why she did not consummate marriage and give sexual inter-

course to her husband and further refused to submit to medical examination:

Held, that the offer could not be divorced from the rest of her statement, which clearly amounted to an admission of her having been not in a position to consummate the marriage. Her refusal to submit herself to medical examination showed that the subsequent offer, was not a genuine one. In any case it was inconsistent with the rest of her evidence. In the circumstances the husband could be taken to have made out the ground of impotency for claiming relief under Section 18 read with Section 19 (1) of the Divorce Act. (Paras 6, 7)

Cases Referred: Chronological Paras
(1967) AIR 1967 Mad 242 (V 54) =

1967-1 Mad LJ 152 (FB), Jayaraj

v. Mary Seeniammal

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G. Desappa and D. Pandian, for Petitioner;
V. V. Goyal (amicus curiae), for Respondent.

RAMAKRISHNAN, J.— This case came before this Court on an earlier occasion and our decision has been reported in Jayaraj v. Seeni Ammal, AIR 1967 Mad 242. The reference arose out of a petition under Section 18 of the Indian Divorce Act, by the husband for a declaration of nullity in respect of the marriage between him and his wife, Mary Seeniammal, on the substantive ground that the wife declined all access to the husband subsequent to the marriage and refused to consummate the marriage and hence must be regarded as impotent both at the time of the marriage and at the time of the institution of the proceedings. When the matter came before this Court on the earlier occasion this Court found that sufficient evidence had not been adduced for the purpose of proof of the alleged impotency, and after setting out the relevant principles, this Court remanded the matter to the lower Court for disposal after a fresh evidence.

2. After the remand, the learned District Judge took a great deal of trouble to secure the presence of the wife, before him for examination in Court. She appears to have responded only after a warrant of arrest had been issued, and then she appeared through counsel and was examined very carefully by the learned Judge. The following is the gist of her evidence:

"I am not willing for divorce. (This witness is not answering purposely the questions put by the Court why she was not giving room to consummate the marriage and to have sexual intercourse). I do not want to give any answer to the question why I did not give room to consummate the marriage or to have sexual intercourse with him. Now I am willing to be with my husband to consummate and to have sexual intercourse with him. I am not willing to submit to any medical examination to find out whether I am impotent or whether there is any defect in my system. (The witness is not answering the question — 'Why did you not allow

your husband to consummate by having sexual intercourse?)."

3. In the typed script of the evidence which we have extracted above there is a statement which will indicate that the woman was willing at the time when she gave evidence to consummate the marriage with her husband and to have sexual intercourse with him. But the learned Judge in the course of his judgment has not dealt with this part of the evidence of the woman as a subsequent offer by her to consummate the marriage and which the husband was bound to accept. He has viewed the whole evidence as a refusal on the part of the wife to consummate the marriage and deliberate failure to explain why she failed to consummate the marriage even though a long time had lapsed since the marriage. She also refused to submit herself to medical examination to find out whether there was any inherent defect in her, whether bodily or psychologically, which stood in the way of consummation of the marriage. Hence, the learned Judge concluded after carefully studying her attitude that he was constrained to draw the inference that the reason why she did not permit her husband to consummate the marriage for all this long period of time (she is 35 years old) was her impotency both at the time of the marriage and at the institution of the suit.

4. Decisions under the corresponding provisions of the English Matrimonial Act have held that where a woman is shown to have had intercourse with her husband after a reasonable time for consummation of the marriage and it appears that she has refused intercourse and resisted her husband's attempts, the Court, if satisfied that the refusal was not due to mere obstinacy or caprice, may draw the inference that it arose from some incapacity proceeding from nervousness or hysteria or from an invincible repugnance to the act of consummation resulting in a paralysis of the will which was consistent only with incapacity (vide Rayden on 'Divorce' 9th Edn. page 114). There is also authority in the standard English text books on the subject that where the husband or the wife refused to submit to inspection, the Court may nevertheless grant a decree — Vide Rayden on 'Divorce' 9th Edn. p. 117.

5. In the present case, we are satisfied that the wife's consistent refusal to consummate the marriage and also her refusal to submit herself to medical examination, are strong circumstances from which a legitimate inference of her impotency at the time of the marriage and also at the time of the institution of the proceedings against her, within the meaning of Section 19 (1) of the Indian Divorce Act, can be drawn.

6. At the hearing of this reference, the wife, the respondent was ex parte. The learned Counsel engaged amicus curiae for the respondent, pleaded a great deal of reli-

ance upon the statement contained in the record of the deposition of the wife by the lower Court about her present offer to consummate the marriage. We are of opinion that this offer cannot be divorced from the rest of her statement, which clearly amounts to an admission of her having been not in a position to consummate the marriage both at the time of marriage and also at the time when the petition was filed. Her refusal to submit herself to medical examination also appears to us to show that the subsequent offer, if she had really made such an offer, was not a genuine one. In any case it is inconsistent with the rest of her evidence, and if it was a genuine offer the learned Judge would have certainly made a point of this offer and considered it in the context of his findings.

7. In the above circumstances, it appears to us that this is a genuine case where the husband has made out the ground of impotency for claiming relief which he has sought under Section 18 read with Section 19 (1) of the Indian Divorce Act. We therefore accept the reference and confirm the decree of nullity of marriage passed by the learned District Judge. There will be no order as to costs.

Reference accepted.

AIR 1970 MADRAS 104 (V 57 C 27)
SPECIAL BENCH

M. ANANTANARAYANAN, C. J.,
RAMAKRISHNAN AND
NATESAN, JJ.

Mrs. Dawn Henderson, Petitioner v. D. Henderson, Respondent.

M. C. No. 2 of 1967, D/- 11-2-1969 referred by Dist. J., Tiruchirappalli in O. P. No. 128 of 1966.

Divorce Act (1869), Ss. 10 and 17 — Wife's petition for dissolution of marriage on ground of cruelty — Evidence — Adultery coupled with cruelty must be proved — Adultery, what is — Nature of proof of adultery required — (Words and Phrases — 'Adultery') — (Hindu Marriage Act (1955), Section 13.)

There cannot be greater degree of cruelty than to compel a chaste wife to submit to overtures of other persons, out of an ignoble desire to make gain by prostituting the wife. But, this ground, per se, will be quite insufficient to grant the wife the relief of divorce. She must prove adultery coupled with cruelty. (Para 4)

Adultery is the matrimonial offence when there is consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse during the subsistence of the marriage. It may not be always possible for the wife to give the name of the person with whom adultery was com-

mitted by her husband but, indisputably, there must be such a specific individual, and there must be evidence from which a clear and rational inference could be drawn that adultery had taken place as between the erring spouse (her husband) and that individual. Needless to say, general evidence of the ill-repute of the husband, or of the lewd company that he keeps, or even that he knows the addresses of prostitutes, and was seen with doubtful women, would neither prove nor probalilise adultery. It may be perfectly possible for an individual to keep such bad company and, still, not to commit adultery. (Para 5)

In such a case although a decree for divorce cannot be granted, it is competent for the Court to grant the decree of judicial separation, which has the effect of divorce a mensa et thoro under the existing law.

(Para 6)

R. Janardhana Rao (Amicus Curiae), for Petitioner; M. S. Krishnamachariar (Amicus Curiae), for Respondent.

M. ANANTANARAYANAN, C. J.:— This is a reference under Section 10 of the Indian Divorce Act, by the learned District Judge of Tiruchirapalli, for confirmation of the decree nisi dissolving the marriage between the parties under Section 17 of the same Act.

2. The petitioner is the wife, and she has put forward, as the ground for dissolution of the marriage, the Clause of Section 10 which refers to

“adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro.”

In the body of the petition, the petitioner states that the respondent, her husband, married her, according to Christian rites, at St. Joseph's Church Golden Rock, Tiruchirapalli on 27-5-1961. But soon after the marriage, the respondent behaved to her with great cruelty, and brought drunken young men to the house and attempted to constrain or induce the petitioner to submit to the indecent overtures of those men. He also beat her and starved her, and in brief, attempted to compel her to lead a life of prostitution. Because she resented this and resisted the attempts with all might, the respondent forced her to leave the house in September 1961, and she has since been living with her parents. In paragraph 10 the petitioner also states that the respondent was leading an adulterous immoral life, visiting brothels and being friendly with prostitutes. According to the petitioner, the respondent is “an incorrigible moral wreck.”

3. The respondent was ex parte throughout. The petitioner gave evidence as P. W. 1 broadly in support of the averments in the petition. She swore that the respondent tried his best to coax her to lead the life of a prostitute, and to submit to the indecent overtures of drunken young men brought by

him to the house. After the petitioner was driven away, the respondent is, according to her leading a bad, immoral life, consorting with lewd women. P. W. 1 has been supported by P. W. 2, P. W. 3 and P. W. 4, all of whom have given testimony in the matter. P. W. 2 is the father of the petitioner, and, he also speaks to the cruelty of the respondent towards the petitioner and to the subsequent profligate life led by the respondent. P. W. 3 states that respondent some times made suggestions to him to visit women of bad repute, either at Tiruchirapalli or at a particular street in Srirangam town. The respondent knew the addresses of women of bad repute. P. W. 4 gave evidence to much the same effect. That is all the evidence in the case, and the learned District Judge has accepted this evidence and also recorded his satisfaction that there was no collusion between the parties, in making the decree nisi.

4. We are afraid that this evidence cannot amount to proof of the ground relied upon by the petitioner under S. 10 of the Indian Divorce Act. Had the ground related to cruelty alone, the petitioner would indisputably be entitled to succeed. We are satisfied that cruelty in an extreme and unbearable form has been proved in the case, both by the evidence of P. W. 1 and by the evidence of the other witnesses. There cannot be a greater degree of cruelty than to compel a chaste wife to submit to overtures of other persons, out of an ignoble desire to make gain by prostituting the wife. But we are afraid that this ground, per se, will be quite insufficient to grant the petitioner the relief of divorce, the law specifically states that the petitioner must prove adultery coupled with cruelty, or if another relevant section is to be resorted to, adultery coupled with desertion without reasonable excuse for two years or more.

5. Adultery is the matrimonial offence, defined in the following manner in standard Treatises, such as Raydon on Divorce, 10th Edn. it is:—

“Consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage”.

Judged by this test, there is no relevant evidence in the present record to prove adultery. It may not be always possible for the wife to give the name of the person with whom adultery was committed, but, indisputably, there must be such a specific individual, and there must be evidence from which a clear and rational inference could be drawn that adultery had taken place as between the erring spouse (her husband) and that individual. Needless to say, general evidence of the ill-repute of the husband, or of the lewd company that he was keeping, or even that he knew the addresses of prostitutes, and was seen with doubtful women, would neither prove nor probalilise adultery. It may

be perfectly possible for an individual to keep such bad company and, still, not to commit adultery. Actually, the record appears to suggest, judging from the particular kind of cruelty exhibited by the respondent towards the petitioner, that the respondent must be a person or some perversity in the sexual impulse, and frequently, such a perverted impulse may find satisfaction in other activities, without at all involving adulterous sexual intercourse.

6. Under the circumstances, we are unable to accept the reference, and to grant the divorce, though we are satisfied that the parties are not acting in collusion. But, under Section 22 of Act IV of 1869, in such a case, it is competent for the Court to grant the decree of judicial separation. This decree has the effect of a divorce a mensa et thoro under the existing law. That form of the decree has been rendered obsolete as far as divorce decrees proper are concerned. Accordingly, we grant the petitioner a decree for judicial separation.

7. Learned Counsel for the petitioner submits that it may still be open to the petitioner, if the respondent is continuing in his profligate ways and is committing acts of adultery with other women, to take out further proceedings for actual divorce, on the basis of evidence about such a specific act. We merely record this with the observation that it may certainly be open to the petitioner to resort to such a remedy, if there is an adequate basis for it, in the future.

Order accordingly.

AIR 1970 MADRAS 106 (V 57 C 28)

VEERASWAMI, J.

K. V. S. Varadaraja Chettiar, Petitioner v. K. V. C. Chenni Veeri Chettiar and others, Respondents.

Civil Revn. Petn. No. 1951 of 1967, D/-26-8-1968, against order of Sub. J., Salem in I. A. No. 1474 of 1966.

Partition Act (1893), Sections 2, 3 — Application under Section 3 (1) filed on basis of request made under Section 2 — Subsequent withdrawal of request would be inconsequential to continued maintainability of application under Section 3 (1). AIR 1950 Mad 759 and AIR 1951 Mad 593, Applied. (Para 2)

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| Cases Referred: | Chronological | Paras |
| (1951) AIR 1951 Mad 593 (V 38) = | | |
| 1950-1 Mad LJ 732, Vedachala Naicker v. Duraiswami Mudaliar | | 8 |
| (1950) AIR 1950 Mad 759 (V 37) = | | |
| 1950-1 Mad LJ 29, Rajagopala Chettiar v. Razak Sahib | | 8 |
| (1918) AIR 1918 All 356 (V 5) = | | |
| 47 Ind Cas 905, Umrao Singh v. Umrao Singh | | 8 |

CM/EM/B98/69/RSK/D

T. R. Ramachandran, for Petitioner; S. S. Mathivanan, S. T. Ramalingam for G. Ramajam and Gopalaswami, for Respondents.

ORDER: This petition is directed against the order of the Subordinate Judge of Salem dismissing an application under Section 3 of the Partition Act. There was an application under Section 2, but that application having been withdrawn the learned Subordinate Judge thought that the dismissal of the application under Section 3 should automatically follow.

2. I am unable to accept that view. Section 2 provides for sale of the property which is not capable of partition among the shareholders. But such a sale can be ordered only at the request of the shareholders interested individually or collectively, to the extent of one moiety or upwards, in the property. Under Section 3, if a request of that kind has been made to the court, any other shareholder may apply for leave to buy at a valuation the share or shares in the property and the court shall then order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained. The policy of this provision appears to be that third parties should be avoided and the partition by that process should be confined to the shareholders. It seems to me that once a request has been made and an application on the basis of that request has also been filed under Section 3 (1), the withdrawal of the request under Section 2 will in no way affect the application under Section 3 (1). Notwithstanding the withdrawal of the request under Section 2, the application under Sec. 3 (1) will have to be dealt with and disposed of on its merits. The only condition precedent for an application under Section 3 (1) is a request under Section 2 and once that condition has been satisfied, any subsequent withdrawal of the request will be inconsequential to the continued maintainability of the application under Section 3 (1).

3. Umrao Singh v. Umrao Singh, 47 Ind Cas 905 = (AIR 1918 All 356) does not appear to decide the point and there is no other case which directly deals with it. But Rajagopala Chettiar v. Razack Sahib, 1950-1 Mad LJ 29 = (AIR 1950 Mad 759) and Vedachala Naicker v. Duraiswami Mudaliar, 1950-1 Mad LJ 732 = (AIR 1951 Mad 593), provide the nearest parallel, which have been decided in the context of Section 9 of the Madras City Tenants Protection Act, 1921. It has been held in those cases that the subsequent withdrawal of the suit will not render the application filed under Section 9 infructuous, but the latter will have to be dealt with and disposed of according to the merits. I think the principle of these cases will have application to the instant case.

4. The petition is allowed. The lower court is directed to dispose of the application under Section 3 (1) on its merits. No costs.

Petition allowed.

AIR 1970 MADRAS 107 (V 57 C 29)
VEERASWAMI AND RAMAPRASADA
RAO, JJ.

Adam Ibrahim Sait, Petitioner v. A. Simruthmall and another, Respondents.

Civil Revn. Petn. No. 173 of 1967 and Appeal No. 805 of 1963, D/- 13-11-1968 against order of Sub-Court, Nilgiris at Ootacamand, D/- 11-7-1966.

Court-fees and Suits Valuations — Madras Court-fees and Suits Valuation Act (14 of 1955), Sections 33 (8) and 35 — Scope — Suit for redemption of mortgage and for accounts — Allegation in plaint that documents in question though executed as sale-deeds, operated only as mortgages — Held there was no need of cancellation of sale-deeds and, therefore, payment of court-fees on that basis was not necessary. C.R.P. 1764 of 1961 (Mad), Overruled. (Paras 2, 3)

Cases Referred: Chronological Paras (1961) C. R. P. No. 1764 of 1961 (Mad) 3

S. Thyagaraja Iyer, for Petitioner; Addl. Govt. Pleader and G. Viswanathan, for Respondents.

VEERASWAMI, J.: The petitioner sued for a declaration that the two sale deeds, which he had executed in favour of the first defendant were meant only as security for a loan of a specified sum and for recovery of possession of the plaint schedule properties, after taking an account of the receipts from the hypotheca, and setting off there against the considerations for the mortgages and for passing a decree for the surplus receipts. The execution of the two documents has been admitted. But the petitioner's case was that they were intended to operate only as securities and there were lease deeds in favour of the first defendant covering the suit properties and agreements to reconvey them to the plaintiff. In effect, the suit is for redemption of a mortgage and for accounts. The court below considered that the plaint impliedly asked for cancellation of the two sale deeds and directed payment of court fee on that basis. It also directed the petitioner to pay court fee on the relief for accounting under Section 33 (8) read with Section 35 on a sum of Rs. 73,000. The plaint had been valued under S. 33 (8) that is to say, court fee being payable on one-fourth of the principal secured under the mortgages. The relief of accounting was valued under Section 35 (1). The petitioner being aggrieved by the orders of the court below preferred a revision petition and also a petition to appeal in forma pauperis. When the civil revision petition came up before

one of us, it was directed to be posted along with the petition to be disposed of by a Bench. This was in view of the petition to file the appeal in forma pauperis.

2. In our opinion, the valuation for purposes of court fee made by the petitioner was correct. The point turns on whether the petitioner should be deemed to have asked for cancellation of the two sale deeds. We are of the view that, having regard to the case of the petitioner, no cancellation at all need be asked for. As we mentioned, the petitioner himself admits in the plaint that the two documents were executed as sale deeds. But he alleges that they were meant to operate only as mortgages on certain terms in relation to leases and agreements to reconvey. It is obvious, therefore that if the sale deeds are cancelled, there will be then no basis for the petitioner's case that they operated only as mortgages and that as such he was entitled to redemption and the relief of accounting. This is not a case where the sale deeds operated as an impediment or obstruction to the relief of possession and accounting. On the other hand, the petitioner has to stand by the transaction but only treating them as mortgages, far from getting them cancelled, which would at once put an end to his case.

3. Our attention has, however, been invited to an order of Venkatadri, J. in C. R. P. 1764 of 1961 (Mad). There, a son-in-law executed a sale of immoveable properties in favour of his father-in-law and later sued his brother-in-law for redemption of the properties covered by the sale deeds as if they were only mortgages and for accounts. The learned Judge held that court fee was payable as if the suit was one for cancellation of the sale. With due respect, we are unable to share that view. If the sale in that case is to be cancelled, we fail to see the basis on which the prayer for redemption and for accounts can be maintained. Cancellation will at once entail dismissal of the suit. The learned Judge adverted to a number of decided cases in coming to his conclusion, but it seems to us that they were all cases in which, but for cancellation of the documents, they would operate as an obstacle to the relief of possession. That, as we endeavoured to point out is not the case in the instant case, as indeed, in the case before Venkatadri, J. Where, therefore, a certain document is the very basis of the plaint claim for redemption and accounts but the prayer is based on the averment that its effect in law, in the light of facts to be established, is some thing different from what ex facie it purports to be, there is no need for asking for cancellation. On that view, the orders of the court below are set aside, and treating the application to appeal in forma pauperis as an appeal and the plaintiff-appellant for the purpose of the appeal as a pauper, allow the appeal. In view of this, the civil revision petition will stand

dismissed, but with no costs. Since the appellant has succeeded which means the plaintiff has to be taken on file and proceeded with by the court below, there need be no formality of payment of court fee and refund and therefore, no question of recovery of court fee from the petitioner in the appeal will arise. We may add that nothing we have said in our judgment should be construed as an expression of opinion on the merits of the petitioner's case in the plaintiff.

Order accordingly.

AIR 1970 MADRAS 108 (V 57 C 30)

K. SRINIVASAN AND R. SADASIVAM, JJ.

Union of India owning the Southern Rly. represented by the General Manager, Madras, Appellant v. Seyadu Beedi Co. and another, Respondents.

Appeals Nos. 38 (Tr.) 401 of 1962, D/- 12-11-1968 against decree of Sub-Court, Tirunelveli in O. S. No. 5 of 1959.

Limitation Act (1908), Section 19 and Article 30 — Suit against Railway for compensation for losing or injuring goods — Starting point of limitation — Statement by Railway authorities that plaintiff's claim was under investigation and calling upon him to abstain from rushing to court — Not acknowledgment of liability.

Article 30 of the Limitation Act mentions that the time begins to run from the date when the loss or injury occurs. The actual loss or injury to the goods may occur on one date and the carrier may come to know of it only on a later date and the interval between the two dates may be more than one year. It would not be reasonable to construe the time from which the limitation commences to run under Article 30 as the actual date of the loss or injury and it is on account of this fact, the Courts rely on the date on which the carrier of the goods after coming to know of the loss or injury to the goods conveys the information to the consignor as the starting point for limitation. It depends on the facts and circumstances of each case as to when the plaintiff suing a carrier for compensation for losing or injuring the goods really comes to know of the loss or injury to his goods. According to column (3) of Article 30, the starting point of limitation would be the date of the loss or injury to the goods though after the goods were consigned by the consignor he would not be in a position to know the precise date on which the loss or injury has occurred and the burden would be on the railway administration who want to non-suit the plaintiff on the ground of limitation to establish that the loss or injury occurred more than one year before the institution of the suit. The period of limitation could not be put to a later date when the extent of the injury is ascertained, or the quantum of

actual damages is assessed. If the Legislature intended to fix the date of the assessment of the actual damages as the starting point of limitation, it would have specifically expressed it in unambiguous terms: Case law discussed. (Paras 4 and 6)

The fact that the Railway authorities have mentioned that the claim of the plaintiff was under investigation that he will be advised definitely on the finalisation of the claim cannot be construed as even an implied admission of liability. The further statement calling upon the plaintiff to abstain from rushing to court and threatening him that he would be held liable for costs if he did so could not also be considered as an implied acknowledgment of liability, on the ground that the plaintiff was invited to desist from the suit on promise of settlement. (Para 7)

Cases Referred: Chronological Paras

- (1963) AIR 1963 Mad 365 (V 50) =
1963-33 Com Cas 807, Sultan Pillai and Sons v. Union of India 5
(1962) AIR 1962 SC 1716 (V 49) =
1963-1 SCR 70, Bootamal v. Union of India 4, 6
(1962) AIR 1962 SC 1879 (V 49) =
1963-1 SCJ 505 = 1963 Andh WR (SC) 89 = 1963-1 Mad LJ (SC) 89 = 1963-2 SCR 832, Jetmull Bhojraj v. D. H. Railway Co. Ltd. 6
(1962) AIR 1962 Mad 349 (V 49) =
ILR (1961) Mad 1122 = 1961-2 Mad LJ 521, Union of India v. Sitaraniiah 4, 5, 6
(1960) AIR 1960 SC 233 (V 47) =
1960 SCJ 543 = 1960-2 SCR 75, Union of India v. Amar Singh 4
(1941) AIR 1941 Cal 304 (V 28) =
199 Ind Cas 437, East Indian Railway v. Gopilal Sharma 6

In Appeal No. 38/62:—

K. C. Jacob, S. K. L. Ratan and R. Vendantham, for Appellant; R. Gopalaswami Iyengar and T. R. Mani, for Respondents.

In Appeal No. 401/62:—

K. C. Jacob, S. K. L. Ratan, for Appellant; S. M. Amjad Naina and S. M. Abdul Khadar, for Respondents.

SADASIVAM, J.: The Union of India owning the Southern Railway, represented by the General Manager, Madras, has preferred these appeals against the common judgment in O. S. Nos. 5 of 1959 and 56 of 1960, on the file of the Subordinate Judge's Court, Tirunelveli, decreeing the claim for damages made by the plaintiff (in each of the suits). It is an undisputed fact that the respondent in each of the appeals consigned beedi parcels with the appellant-railway on 17th September, 1957 for being transported to Colombo and that the goods were drenched by water and damaged on 17th September, 1957, the very day on which they were loaded on the ship "S. S. Irwin" belonging to the appellant-railway. The

learned Subordinate Judge Tirunelveli, negatived the pleas put forward by the appellant and decreed the suits for damages.

2. Sri S. K. L. Ratan appearing for the appellant in these appeals argued the appeals mainly on the question of limitation and also to some extent on the question whether there was negligence and misconduct on the part of the railway to make them liable for damages.

3. On the merits of the case, we see no sufficient ground to differ from the finding of the trial Court. The goods of the respondents were loaded in No. 3 hatch in the ship and the loading was completed at 12-10 P. M. on 17th September, 1957 and the hatch was battened down. When the hatch was again opened to load other goods at about 2-45 P. M., it was found that the hold was flooded with sea water. The evidence of D. W. 8, Rama Rao, Marine Superintendent, Southern Railways, and the report Exhibit B-2 made by him show that there was no leak in ship and that in his opinion it appeared to be a case of planned sabotage. The ship was guarded by the employees of the appellant-railway and so the only reasonable inference is that the damage should have been caused either by the wilful acts of the appellant's employees, or by others on account of the negligence of the appellant's employees. We agree with the findings of the learned Subordinate Judge that the damage to the goods of the plaintiff in each of the suits was due to the misconduct on the part of the servants of the railway.

4. There is no dispute about the fact that Article 30 of the Limitation Act of 1908 applies to the facts of this case and it provides one year period of limitation for a suit against a carrier for compensation for losing or injuring goods and the time from which the period begins to run is "when the loss or injury occurs". In *Union of India v. Amar Singh*, (1960) SCJ 543 = (1960) 2 SCR 75 = (AIR 1960 SC 233 at p. 238) it has been held that the burden is upon the defendant-railway who seeks to non-suit the plaintiff on the ground of limitation to establish that the loss occurred beyond one year from the date of the suit and that the proposition is self-evident and no citation is called for. In construing Articles 30 and 31 of the Limitation Act, the Supreme Court has observed in *Bootamal v. Union of India*, (1963) 1 SCR 70 = (AIR 1962 SC 1716), that ordinarily the words of a statute have to be given their strict grammatical meaning and equitable considerations are out of place, particularly in provisions of law limiting the period of limitation for filing suits or legal proceedings. Article 30 of the Limitation Act, as already pointed out, mentions that the time begins to run from the date when the loss or injury occurs. The actual loss or injury to the goods may occur

on one date and the carrier may come to know of it only on a later date and the interval between the two dates may be more than one year. It would not be reasonable to construe the time from which the limitation commences to run under Article 30 of the Limitation Act of 1908 as the actual date of the loss or injury, and it is on account of this fact, the Courts rely on the date on which the carrier of the goods after coming to know of the loss or injury to the goods conveys the information to the consignor as the starting point for limitation. It is common knowledge that when a person loses an article, he may not be aware of the loss immediately, but only at some later date when he needs that article and searches for it and finds it missing. In *Union of India v. Sitaramaiah*, ILR (1961) Mad 1122 = (1961) 2 Mad LJ 521 = (AIR 1962 Mad 349), a Bench of this Court has held that under Article 30 of the Limitation Act of 1908, limitation will begin to run only from the date on which the consignee was informed of the injury to the goods.

5. The learned Advocates for the respondents urged that in cases where the consignor takes open delivery of the goods after ascertaining the extent of damage to the same, the period of limitation will commence to run only from the date of such open delivery. In ILR (1961) Mad 1122 = (1961) 2 Mad LJ 521 = (AIR 1962 Mad 349), the consignee took open delivery of the goods on 21st September, 1950 and even if that date was taken as the starting point for limitation, the suit was barred by limitation and it was in that context it was observed that limitation would, in any event start running from 21st September, 1950. We have already referred to the decision in that case that time will start to run only from the date on which the consignee became aware of the injury to the goods. In *Sultan Pillai and Sons v. Union of India*, (1963) 33 Com Cas 807 = (AIR 1963 Mad 365), it has been held that in a suit for damage to goods against a carrier, the proper Article of the Limitation Act applicable is Article 30 and time will run from the date on which the consignee becomes aware of the damage and that the date of repudiation of the claim by the carrier cannot be the starting point of limitation in such cases. It is clear from the facts of that case that the plaintiff therein had come to know in a general way even prior to his taking open delivery on 6th December, 1956 that the tobacco consigned in that case had been wetted and damaged. It was held in that decision that limitation began to run only from 6th December, 1956 as

"the exact nature of the injury and quantum thereof on which alone he could have claimed damages was known to him only when the goods were examined after opening each bag and ascertaining its condition."

6. It depends on the facts and circumstances of each case as to when the plaintiff suing a carrier for compensation for losing or injuring the goods really comes to know of the loss or injury to his goods. Thus the above decision could be distinguished on the facts of that case. If, however, the decision purports to lay down that it is only when the plaintiff comes to know the nature of the injury and the extent of the same, irrespective of prior knowledge that his goods were injured, the period of limitation would commence, it would be opposed to the plain wording of Article 30 of the Limitation Act and the decision of the Supreme Court in *Jetmull Bhojraj v. D. H. Railway*, (1963) 1 SCJ 505 = (1963) 1 Andh WR (SC) 89 = (1963) 1 Mad LJ (SC) 89 = (1963) 2 SCR 832 = (AIR 1962 SC 1879 at p. 1885). It is clear from this decision that according to column (3) of Article 30 of the Limitation Act, the starting point of limitation would be the date of the loss or injury to the goods, though after the goods were consigned by the consignor he would not be in a position to know the precise date on which the loss or injury has occurred and that the burden would be on the railway administration who want to non-suit the plaintiff on the ground of limitation to establish that the loss or injury occurred more than one year before the institution of the suit.

We have already referred to the decision in (1961) 2 Mad LJ 521 = ILR (1962) Mad 1122 = (AIR 1962 Mad 349), where it has been held that the time will start to run from the date on which the consignee became aware of the injury to the goods. The decision in *East India Railway v. Gopilal Sarma*, AIR 1941 Cal 304, that the time does not run from the date of plaintiff's knowledge and that it begins to run from the date when the injury was actually caused and that the burden of proving when the injury was caused rests upon the carrier has been cited with approval in that decision. Thus even in a case falling under Article 49 of the Limitation Act for compensation for injury to property, the period of limitation commences from the date when the property is injured. The period of limitation could not be put to a later date when the extent of the injury is ascertained, or the quantum of actual damages is assessed. If the Legislature intended to fix the date of the assessment of the actual damages as the starting point of limitation, it would have specifically expressed it in unambiguous terms. We have already referred to the decision in (1963) 1 SCR 70 = (AIR 1962 SC 1716) where it has been pointed out that the words of a statute have to be given their strict grammatical meaning and equitable considerations are out of place, particularly in provisions of law limiting the period of limitation for filing suits or taking legal proceedings.

7. We shall first deal with the claim of the plaintiff in O. S. No. 5 of 1959 on the file of the Sub Court, Tirunelveli. Exhibits A-14 to A-17 show that the assessment of damages to the plaintiff's goods was made on 13th November, 1957. Even if this is taken as the starting point of limitation, and two months' time required to be given to the defendant in giving notice under Section 80, Civil Procedure Code is excluded, the suit should have been filed on 13th January, 1959. But the suit was actually filed on 30th January, 1959. The suit is, therefore, clearly barred by limitation. But the learned Subordinate Judge accepted the plea of the plaintiff that there was an acknowledgment of liability by the railway in Exhibit A-32, which is as follows:—

"While acknowledging receipt of your notice referred to above on behalf of your clients Messrs. Seyadu Beedi Company, Sindu Poondurai, Tirunelveli, I have to state, that the Railway is having the matter thoroughly investigated and that the cause of damage by water is being enquired, and it is hoped your clients will be advised definitely on the finalisation of the claim shortly.

If, however, in the meanwhile, your clients take the matter to Court, please note and notify them that they will be held liable for all costs the Railway incur in such a proceeding."

Admittedly, there is no express acknowledgment of liability in this communication sent by the railway to the plaintiff. Sri R. Gopalswami Iyengar appearing for the respondent-plaintiff urged that on a reading of the plaintiff's Advocate's notice Exhibit A-29 along with this letter Exhibit A-32, it will be clear that there is an implied acknowledgment of liability. The railway has merely acknowledged the receipt of the notice Exhibit A-29 sent by the plaintiff. The fact that the Chief Commercial Superintendent of the Southern Railway has mentioned in Exhibit A-32 that the claim of the plaintiff was under investigation and that he will be advised definitely on the finalisation of the claim cannot be construed as even an implied admission of liability. The further statement in Exhibit A-32 calling upon the plaintiff to abstain from rushing to Court and threatening him that he would be held liable for costs if he did so could not also be considered as an implied acknowledgment of liability, on the ground that the plaintiff was invited to desist from suit on promise of settlement. It is not possible to spell out an admission of liability by even a liberal construction of the letter, Exhibit A-32. The claim of the plaintiff in O. S. No. 5 of 1959, on the file of the Sub-Court, Tirunelveli, is clearly barred by limitation.

8. The plaintiff in O. S. No. 56 of 1960, Sub-Court Tirunelveli, took open delivery of the goods on 10th December, 1957. If he had no prior knowledge of the injury

to his goods, he could certainly rely on the date of Exhibit A-64 as the starting point for limitation and the suit would be within time as found by the lower Court. But the Chief Commercial Superintendent has given intimation to the plaintiff in O. S. No. 56 of 1960, on the file of the Sub-Court, Tirunelveli, of the injury to the goods even by his letter Exhibit A-63, dated 9th October, 1957, which the plaintiff had received on 13th October, 1957, as mentioned in paragraph 5 of the plaint. Hence the period of limitation would commence to run from 13th October, 1957, and the suit should have been filed on or before 13th December, 1968. But the suit was actually filed on 17th December, 1958, after a delay of four days. The certificate of damages and shortages marked as Exhibit A-64 can hardly be construed as an express or implied acknowledgment of liability to pay compensation or damages to the plaintiff. The certificate Exhibit A-64 is only with regard to the assessment of damages to the plaintiff's goods and it has nothing to do with the liability of the Southern Railway to the Plaintiff. The claim of the plaintiff in O. S. No. 56 of 1960, on the file of the Sub-Court, Tirunelveli, is also barred by limitation.

9. Sri R. Gopalswamy Iyengar appearing for the respondent in Appeal No. 38 of 1962 urged that, in any event, he would be entitled to recover Rs. 4800 mentioned in paragraph 11 of the plaint from the Southern Railway. The said amount represents the duty paid by the plaintiff to the Central Excise and the plaintiff would be entitled to get a refund of the same if the goods had been exported outside India. In his notice Exhibit A-37, the plaintiff in O. S. No. 5 of 1959, on the file of the Sub-Court, Tirunelveli, has claimed the total damages of Rs. 38,455-16, as falling under two heads mentioned in paragraphs 8 and 9 of the said notice. The plaint in this case is in conformity with the notice and paragraph 12 of the plaint refers to the total damages of Rs. 38,455-16 as falling under the two heads mentioned in the two prior paragraphs. The claim against the Southern Railway for the entire compensation claimed in the suit is one falling under Article 30 of the Limitation Act. We, therefore, fail to see how the claim for compensation for the loss of duty paid by the plaintiff in respect of which he could have got refund, if the goods had been exported outside India, would stand independent of the compensation for injury to the goods.

10. For the foregoing reasons, the decree and judgment in both the suits, O. S. No. 5 of 1959 and O. S. No. 56 of 1960, on the file on the Sub-Court, Tirunelveli, are set aside and the suits are dismissed on the ground that they are barred by limitation. But, in view of the fact that the appellant-railway succeeds only on the question of limitation,

we direct the parties in each of the appeals to bear their respective costs in both the Courts.

Appeals allowed.

AIR 1970 MADRAS 111 (V 57 C 31)
VEERASWAMI AND ALAGIRISWAMI, JJ.

Commissioner of Income-tax, Madras,
Applicant v. N. K. K. R. Muthukaruppan
Chettiar, Respondent.

T. C. No. 52 of 1965 (Ref. 16), D/- 20-8-1968.

(A) Gift Tax Act (1958), Section 5 (1) —
Exemption under — Share in foreign firm
owning immovable property — Not “immovable
property situated outside India.”

Where a partner having a share in foreign
firm owning immovable properties among
other assets, transfers such a share, such a
transfer is not a transfer of those immovable
properties exempt under Section 5 (1).
AIR 1966 SC 1300, Applied.

(Paras 2 and 3)

(B) Gift Tax Act (1958), Section 4 —
Transfer — Unequal partition between father
and son — No transfer involved.

Where at a partition between father and
son the father contents himself with certain
properties whose value is less than his share
and the remaining properties are allotted to
the son it is a case of an unequal partition
simpliciter and it cannot be said that there
is an outright transfer of the father's share
to the son after a division in status had been
effected. (1966) 60 ITR 454 (Mad), Followed.
(Para 4)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 1300 (V 53) =
1966-2 SCJ 490, Narayanappa v.

Krishnappa 2

(1966) 1966-60 ITR 454 = ILR (1967)

2 Mad 413, Commr. of I. T. v.

Getti Chettiar 4

V. Balasubramaniam and J. Jayaraman, for
Applicant; K. Srinivasan and D. S. Meenakshi-
sundaram and K. C. Rajappa, for Respon-
dents.

VEERASWAMI, J.: This reference arises
under Section 26 (1) of the Gift Tax Act,
1958. The assessee and his minor son,
Karuppah Chettiar constituted a Hindu
undivided family. The family owned
shares in house properties and busi-
ness assets and outstandings due in this
country and also shares in partnership busi-
ness in Burma and Penang, the total of which
was valued at Rs. 9,08,000 as on 2-9-1958.
On that date, there was a partition, the
terms of which are found in the partition

deed. The assessee retained Rs. 70,000 in cash with him and the balance of the family assets was allotted to the share of the minor son. The responsibility for bringing up the assessee's four daughters and performing their marriages in accordance with the custom of the community and the status of the family was left with the minor son. Though the assessee retained for himself the sum of Rs. 70,000 he undertook to discharge a registered mortgage due from the family, a sum of Rs. 20,000. The partition appears to have been recognised for purposes of income-tax under Section 25-A of the Income-tax Act, 1922. For the assessment year 1959-60, the assessee filed a 'nil return' for purposes of the Gift Tax Act. But, on the view that the half share of the father, deducting Rs. 70,000 retained with him, had been transferred to the minor son without consideration in money or money's worth, the Gift Tax Officer brought the value of the residue, a sum of Rs. 3,84,000, to tax. On appeal by the assessee, the Appellate Assistant Commissioner agreed with the Gift Tax Officer that the transaction amounted to a gift, but considered that, as the immovable properties worth Rs. 3,61,300, were situated outside the territories of India, they were exempt under Section 5 (1) of the Gift Tax Act from charge. On that view, he directed the Gift Tax Officer to make due allowance for it and amend the assessment accordingly. The Gift Tax Officer appealed in so far as the order of the Appellate Assistant Commissioner was against the department. On his behalf the contention was that the share gifted to Muthu Karuppan Chettiar did not by itself constitute or consist of immovable properties.

This point was reiterated before the Tribunal in different ways, but in substance, the contention for the Revenue was that the share of the family as a partner in the foreign firms could not be regarded, as, by itself, immovable property within the meaning of Section 5 (1). The Tribunal declined to accept that view with the result the department's appeal failed. Though that conclusion of the Tribunal would have sufficed to dispose of the appeal before it, it went further and said, in effect, that on the facts it could not be held that the transaction was one without consideration inasmuch as the responsibility for maintaining and performing the marriages of his sisters lay on the minor under the terms of the partition. In the circumstances, at the instance of the Commissioner, the reference comes before us, the question for our consideration being—

"(1) Whether on the facts and in the circumstances of the case, the assessee was liable to gift tax? (2) If the answer to the first question is in the affirmative, whether the sum of Rs. 3,61,300 representing the value of the immovable properties in Malaya is exempt from taxation under Section 5 (1) of the Gift Tax Act?"

2. On the strength of *Narayanappa v. Krishnappa*, 1966-2 SCJ 490 = (AIR 1966 SC 1300) the department contends that the Tribunal should have accepted the position that the exemption of the immovable properties under Section 5 (1) was not well founded. It seems to us that the department is right. Neither the Appellate Assistant Commissioner nor the Tribunal examined critically whether, because a partner had a share in a firm which owned immovable properties among other assets, therefore, when such a share was transferred, it can assume that there has been a transfer of immovable properties which are exempt from charge under Section 5 (1). They seemed to have approached the question from the factual situation of the immovable properties outside the territories of India and applied Section 5 (1). 1966-2 SCJ 490 = (AIR 1966 SC 1300) held that whatever be the character of the property brought in by the partners, or acquired in the course of the business, it became the property or trading assets of the firm and that a partner was entitled only to his share of profits, if any, accruing and upon dissolution to a share in the moneys realised which represented the value of the property.

In that case, a Karar was executed by one of the partners, which recorded the fact that the partnership had come to an end and he had given up his share in the assets consisting of machine etc. of the business in the firm and made over the same to the other partner by way of adjustment. The Karar also contained a recital that the partner who executed the document had been given certain immovable property that formed part of the trading assets of the business by the other partner. The document was not registered and the question before the Supreme Court pertained to the validity of the document. It was held that the document did not require registration. The Court observed at page 495 (of SCJ) = (at p. 1304 of AIR)—

"The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done, whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon

among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that what is permitted by Section 29 (1), that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners."

3. It was on that view the Supreme Court held in that case that the document there did not involve any transfer of immoveable property and it did not, therefore, require registration. It seems to us, the principle of this decision has direct application to the facts before us. The joint family of the assessee only owned a share, and that is not in dispute, in the foreign firms, which owned immoveable properties as part of trading assets. The subject matter at the family division was, therefore, that share owned by the family in the foreign firms, and not the immoveable properties per se which constituted the business assets of those firms. We are of opinion, therefore, that S. 5 (1) has no application and the allowance granted in respect of the immoveable properties to the value of Rs. 3,61,300 cannot be sustained.

4. That, by itself, may not conclude in favour of the Revenue, which has got to get over another hurdle. The next question will be whether the partition deed, having regard to its entire tenor and effect, amounted to a transfer of the assessee's half share. A relative question was considered by Commissioner of Income-tax v. Getti Chettiar, (1966) 60 ITR 454 (Mad) to which one of us was a party. That was a case of a joint Hindu family consisting of a father, his son and six grandsons by that son. There was a partition at which the father took for himself Rs. 1,78,343 and the residue out of the total assets of the family valued at Rs. 8,51,440 was allotted to the son's share. The father was charged to a gift tax on Rs. 2,36,377 on the view that allotment of the father's half share less Rs. 1,78,343, amounted to a gift without consideration in money or money's worth. This court held that the transaction did not amount to a gift. This was on the view that the allotment of the father's half share did not involve a transfer of property by him to his son and grandsons. The principle of this decision has undoubted application to this case. But Mr. Balasubramaniam for the Revenue resting himself on the terms of the deed of partition attempted to distinguish (1966) 60 ITR 454 (Mad). According to learned counsel, if regard is had to the terms of the partition, it will be clear that there was first a division in status between the

assessee and his son, thereafter, after retaining with him a sum of Rs. 70,000, the father made over the residue of the family assets to his son. On this basis, it is pressed on us that this was not a case of an unequal partition simpliciter, but an outright transfer of the father's share after a division in status had been effected. We do not think that the partition deed lends itself to the construction which learned counsel for the Revenue sought to place. There is nothing in the partition deed to show that there has been a division first, later on a kind of notional division by metes and bounds and thereafter, the father transferring his half share after retention of a portion. As a matter of fact, the partition deed itself says—

"Having valued my share and obtained in cash and having partitioned the entire assets to my minor son Karuppan Chettiar, myself and my minor son Karuppan Chettiar have become divided in status".

The division in status is, therefore, contemporaneous with the division of the family assets. It seems to us, therefore, that there is hardly any room for holding that (1966) 60 ITR 454 (Mad) is inapplicable.

5. We answer the first question against the Revenue and the second question in its favour. Before leaving this case, we have to make one more observation. The Appellate Assistant Commissioner did not set aside the view of the Gift Tax Officer that there was a gift, but finding that the assessee would be entitled to an allowance under Section 5 (1), directed him to amend the assessment accordingly. The assessee did not prefer an appeal against the Gift Tax Officer's order in so far as it held that there was a gift; nor did he prefer an appeal against the order of the Appellate Assistant Commissioner on that question. What the tax effect of this would be we are not called upon to consider in this reference. But we have considered the first question in this reference only in so far as it has a bearing upon the answer to the second question.

6. In the circumstances, we make no order as to costs.

Answered accordingly.

AIR 1970 MADRAS 113 (V 57 C 32)

NATESAN, J.

Srinivasa Padayachi, Appellant v. Parvathiammal and others, Respondents.

Second Appeal No. 1188 of 1964, D/- 18-10-1968 against decree of Sub Court, Cuddalore in A. S. No. 113 of 1963.

Hindu Law — Mitakshara School (Madras School) — Joint family property — Alienation of, by coparcener — Alienation in consideration of promise to marry — Validity of — Promise to marry is valuable consideration — Alienation, not being gift, is valid to

GM/HM/C872/69/CWM/T

the extent of his share in the property — (Transfer of Property Act (1882), Section 122) — (Contract Act (1872), Section 2 (d)).

A gift by coparcener of his undivided share in the joint family property is void and does not bind even the alienor. But according to Mitakshara law prevailing in Madras, a coparcener has power to alienate for value his undivided interest in the property without the consent of other coparceners. (1879) 6 Ind Cas 88 (PC), Foll.

(Para 4)

Where settlement of joint family property is executed by a coparcener in favour of his adult would-be wife as consideration for her marrying him and in consideration of the transfer marriage followed immediately after, then such transfer being conveyance for valuable consideration, is not a gift pure and simple. Therefore, such settlement is valid to the extent of his interest in the joint family property and has no right to dispose of that property ignoring the right of his wife. AIR 1919 Mad 500, Foll. (Para 6)

It cannot be said that such settlement, being in consideration of promise to marry, is invalid. Marriage may be a sacrament under Hindu law, but that does not militate against the existence of a contract for marriage. Normally reciprocal promise to marry will be a consideration for contract of marriage. But there can be other consideration, provided that such consideration is not opposed to public policy or in any manner illegal. Case law discussed. (Para 5)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 569 (V 54) = 1967-1 SCR 353, A. Perunalakkal v. Kumaresan Balakrishna 4
 (1961) AIR 1961 Mad 356 (V 48) = 1961 Mad WN 172, Sivagnana Thevar v. Udayar Thevar 4
 (1961) AIR 1961 Mad 405 (V 48) = 74 Mad LW 16, Kulasekharaperumal v. Pathalkutty 5
 (1959) 1959-1 Mad LJ 221 = ILR (1959) Mad 630, Tejaunnissa Bivi Ammal v. Rahimath Bivi Ammal 5
 (1957) AIR 1957 Mad 330 (V 44) = 1957-1 Mad LJ 238, Palvanna Nadar v. Annamalai Ammal 4
 (1925) AIR 1925 Cal 856 (V 12) = ILR 52 Cal 425, Pran Mohan v. Hari Mohan 5
 (1919) AIR 1919 Mad 500 (V 6) = ILR 42 Mad 154, Nanjundasami Chetti v. Kanagaraju Chetti 6
 (1910) 15 Cal WN 205 = 12 Cal LJ 173, Gobinda Rami Dasi v. Radha Ballabha Dasi 5
 (1903) ILR 26 Mad 74, Kasturiramaraju v. Ivaluri Ramalinga 6
 (1902) ILR 25 Mad 690, Ayyagiri Venkataramayya v. Ayyagiri Ramayya 6
 (1886) ILR 9 Mad 273, Ponnusamo v. Thatha 6
 (1884) ILR 7 Mad 357 (FB), Baba v. Timma 6

(1879) 6 Ind App 88 = ILR 5 Cal 148 (PC), Suraj Bansi Koer v. Sheo Prosad Singh 4

A. Srirangachariar, for Appellant.

JUDGMENT: In this second appeal by the chief contesting first defendant who has failed in both the courts below, the short question for consideration is whether the settlement deed Ex. A.1, executed in favour of the plaintiff by her husband just before the marriage, is wholly void, or valid as against his share in the properties covered by the deed. The courts below have upheld the plaintiff's claim of a half share in the properties, declared her right to the same, and decreed delivery thereof with mesne profits. The suit properties, an extent of one acre and 80 cents in R. S. 18/2 and a house in Vadakrishnapuram village, Chidambaram taluk, stood in the name of the plaintiff's husband Muthulinga Padayachi. His brother is one Palanivelu Padayachi, father of defendants 5 to 8 in the suit who have not contested the plaintiff's claim. The finding of the courts below is that, on the plaintiff's parents insisting upon a settlement of property being made in her favour as a consideration for the plaintiff marrying him, Muthulinga Padayachi settled the properties on her under the deed Ex. A.1, dated 30-6-1943. The courts below have accepted the evidence that the settlement was a condition for the plaintiff marrying Muthulinga Padayachi. The further finding is that the plaintiff was a major at the time of the marriage negotiations and settlement. The marriage was celebrated a week after the execution of the document and there is evidence that she had been put in possession of the properties settled and was in enjoyment of the same. Some years after the execution of the settlement deed, Palanivelu Padayachi, the brother of the settlor, instituted the suit, O. S. 282 of 1951 on the file of the District Munsif Court, Chidambaram for partition and separate possession of his half share in the suit properties, contending that they are joint family properties, and that the plaintiff's husband, in whose name the properties stood, had no exclusive right in the properties. The plaintiff and her husband were both made defendants in that suit. They made common cause in the suit, and it was pleaded therein that the plaintiff's husband, Muthulinga Padayachi, had been in possession of the properties till the settlement and thereafter his wife, the 2nd defendant in that suit, had been in possession of the same, and that the properties were separate properties of Muthulinga Padayachi. It was held in that suit that the properties were joint family properties of the brothers, Muthulinga Padayachi and Palanivelu Padayachi, and following the finding a decree for partition and possession of a half share in the properties was granted on 29-11-1952 in favour of Palanivelu Padayachi. As a result of the partition proceed-

ings, Palanivelu Padayachi got the eastern 90 cents of the suit first item. Subsequently Muthulinga Padayachi, ignoring the rights of his wife under the settlement deed, sold away the eastern 90 cents to the present appellant, the first defendant in the suit out of which the second appeal arises, under Ex. B.3, dated 12-4-1954. Defendants 2 and 3 claim under the first defendant and the second appeal relates only to the 90 cents, the subject of conveyance by the plaintiff's husband in favour of the first defendant. It may, here, be stated that the first defendant is an attester to the settlement deed Ex. A.1.

2. The contention of the appellant, with reference to the settlement, is that it was a gift of joint family properties and, therefore, wholly void, void even as against the settlor. It is said that the settlee, the plaintiff, got no title under the document even in respect of the settlor's half share in the properties, so the subsequent alienation by the settlor in favour of the first defendant prevailed over the claim under the settlement deed. The Courts below concurrently find that the settlement deed is not a gift, pure and simple, but a conveyance for consideration and, therefore, binding on the settlor to the extent of his half share in the properties.

3. Now at the time of execution of Ex. A.1 the properties were joint family properties and the settlement was made by a coparcener. The other coparcener filed the suit for partition and secured his half share therein. In that suit, there was no plea as between the settlor and the present plaintiff, that the document was void, nor was there any finding in that suit given as to the true character of the settlement deed, whether it was a gift or conveyance for consideration. The plaintiff in that suit, the brother of the plaintiff's husband, was given a half share in the properties, ignoring the alienation as not binding on his share, overruling the defence that it was not joint family property. But if in law the alienation was a gift, it is well settled that the same would not bind even the settlor and the absence of a finding in the earlier suit is neither here nor there. It was sufficient for the determination of that suit if it did not bind the plaintiff therein. The law is thus summed up in *Mullah's Hindu Law* 13th Edn. at page 291, thus:—

“According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property”.

4. Mr. A. Srirangachariar for the appellant referred to a number of authorities where gifts by coparceners, particularly a gift of ancestral immoveable properties by

a husband to his wife out of natural love and affection and even in fulfilment of his father's wishes, have been held to be void. My attention was drawn to *Sivagnana Thevar v. Udayar Thevar*, AIR 1961 Mad 356 where *Veeraswami, J.* following the Division Bench decision of this Court in *Palvanna Nadar v. Annamalai Ammal*, 1957-1 Mad LJ 238 = (AIR 1957 Mad 330) held that a gift of even a reasonable portion of immoveable property belonging to the joint family to a second wife as a marriage gift or in anticipation of marriage is invalid. In *Perunalakkal v. Kumaresan Balakrishna*, AIR 1967 SC 569 at p. 573 the Supreme Court, while pointing out that a Hindu father can make a gift within reasonable limits of immoveable ancestral property to his daughter in fulfilment of an ante-nuptial promise made on the occasion of the settlement of the terms of her marriage and the same can also be done by the mother in case the father is dead, remarks that no single case had been referred to where a gift by husband to his wife of immoveable ancestral property was upheld. After noticing that a Hindu father or any other managing member had power to make a gift within reasonable limits of ancestral immoveable property for pious purposes, it was said that the Court saw no reason to extend the scope of 'pious purposes' beyond what had already been done. It was observed that even the father-in-law, if he had a desire to make a gift at the time of the marriage of his daughter-in-law, would not be competent to do so in so far as immoveable ancestral property was concerned. But these cases are all cases of gift and it is manifest that a gift of ancestral immoveable property, in favour of the wife would be wholly invalid, whether made by the husband or the husband's father or manager of the joint family of the husband. But according to the Mitakshara law prevailing in this State, a coparcener may sell, mortgage or otherwise alienate for value his undivided interest in the coparcenary property without the consent of other coparceners. In *Suraj Bansi Koer v. Sheo Proshad Sing*, (1879) 6 Ind App 88 (PC); the Judicial Committee observed that 'it has been settled law in the presidency of Madras that one coparcener may dispose of ancestral undivided estate, even by contract and conveyance, to the extent of his own share and a fortiori that such share may be seized and sold in execution for his separate debt.' To restate only a gift of joint family property except for the purposes cognised by the personal law, is wholly void and does not bind even the alienor. The question now is whether the settlement deed Ex. A.1 is a deed of gift or is a transfer for consideration.

5. The document Ex. A.1 recites that, in view of the insistence of a settlement of properties when the settlor asked the plaintiff to marry him, he is giving the proper-

ties under the settlement deed and placing the same in her possession. The properties are to be enjoyed by her during his lifetime without alienation. Children of the marriage have to take the properties absolutely, and, if there is no issue by the marriage, the plaintiff herself has to take the properties. The settlement in this case was not just a motive or a grant made out of affection or as a provision for the future. The transfer here was not just a gratuitous transfer. The transfer preceded the marriage and in consideration of the same the marriage followed immediately after. The Transfer of Property Act defines a gift as a transfer of certain existing moveable or immoveable property made voluntarily and without consideration by a person called the donor to another called the donee, and accepted by or on behalf of the donee. As pointed out in *Mullah's Transfer of Property Act*, 5th Edn. page 772, the word 'consideration' is used in the definition of gift under the Transfer of Property Act, in the same sense as in the Indian Contract Act, and excludes natural love and affection. *Mullah* quotes *Blackstone* as saying 'gifts are always gratuitous grants upon some consideration or equivalent'. See also *Kulasekharaperumal v. Pathalkutti*, AIR 1961 Mad 405. The Indian Contract Act defines 'consideration' in Section 2 (d) as follows—

"When, at the desire of the promisor, the promisee or any other person, has done or abstained from doing, or does or abstains from doing or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise".

As *Anson*, in his *Law of Contract*, 22nd Edn. page 92, points out, "consideration, of course, must be something which is of some value in the eye of law". Motive must not be confused with consideration. A desire to carry out the wishes of a deceased or a person to whom the alienor has respect would not amount to a consideration. It is well recognised that a promise to marry is a valid consideration—See *Tejaunnissa Bivi Ammal v. Rahimath Bivi Ammal*, 1959-1 Mad LJ 221. Marriage may be a sacrament under Hindu Law, but that does not militate against the existence of a contract for the marriage. Normally, the reciprocal promise to marry would be consideration for the contract of marriage. But there could be other consideration, provided that such consideration is not opposed to public policy or in any manner illegal. In *Chitty's Contract*, Volume I, 22nd Edn. page 512, it is said—

"On the other hand, the promise must be supported by consideration to be actionable; and though this consideration is usually reciprocal promise to marry it is not necessary that this should be pleaded when there is other consideration."

In *Pran Mohan v. Hari Mohan*, AIR 1925 Cal 856 at p. 857, where the plaintiffs agreed

to give a house to the 2nd defendant in the case and induced the bridegroom party to agree to the marriage, the court observed—

"There is, therefore, a finding by the courts below that there was ante-nuptial promise by the plaintiff which became a binding contract when the marriage followed. The validity of such contracts is well established. In the case of *Gobinda Rami Dasi v. Radha Ballabha Dasi*, 1910-15 Cal WN 205, Mr. Justice Mookerji held that such contracts are valid and binding". The court there distinguished the cases of marriage brokerage contracts which were opposed to public policy and cases where there was no consideration except natural love and affection.

6. The lower appellate court in this case has followed the decision of this Court in *Nanjundasami Chetti v. Kanagaraju Chetti*, ILR 42 Mad 154 = (AIR 1919 Mad 500). In that case a settlement of a portion of joint family property was made by a Hindu in favour of his foster daughter, in pursuance of a promise made by him in consideration of her marriage with another who offered to marry her on such condition. It was held that the settlement was not a gift, but was valid and binding on the alienor's son to the extent of the alienor's share as an alienation for consideration. It was a case of settlement pursuant to a promise made when the intended husband insisted on the settlement as a condition for the marriage—similar to the present case except that the promise here is by the husband to his would-be wife. The settlement was by the foster father of the bride to her would-be husband. It must be noted that the bride not being the daughter of the joint family the settlement evidently was not attempted to be justified as a gift permitted under the Hindu law. The court observed in that case that, if a person contracted a marriage in consideration of a promise, then the marriage would be valuable consideration within the meaning of the definition of 'consideration' in the Contract Act. After pointing out that it was settled law that a coparcener could not make a valid gift even of his share, the court proceeded to consider the question whether the transaction in that case was a gift or alienation for valuable consideration. The Division Bench posed before itself for decision the question whether the gift, made in pursuance of a promise for consideration of marriage, is an alienation for valuable consideration under Hindu law and observed—

"But once the validity of alienation for valuable consideration is recognised, it seems to us impossible not to include such a transaction as this within the operation of the rule. None of the cases to which we have been referred lay down that this power of a Hindu coparcener is merely confined to sales or mortgages; but the general

proposition which we deduce from the decisions in Ayyagiri Venkataramayya v. Ayyagiri Ramayya, (1902) ILR 25 Mad 690, Baba v. Timma, (1884) ILR 7 Mad 357, Ponnusamo v. Thatha, (1886) ILR 9 Mad 273 and Kasturiramaraju v. Ivaluri Ramalinga, ILR 26 Mad 74 is that an ordinary simple gift for no consideration will not be upheld as distinguished from alienation for consideration. We, therefore, hold that the 14th defendant is entitled to a half share of items 3 to 8 of A schedule."

The 14th defendant in the case was the husband of the 4th defendant, the bride who died pendente lite. It was found in that case also, the promise was made just before the marriage. In my view, this decision governs the instant case. Here also, the concurrent finding of the courts below is that the settlement was made in consideration of promise of marriage, just prior to the marriage, and the settlement was followed by the marriage. Both the settlor and the settlee, the husband and would-be wife, were adults, the actual contract was between them and the settlement was in favour of the would-be wife. There is no question of any public policy involved with reference to the settlement, and the mutual promises have been performed. This is not a case of any gratuity or a gift to a third party in consideration of giving an infant or minor in marriage, nor is it a marriage brokerage contract. The husband is, therefore, bound by the settlement; the settlement being a transfer for consideration is not wholly void and is good to the extent of the settlor's interest in the properties. There is no question of natural love and affection at that stage. Of course, the settlement did not bind the settlor's brother and the contest is with reference to the settlor's share only. No decision of our Court contrary to the decision in ILR 42 Mad 154=(AIR 1919 Mad 500) has been placed before me. The ratio decidendi of this decision is that a transfer, made specifically in consideration of marriage, is an alienation for valuable consideration within the rule of Hindu law and not a gift. It follows that the decisions of the Courts below are correct and cannot be assailed in law.

7. It is pointed out that, while the trial Court has specifically stated that the plaintiff has title to a half share in the suit properties, the decree as drafted has not brought out this aspect of this matter and holds the plaintiff entitled to the suit properties as described in the schedule. In the schedule the entire items are described. The lower Appellate Court, on appeal by defendants 1 to 3, has pointed out that only the eastern 90 cents in the first item of plaintiff B schedule which had been sold by the plaintiff's husband to the first defendant and the first defendant, in his turn, to defendants 2 and 3, was the subject of appeal. But the appellate decree, without any modification, con-

firms the decree of the trial Court. The decree in the suit will have to be modified in terms of the lower appellate court's direction confining the decree to the eastern 90 cents in B schedule property. The other item has not been the subject of any appeal. Subject to the provision for rectification of the decree in regard to the first item, the second appeal is dismissed. The plaintiff will be entitled to her costs. Leave refused.

Appeal dismissed.

AIR 1970 MADRAS 117 (V 57 C 33)

VEERASWAMI AND RAMA-
PRASADA RAO, JJ.

Smt. Parvathi Ammal, Appellant v. Controller of Estate Duty, Madras, Respondent.

Tax Case No. 215 of 1965 (Refd. No. 109), D/- 4-3-1969.

(A) Estate Duty Act (1953), Sec. 10 — Scope — Absolute gift of a house — Donor under a separate contract retaining possession and enjoyment of the gifted house on Rs. 15,000/- as annual rent — On donor's death only the interest retained by him in the gifted house will pass and will be chargeable — Section 10 attracted.

Where there was an absolute gift of a house and the donor under a separate agreement retained the possession and enjoyment of the gifted house as a tenant on Rs. 15,000/- as annual rent and on donor's death the question was as to whether the Estate Duty would be chargeable on the entire value of the gifted property or on the value of the interest deemed to have passed on donor's death:

Held that since the subject matter of the gift was of the entirety of the property to donees (sons) including the right to immediate possession and enjoyment, Sec. 10 was attracted. The operation of Sec. 10 was confined to the subject matter of a gift and not extended to what is excluded from the scope of the gift. The Revenue could not charge estate duty on the entire value of the property and the accountable person could not escape duty to the extent of the non-exclusion of the deceased donor on account of retention of possession and enjoyment of it by the donor during his life. AIR 1966 Mad 429, Foll. (Paras 3, 6)

(B) Estate Duty Act (1953), Sec. 10 — Scope — Does not cover entire range of the subject-matter of gift — The expression 'to the extent' — Effect.

Section 10 has no application to the entire range of the subject matter of a gift, for otherwise, it will not be a case of real gift at all. The subject-matter will invariably constitute a bundle of rights. The effect of the words 'to the extent' followed by the non-exclusion and benefit clauses is that if any one or more of the constituent rights

came within the mischief of the non-exclusion clause or there was a benefit to the donor in respect of it by contract or otherwise, such right or rights alone will attract estate duty. (Para 3)

Cases Referred: Chronological Paras
(1966) AIR 1966 Mad 429 (V 53)=
(1966) 60 ITR 810, V. S. Mani v.
Controller of Estate Duty, Madras 3

S. Swaminathan and K. Ramagopal, for Appellant; V. Balasubramaniam and J. Jayaraman, for Respondent.

JUDGMENT:— A property known as Mayavaram Lodge in Thiruchirapalli was included by the Revenue in the principal value of the estate, passing on the death of one R. Venkateswara Iyer on 6-4-1957. His widow, as the accountable person, excluded the property from the return, in view of the fact that by a deed dated 11-3-1955, the deceased had allotted the Mayavaram Lodge to his five sons in equal shares, retaining for himself the other house and certain agricultural lands. On 26-6-1955, the deceased entered into an agreement with his sons by which they leased to their father the Mayavaram Lodge, where, as before, he continued to carry on his boarding and lodging business, with only this difference, that the value of this property was written off from the account of the lodging and boarding business and the deceased started paying a rent of Rs. 15,000, per annum to his sons. The deed of 11-3-1955, *ex facie*, purported to be one of partition but the Revenue at all stages, being of the view that the Mayavaram Lodge was the self-acquisition of the deceased, took it to be a settlement and a gift of the property to his sons. On the ground that the deceased was not excluded from possession and enjoyment of the property which was the subject-matter of the gift, the property was made liable to estate duty.

2. Another point which the revenue did not accept was that the partition did not amount to a gift. The question referred to us at the instance of the accountable person is:

"Whether on the facts and in the circumstances of the case, the entire value of the property known as 'Mayavaram Lodge' or any portion of its value is liable to be included in the principal value of the estate of the deceased as property deemed to have passed on his death?"

Before us, an attempt has been made on behalf of the accountable person to show, but unsuccessfully, that, assuming the transaction amounted to a gift, the subject-matter of it was exclusive of the deceased's right to continue in possession and enjoyment of the Mayavaram Lodge for the purpose of running his business of lodging and boarding. In support of this view, Mr. Swaminathan has in his own way marshalled and looked at the effect of the facts existing as on the date of

the partition and immediately thereafter. He urges that having regard to them, the intention of the deceased could not have been to denude himself of Mayavaram Lodge absolutely without excluding from it his right to be in possession and enjoyment of it and run his business as long as he wanted. Counsel has also presented his point from another angle, namely, that in view of the tenancy laws in force, the deceased had a right to continue in possession of the property as a tenant. What apparently is suggested by the tenancy is the statutory protection afforded by such laws to tenants from eviction. The Central Board of Revenue in its stated case has made reference to the partition deed of 11-3-1955 and we have ourselves looked into its terms. We are of the view that the subject-matter of allotment to the sons by the partition deed was the entirety of Mayavaram Lodge with all the rights that could possibly go into it. Nowhere is there any stipulation in the deed excluding from the scope of the allotment any aspect of any claim or right in or to the property. Great stress is laid by Mr. Swaminathan on the fact the deceased never parted with possession except notionally of the property and that indicated the intention on his part to exclude his right to continue in possession and enjoyment for the purpose of running the business from the scope of the allotment of the property to the sons. In fact, the Central Board in its order has observed that the deceased continued to be in undisputed possession of the premises even after 11-3-1955. But there is sufficient indication in the deed of that date, and the recital to that effect is clear evidence of the fact that the sons had assumed possession and enjoyment of the entirety of the house. They should, thereafter, have allowed the father to continue in the premises and run his business. That would also meet the contention that there was statutory protection any longer available to the deceased, once the sons were allowed to assume possession of the property. Also, statutory protection can only be based on an antecedent tenancy which originally never existed.

3. We, however, agree with Mr. Swaminathan that the applicability of Section 10 would necessarily depend on what is the subject-matter of the gift. The operation of the section, as we understand it, is confined to the subject-matter of a gift and not extended to what is excluded from the scope of the gift. But since we are of the view that the subject-matter of the allotment by the deceased was of the entirety of the property to his sons, including the right to immediate possession and enjoyment, Section 10 is attracted. So then, the next step is to find whether by reason of non-exclusion to any extent of the deceased from the property or reservation or accrual of benefit to him by contract or otherwise, there is *pro tanto* passing on his death of the property. Mr.

Swaminathan does not at this stage dispute that the deceased's sons assumed exclusive possession and enjoyment of the property. But he says that at best for the Revenue it could only be stated that there was subsequent non-retention by the donees and that by way non-exclusion of the deceased from possession and enjoyment of the property and passing on account of it should be limited to that extent and it could go no further. Mr. Balasubramaniam has joined issue with it and contended for the Revenue that since the non-exclusion of the deceased is total because he was allowed to continue in possession and enjoyment of the entire property, the whole of it would pass on his death. The effect of this argument for the Revenue is to ignore the words "to the extent" in Sec. 10. The Revenue would say that these words do not mean the quantum of interest that passes but only have the effect of "if" or 'where'. The precise argument was addressed to this Court in *V. S. Mani v. Controller of Estate Duty*, (1966) 60 ITR 810 at p. 812=(AIR 1966 Mad 429, at p. 430), to which one of us was a party, but was repelled. It was there held—

"We are of the view that the word 'entirety' in the context refers only to the fractional part, the possession of which has not been taken or assumed by the donee and retained to the exclusion of the donor. In the same case there was this earlier observation:

"To the extent to which the donor retains an interest in the entirety of the property given away by him as gift, there will be pro tanto liability to estate duty".

Since we are accepting this view, there is no need to reiterate the reasoning set out in (1966) 60 ITR 810=(AIR 1966 Mad 429). It seems to us that Section 10 will have no application to the entire range of the subject-matter of a gift, for otherwise, as we think, it will not be a case of a real gift at all. The subject-matter of a gift would invariably constitute a bundle of rights. If any one or more of the constituent rights come within the mischief of the non-exclusion clause or there was a benefit to the donor in respect of it by contract or otherwise, such right or rights alone pass and will attract duty. That we think is the effect of the words 'to the extent' followed by the non-exclusion and benefit clauses. On this view, we do not think it necessary to refer to the other cases cited before us on either side of the Bar.

4. Mayavaram Lodge was certainly a bundle of rights of which possession and enjoyment formed a part which, as we have observed, were not subsequently to their assumption retained by the sons of the deceased. To that extent, there was non-exclusion of the deceased. So far as the ownership of the property is concerned, there can be no question that the donees exclusively retained it. It follows that it is only the value of the right to possession and enjoyment in

the hands of the deceased as a lessee that would pass on his death and would attract duty. For the Revenue it is urged that the entire premises being in the occupation and enjoyment of the deceased until his death, its entire value would pass. We are unable to accede to this view, because it does not take note of the value of the other rights of the donees including the ownership of the property, which they retained to the exclusion of the deceased. Since we have held that only to the extent of the non-exclusion mentioned, the proportionate property referable to it would pass, it would be necessary for the Revenue to apportion its value taking all the facts into account and revise the assessment.

5. That is sufficient to dispose of the reference. In view of this, we do not think it necessary to deal with the other point as to whether the transaction of 11-3-1955, amounted to a gift. We have proceeded on the basis that it was a gift.

6. The question is answered partly in favour of the Revenue and partly in favour of the assessee. This is because, on the view we have expressed, the Revenue cannot charge estate duty on the entire value of the property, while at the same time the accountable person cannot escape duty to the extent of the non-exclusion we have indicated. There will be no order as to costs.

We have no doubt that before the Board of Revenue fixing the value of the interest covered by the non-exclusion clause, the accountable person will be given an opportunity of putting forward her case.

Reference answered.

AIR 1970 MADRAS 119 (V 57 C 34)

VENKATARAMAN AND
RAMAMURTI, JJ.

Minor Dorairaj, Appellant v. K. KR. Karuppiiah Ambalam and others, Respondents.

Appeal No. 349 of 1962, D/- 26-9-1968, against decree of Sub-Court, Devakottai in O. S. No. 16 of 1957.

(A) Civil P. C. (1908), Ss. 9 and 16 — Scope — Suit for accounts of dissolved partnership — Defendant resident within jurisdiction of Indian Court — Partnership having assets in form of immovable property in foreign country — Court in India has jurisdiction to entertain suit and, if necessary, to appoint receiver to realise assets of partnership situate in foreign country.

Where there is a suit for taking accounts of a dissolved partnership against a defendant who is resident within the limits of the jurisdiction of a Court in India, but the partnership has assets in the shape of immovable properties in a foreign country, and there is no dispute about the title of the partnership

CM/IM/B82/69/VGW/B

to those assets so far as the plaintiff and the defendant are concerned, there can be no objection to the Indian Court trying the suit. Once it is ascertained whether any amount is due from the defendant and if so, the quantum thereof, it may well happen that the parties may agree about the valuation of the assets in the foreign country and the defendant may pay the proportionate share thereof to the plaintiff in India itself which the plaintiff may accept. In such a case, the plaintiff need not go to the foreign Court at all. Secondly, even if it is necessary to sell the immovable property, in the foreign country it may be done by a receiver appointed by the Indian Court and under the rules of Private International Law and the comity of nations, the foreign Court is bound to recognise the appointment of the receiver. Thirdly, even if it should become necessary for the receiver to remove any impediment or obstruction from any third party in the foreign country, the receiver can seek the aid of the foreign Court and the action will be tried according to the laws prevailing in the foreign country. From any point of view, therefore, there is no possibility of the decree passed by the Indian Court becoming ineffective or useless. Therefore, it is clear that a Court in India will have jurisdiction in such cases: English and Indian Case Law discussed. (Paras 9, 15)

(B) Registration Act (1908), Sec. 17 (1) (b) — Scope — Document not creating or declaring any interest in immovable property but merely reciting the pre-existing rights of parties in immovable properties — Document does not require registration: AIR 1932 PC 55 & (1880) ILR 5 Bom 232 & AIR 1960 SC 307 & AIR 1966 SC 1300, Rel. on. (Paras 20, 22)

(C) Registration Act (1908), Secs. 1 and 17 — Scope and applicability — Act does not apply to immovable property situate outside India.

The Indian Registration Act of 1908, and in particular Sec. 17 (1) (b), would apply only to India and cannot apply to immovable properties situate in Malaya. The object of the legislation is only to provide for compulsory registration in respect of immovable property in India so that the title may be clear and it is no concern of the Indian legislature to legislate with respect to the title to immovable properties in Malaya: Case law discussed. (Paras 20, 23)

Cases Referred: Chronological Paras

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A. Sundaram Iyer, for Appellant; T. B.
Srinivasan, for Respondents.

JUDGMENT: This appeal has been filed by the plaintiff in O. S. No. 16 of 1957 on the file of the Subordinate Judge's Court, Devakottai, against the judgment and

decree dismissing his suit. The suit is for taking accounts of a dissolved partnership and is directed against the first defendant Karuppiiah Ambalam. The suit has been dismissed on two preliminary grounds—(1)

that in part it involved the determination of title to immoveable property situate in Malaya a foreign territory; and (2) limitation.

2. The following genealogical tree will show the relationship of the parties—

SOLAYAPPA (died on 19-1-1946)

Ayyachami (died on 30-3-50)
Married Visalakshi
(2nd deft)

Minor Dorairaj (Plff)

Periannan alias Muthukannu
(died on 14-5-50), married
Ponnalagi (3rd deft)

Solaimalai
(4th deft)

Ramaswami
(5th deft)

The plaintiff's grandfather Solayappa and the first defendant Karuppiiah Ambalam were sons of sisters. They carried on a partnership business in Malaya under the name and style of K. R. PR. Mantin. Originally the business was at Mantian and later it was in Siramban. This partnership is admitted. It is also common ground that Solayappan had 3/4 share and the 1st defendant 1/4 share. Solayappa died on 19-1-1946. Section 42 of the Partnership Act says "Subject to contract between the partners, a firm is dissolved by the death of a partner". As pointed out by their Lordships of the Supreme Court in Commissioner of Income-tax v. Govindaram Sugar Mills, 1965-3 SCR 488 = (AIR 1966 SC 24), a firm of two partners necessarily gets dissolved on the death of one of the partners and to such a partnership the phrase "subject to contract between the partners" cannot apply, because a partnership necessarily involves a minimum of two partners. Even when the legal representatives of the deceased partner takes his place and carry on the business with the other partners, it will only be a new partnership. The plaintiff, however, states inaccurately that there was a contract between Solayappa and the 1st defendant that the partnership should continue without dissolution even in the event of the death of one of the partners, by the legal representatives taking his place. But in substance, the case in the plaint is that a new partnership came into existence on the death of Solayappa, between his sons Ayyachami and Periannan on the one hand, and the first defendant on the other. Paragraph 13 of the plaint alleges—

"He (first defendant) has caused the partnership between KR. PR. to be continued at Seramban without break and without bringing about dissolution and treating Ayyachami and Periannan as partners of the continuing business in the place of their deceased grandfather. (In the plaint Solayapan is throughout referred to as the grandfather). He caused the continuity of the firm to be recognised and registered according to the requirements of the law of Malaya by introducing their names and carried on the firm

under his exclusive directions and management".

This is also made clear in the other paragraphs, like paragraphs 7 and 14.

3. The plaint further states that Ayyachami and Periannan were given to drinking and other bad habits and, therefore, Ponnalagi the wife of Periannan, acting as the next friend of her minor sons, Solaimalai and Ramaswami, instituted a suit, O. S. No. 33 of 1948, on the file of the Subordinate Judge's Court, Devakottai, on 8-11-1947, for partition. In that suit Ayyachami was the 1st defendant, Periannan alias Muthukannu was the 2nd defendant and Karuppiiah Ambalam, the 1st defendant in the present suit (O. S. 16 of 1957) was the 3rd defendant. Two other persons with whom we are not now concerned, were impleaded as alienees. It will be seen that Ponnalagi and her sons Solaimalai and Ramaswami are respectively defendants 3 to 5 in the present suit. In that suit the assets of the partnership KR. PR. in Malaya were described in the C schedule to the plaint. That suit was compromised on 5-4-1949. Ex. A.5 is the certified copy of the compromise. Its terms are very important, particularly, Clause (1). We shall set out Clause (1) in original and also give a free translation of all the clauses. (Here followed the Clause (1) in Native Script)

"Regarding the shop set out in the C schedule of the plaint, we have compromised as follows:—

1. The above shop at Siramban was carried on for a long time between Solayan Ambalam, the father of defendants 1 and 2 with three shares, and the third defendant (Karuppiiah Ambalam, the present 1st defendant) with one share. After the death of the said Solayan Ambalam, the above partnership is being carried on without a break as a partnership between defendants 1, 2 and 3, with the shares as before.

2. The remittance of S 2000 sent recently from the above shop by the 3rd defendant (1st defendant in O. S. 16 of 1957) has been properly settled by looking into the accounts.

3. In regard to the taking of accounts otherwise of the said partnership business, after the 1st and 2nd defendants take out letters of administration after payment of duty to the deceased Solayan Ambalam, we shall divide according to our shares the assets of the partnership in specie or their sale proceeds and at that time we shall finalise all the accounts.

4. Taking the shares of the shop as four, when the accounts are finally settled as stated in Cl. (3), the $1\frac{1}{2}$ share belonging to the family of the 2nd defendant (Periannan alias Muthukannan) shall be divided, by the plaintiff (present defendants 4 and 5) taking one share and the 2nd defendant (their father Periannan) taking a half share. $1\frac{1}{2}$ share out of four will be taken by the 1st defendant (Ayyachami, father of the present plaintiff). The 3rd defendant (1st defendant in O. S. No. 16 of 1957) will take one share. (Stated simply, it will be seen that this recognised that the shares of Ayyachami and Periannan were together three as against the one share of Karuppiiah Ambalam, the present 1st defendant and there is a division inter se between Periannan and his two sons, the two sons being the minor plaintiffs in that suit.

5. Since the shop at Siramban is a partnership and its assets are mostly immovable properties in foreign territories the assets of the said shop are excluded from the suit. Hence it is prayed that the court may record this and remove the C schedule from the plaint and the 3rd defendant without costs."

The above compromise was signed on behalf of the plaintiffs therein by their next friend Ponnalagi and by the first three defendants in that suit, namely Ayyachami, Periannan and Karuppiiah Ambalam (present 1st defendant). The plaint asserts that the above compromise recites what was actually the fact, namely, that the partnership business was carried on without a break even after the death of Solayan Ambalam, as between Ayyachami, Periannan and Karuppiiah. The plaint further states that the first defendant was throughout in charge of the business in Siramban and particularly after the death of Solayappa, and that the other two partners, Ayyachami and Periannan, did not take any interest because of their profligate habits. The plaint charges the first defendant with gross acts of embezzlement. Ayyachami, the father of the plaintiff, died on 30-3-1950 and Periannan (father of defendants 4 and 5) died on 14-5-1950. Paragraph 18 of the plaint states that the firm became dissolved without any debt on 30-3-1950 and still more indisputably by 14-5-1950 and that the first defendant without handing over the assets to the plaintiff and defendants 4 and 5, misappropriated them. The plaint, therefore, prays for accounts from 18-1-1946, but that was on the footing that the 1st defendant utilised the assets of the

old partnership. See, for instance paragraph 13 of the plaint, where it is stated that on 12-4-1947, the 1st defendant opened a new account for the KR. PR. firm by transferring all the assets and liabilities of the firm to the new account.

4. The plaint also refers to three items of properties as thottam properties and states that they were the exclusive properties of Solayappa bought with the funds of the joint family of which he was the kartha or manager though the sale deeds for two of those properties stood in the name of the 1st defendant. The accounts of the income of those three properties were no doubt maintained along with the accounts of the KR. PR. firm, but separately. The plaint prayed for an account of the income of those properties as well against the 1st defendant.

5. Originally the suit was filed with Dorairaj as the first plaintiff and Solamalai and Ramaswami as plaintiffs 2 and 3. But at the instance of the plaintiff, they were transposed by an order in I. A. 184 of 1959 dated 7-4-1959, as defendants 4 and 5, and that is how they have been described in the above narration as defendants 4 and 5. The explanation for this appears to be that the 1st defendant settled the claim of defendants 3 to 5 outside court. The plaint was filed on 5-4-1957, more than three years after 30-3-1950, the date of dissolution, according to the plaintiff. The delay is sought to be explained on two grounds—(1) the absence of the 1st defendant from India in Malaya for certain periods which have to be excluded under Section 13 of the Limitation Act of 1908 (the Act applicable when the suit was laid); (2) The plaintiff was a minor. The 5th defendant was still a minor. The 4th defendant attained majority on 21-1-1956, but the suit was filed within three years thereafter.

6. The suit was contested by the 1st defendant on the following grounds: (1) There was no agreement between Solayappa and the 1st defendant that the partnership should continue even after the death of one of them. Further such an agreement is out of question in a case where there were only two partners. (2) The partnership came to an end on 19-1-1946. No new partnership was formed between Ayyachami, Periannan and the 1st defendant. (3) The original partnership came to an end on 19-1-1946 by the death of Solayappa. Ayyachami and Periannan were competent to give a valid discharge on behalf of their sons; (the plaintiff and defendants 4 and 5) in respect of the accounts of the firm which was dissolved on 19-1-1946 and no suit having been filed by them within three years of 19-1-1946, no cause of action survived to the plaintiff or defendants 4 and 5 and the suit was time-barred. (4) The thottam properties were not the exclusive properties of Solayappa, but belonged to the partnership and the

1st defendant was entitled to 1/4 share in them. (5) There was thus a dispute about title to the immoveable properties lying in Malaya and even for giving a relief of accounting of the income thereof, the Subordinate Judge's Court, Devakottai, had no jurisdiction. (6) The 1st defendant was not in charge of the firm. Solayappa had been in charge of the firm during his lifetime and after him that partnership which was dissolved on his death was wound up, and in the course of such winding up Ayyachami and Periannan and also their two widows, Visalakshi and Ponnalagi, received payments from the 1st defendant in full quit of the claims of the plaintiff and defendants 4 and 5. They also were in management. The first defendant was, therefore, not liable to account at all. He did not commit any acts of misappropriation. (7) Ex. A.5 is inadmissible for want of registration. According to the first defendant, it does not mean that there was any partnership between Ayyachami, Periannan and the 1st defendant. On the other hand, it would only show how accounts should be taken of the partnership which had become dissolved on the death of Solayappa. Further, Ex. A.5, contemplates that letters of administration had to be obtained for Solayappa and the suit as framed without obtaining letters of administration was not maintainable.

7. Several issues were framed, but, as mentioned already, the learned Subordinate Judge dismissed the suit on the preliminary grounds of limitation and jurisdiction. On the question of limitation, the learned Judge took the view that no new partnership came into existence as between Ayyachami, Periannan and the 1st defendant and that the original partnership got dissolved on the death of Solayappa. He also thought that Ex. A.5 required registration and that, in any case, it was only a piece of evidence on the question, whether the old business was carried on between Ayyachami, Periannan and the 1st defendant. As against Ex. A.5, there were clear statements in Ex. A.1, the plaint filed in O. S. No. 83 of 1948, that the partnership between Solayappa and the 1st defendant had become dissolved on 18-1-1946, and accounts had to be taken of that dissolved partnership.

8. On the question of jurisdiction, he held that it was clear from the decision of the Bench of this court (Wadsworth and Rajamannar, JJ.) in *Nachiappa Chettiar v. Muthukaruppan Chettiar*, 1946-1 Mad LJ 310 = (AIR 1946 Mad 398) and the statement of law in Halsbury's Laws of England Vol. 6, (Hailsham's Edn.), that the Subordinate Judge's Court of Devakottai, could not adjudicate on the title of the Thottam properties situate in Malaya, and that even the relief of accounting of the income therefrom involved an adjudication of the title of those properties and that consequently the Subordinate Judge's court had no jurisdiction.

9. The question of jurisdiction is fundamental, but the position has been considerably simplified, because in this court the plaintiff has filed a memorandum through his learned counsel giving up the contention that the thottam properties belonged to Solayappa, and accepting the 1st defendant's contention that the properties belonged to the partnership and that the appellant's grandfather was only entitled to 3/4 share therein. The position, therefore, is very simple, namely, that here is a suit for taking accounts of a dissolved partnership against a defendant who is a resident within the limits of the jurisdiction of the Devakottai Subordinate Judge's court. The partnership has assets in the shape of immoveable properties in Malaya, and there is no dispute about the title of the partnership to those assets, so far as the plaintiff and the 1st defendant are concerned. Under those circumstances the principle and common sense inform us that there can be no objection to the Devakottai Subordinate Judge's court trying the suit. Once it is ascertained whether any amount is due from the 1st defendant and if so, the quantum thereof, it may well happen that the parties may agree about the valuation of the assets in Malaya and the defendant may pay the proportionate share thereof to the plaintiff in India itself which the plaintiff may accept. In such a case, the plaintiff need not go to the foreign court in Malaya at all. Secondly, even if it is necessary to sell the immoveable property in Malaya it may be done by a receiver appointed by the Subordinate Judge's Court, Devakottai and, under the rules of Private International Law, and the comity of nations, the foreign court in Malaya is bound to recognise the appointment of the receiver. Thirdly, even if it should become necessary for the receiver to remove any impediment or obstruction from any third party in Malaya the receiver can seek the aid of the foreign court and the action will be tried according to the laws prevailing in Malaya. From any point of view, therefore, there is no possibility of the decree passed by the Subordinate Judge's Court, Devakottai, becoming ineffective or useless. Therefore, it is clear that the Subordinate Judge's Court, Devakottai, will have jurisdiction in such cases. These propositions, which accord with principle and common sense, of course, find place in the leading text books and in several decisions, English and Indian. They will be found collected in the leading text books and digests.

10. The important principle to bear in mind is that the suit here is essentially an action in personam against a defendant who is amenable to the jurisdiction of the Subordinate Judge's Court of Devakottai. It is an accepted principle that in such cases the court (where he resides) will have jurisdiction to try the action. In fact, in England, the principle has been extended even to a

foreigner, usually resident abroad, but who happens to come to England even temporarily, provided that the writ in the action is served upon him when he is in England. The law is thus stated in 7 Halsbury, page 6, paragraph 4 (the reference is always to Simonds Edn.):—

"The English courts have jurisdiction (subject to the exceptions referred to below) to entertain an action in personam against any person who is within the jurisdiction at the time when the writ in the action is served upon him, however, transitory his sojourn in England may be".

Again, even though the general principle is that the English court will not have jurisdiction to try an action involving the determination of title to the foreign immoveables, there are some exceptions, which have thus been stated at page 83 of Halsbury's Vol. 7:—

"The English courts have power to exercise a jurisdiction in personam, in respect of foreign immoveables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust, provided that the decision of title is not directly involved, and provided that such equity does not depend for its exercise on the *lex loci* of the foreign immoveables. Such an equity must be of a personal nature, that is, there must be either a fiduciary relationship of privity of some other kind between the parties for the courts will not exercise their jurisdiction in order to enforce English principles of equity against third persons who have acquired a good title by the local law, or (in the absence of privity between the parties) to impose on a foreign immoveable a burden other than that which the local law requires it to bear". The exception do not obviously apply here. It is on the above principle that it has been held that "The English courts have jurisdiction to order the specific performance of any contract relating to foreign immoveables which the *lex loci rei sitae* allowed to be carried into effect". (see page 36).

Again, at page 32 it is stated—

"The English courts have jurisdiction to order an account of rents and profits between tenants in common of a foreign immoveable."

At page 37 it is stated —

"The English courts have jurisdiction to order an account of the rents and profits of foreign immoveable property against any person liable to account in respect thereof, and in a suitable case a receiver will be appointed. The court does not, and cannot, by its order put a receiver in possession of foreign immoveables, but any party to the action in which the order is made who prevents the necessary steps from being taken to enable the receiver to take possession according to the *lex loci rei sitae* is guilty of contempt".

Again at page 69 it is stated—

"The English Courts have (with very few exceptions) jurisdiction to entertain an action relating to a contract, wherever made, in all cases where the parties are effectively before the court, as where personal or substituted service of the writ has been effected on the defendants in England...."

Cheshire in his *Private International Law*, in Chapter XVI (page 523 of the 7th Edn. and page 582 of the 5th Edn.) states—

"The objection that a court has no jurisdiction owing to the foreign situs of the *res litigiosa* is fatal to an action in rem, but is no answer to an action in personam". He quotes the following passage from Lord Selborne in *Ewing v. Orr Ewing*, (1883) 9 AC 34 (40) = 53 LJ Ch 435—

"The English courts of Equity are, and always have been courts of conscience operating in personam and not in rem, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction."

11. We may also quote here the dictum of Lord Blackburn, J., in the same case (at page 46)—

"The jurisdiction of the court of Chancery is in personam. It acts upon the person whom it finds within the jurisdiction and compels him to perform the duty which he owes to the plaintiff."

Cheshire also states, at pages 505 and 506 of the 7th Edn., (page 559 of the 5th Edn.), two exceptions to the principle that a possessory or proprietary title to foreign land is not justiciable in England. The first is stated thus—

"If the conscience of the defendant is affected in the sense that has become bound by a personal obligation to the plaintiff, the court, in the exercise of its jurisdiction in personam will not shrink from ordering him to convey or otherwise deal with foreign land."

This doctrine was established in *Penn v. Baltimore*, 1750-1 Ves. Sen 444. We are not concerned with the other exception.

The same principle is also stated in Dicey's *Conflict of Laws* 7th Edn., at pages 151, 155 and 169.

Kerr on *Receivers*, 13th Edn. (1963), states at page 93—

"It is not necessary, in order that the court may have jurisdiction to appoint a receiver, that the property in respect of which he is to be appointed should be in England, or indeed, in any part of His Majesty's dominions, though the extent to which the receiver may be able to obtain possession of the property depends on the *lex loci*. Persons have been appointed to receive the rents and profits of real estates and to convert, get in and remit the proceeds of property and assets, in cases in

which the estate or property in question has been in Ireland, in the West Indies, in India; in Canada; in China; in Italy; in America; in New South Wales; in Jersey; in Brazil and in Peru. But the court will not make such an order if it would be useless. Although the court has no power of enforcing its orders and decrees in places beyond the jurisdiction the receiver may be authorised to proceed abroad, or to appoint an attorney, and a party to the cause who resists him or his attorney will be guilty of contempt". Similarly, in 32 Halsbury, at page 410, dealing with Receivers, it is stated—

"A receiver may be appointed of property situate in a foreign country. Although the court is unable to enforce delivery of possession it may direct an enquiry as to the best means of obtaining possession and make any necessary order on a defendant within its jurisdiction. It is usual to authorise the receiver to appoint an agent to act in the foreign country. The court will recognise a person in the position of a receiver appointed by a foreign court".

We shall now refer to some of the cases chronologically. *Houlditch v. Marquess of Donegall*, (1834) 2 Cl. & Fin 470 (476) = 6 ER 1232 was a case decided as early as 1834, by the House of Lords. The headnote sums up the position correctly and is as follows—

"The creditors of a person resident in Ireland, filed a bill in the English Court of Chancery, and obtained a decree for an account etc. and afterwards (the property of the debtor lying chiefly in Ireland) filed a bill in the court of Chancery there, praying to have the full benefit of the proceedings in the English suit. The court of Chancery in Ireland dismissed such second bill as for want of jurisdiction. Held that the judgment of the court of Chancery in Ireland was erroneous, that the proceedings in the English Court of Chancery were in the nature of a foreign judgment and were to be treated as such in Ireland, namely, as *prima facie* evidence of right in the party who had obtained the judgment. Held also that this House could either remit the case with directions, or appoint a Receiver, and take such other proceedings as the court of Chancery in Ireland might have done". A reading of the page 481 shows that the House of Lords ordered a receiver to be appointed and further directions were reserved to the court of Chancery in Ireland.

In *Bunbury v. Bunbury*, (1839) 1 Beav 318 at p. 336=8 LJ Ch (NS) 297 (at p. 302) the English Court directed the Master to appoint a Manager of the estate in a foreign territory in the West Indies.

Hinton v. Galli, (1854) 24 LJ Ch 121 was a case of 1854, where the Master of the Rolls appointed a receiver for the estate of the deceased Galli situated in Italy and authorised the Receiver to appoint an agent in Italy.

Hendrick v. Wood, (1861) 30 LJ Ch 533 was a decision of the Vice Chancellor in 1861, and it is an interesting case, because it resembles ours. The plaintiff wanted *inter alia* to realise the remaining assets of a firm, the assets being situate in Jamaica, and wanted a receiver to be appointed. The headnote correctly sums up the position:

"The plaintiff being in England, filed a bill for an account against the executors of a deceased partner, some of whom were in England, but acting in concert with the others, who were in Jamaica; the partnership property being also in Jamaica; Held, upon a plea to the jurisdiction by the executors resident in Jamaica, that the suit was properly instituted in this country (England)."

Then comes the decision of the House of Lords in (1883) 9 AC 34=53 LJ Ch 435. We have already quoted from the speeches of Lord Selborne and Lord Blackburn. It was held that the English court had jurisdiction to administer the trusts of the will as to the whole estate, both Scotch and English, and that as no proceedings were pending in a Scotch court, by which the interests of the plaintiff could have been equally protected, the jurisdiction was not discretionary, but that the decree was a matter of course.

In *Bolton v. Curre*, 1894 WN 122, a case of 1894, the English Court appointed a receiver of a foreign property in Ireland.

In *Maudslay v. Maudslay Sons and Field*, (1900) 1 Ch 602 at p. 611 it was stated—

"It is well settled that the court can appoint receivers over property out of the jurisdiction. This power, I apprehend, is based upon the doctrine that the court acts in personam. The court does not, and cannot attempt by its order to put its own officer in possession of foreign property but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officers to take possession according to the laws of the foreign country. See *Keys v. Keys*, 1839-1 Beav 425 where special directions were given to a receiver as to the best mode of getting in an Indian debt; and *Smith v. Smith*, (1853) 10 Hare App lxxi, where it was pointed out that a receiver of property in Jersey and in France would have to recover possession according to the laws of those countries; and in (1834) 2 Cl & Fin 470 the House of Lords held that the court of Chancery in Ireland ought to appoint a receiver in a suit instituted to carry into effect a decree of the court of Chancery in England by which a receiver had been appointed over estates in Ireland".

Kerr on Receivers also refers to other instances, which are found collected in Seton's Judgments and Orders (7th Edn. at page 766 etc.), where receivers were appointed of foreign properties.

12. We shall now refer to some of the Indian decisions. In *Durgadas v. Jainarain*,

ILR 41 All 513 = (AIR 1919 All 350), a suit was brought for dissolution of a partnership in the Aligarh court. The cause of action arose within the jurisdiction of that court. The parties were residing within that jurisdiction. The defendant however, pleaded that the court had no jurisdiction because the factory which belonged to the parties was situate outside the jurisdiction of that court. The trial court upheld this contention and ordered the plaint to be represented to the proper court. That decision was affirmed in appeal. In revision to the High Court, the learned Judges set aside the orders of the courts below and held that the Aligarh Court had jurisdiction. They pointed out that the court would have jurisdiction (under Section 20, Civil P. C.) unless the jurisdiction was excluded by Section 16; but the jurisdiction was not so excluded because there was no dispute about the title to the immoveable property which was admitted to be partnership property. It was pointed out that Section 16 (a) relating to recovery of immoveable property would apply only to a case where the title of the plaintiff is denied by the defendant and the plaintiff seeks to recover the property from the defendant. For the same reason Clause (d) of Section 16 would not apply because there was no dispute about the right to immoveable property or interest in immoveable property. The principle of this decision directly applies to the facts of the case before us, in view of the memorandum of the plaintiff filed in this court giving up his exclusive claim to the thottam properties in Malaya.

13. *Ismailji v. Ismail Abdul*, ILR 45 Bom 1228 = (AIR 1921 Bom 460) was a case where there was a partnership consisting of three persons, the plaintiff, the 1st defendant and one Sulemanji. It carried on business at Chenchai in Delagon, in South Africa. It was managed by the 1st defendant at Chenchai. In 1902 Sulemanji died. The plaintiff filed the suit in Bulsar in Surat District for dissolution of the partnership and for taking accounts. Both the plaintiff and the defendants were within the jurisdiction of the Bulsar Court. Objection was, however, taken that the court had no jurisdiction over the property of the partnership situate in South Africa and could not appoint a receiver to take possession thereof. This objection was upheld by the trial court (Subordinate Judge). But on appeal the learned Judges of the High Court held that the Bulsar court had jurisdiction. They observed—

“Section 20, Civil P. C. clearly gives the courts jurisdiction to decide any suit within the local limits of whose jurisdiction the defendant resides, subject to limitations prescribed in Sections 16 to 19. But it must be admitted that one of those limitations apply to this suit. If therefore, the plaintiff and the defendants were within the jurisdiction

of the Bulsar court, the plaintiff could file a suit against the defendant for dissolution of partnership, even though the partnership commenced and was carried on in foreign territory. It might be difficult to take the accounts of the partnership. That is purely a matter for the plaintiff's consideration, while there can be no doubt that a court can appoint a receiver of property outside its jurisdiction and even in foreign territory, although the receiver in endeavouring to take possession of the suit property will have to apply and will be subject to the law of the territory in which the property is situated. But all these questions have nothing to do with the question of jurisdiction of the Bulsar Court, which is *prima facie* entitled to pass a decree in favour of the plaintiff against the defendant for dissolution of partnership and for accounts unless the Indian Law of Limitation bars the plaintiff's remedy in the Indian Courts.” This decision, again, directly applies to our case.

The above decision was followed by the same High Court in *Chandulal Madhavlal v. Manekalal Lalluram*, ILR 55 Bom 309 = (AIR 1931 Bom 251), and a receiver appointed by a court of the Baroda State was recognised as a proper party for the purpose of filing suits in the British Courts.

In *Sunder Sing v. Gangaram*, ILR (1938) 19 Lah 305 = (AIR 1938 Lah 93) the High Court upheld the order of appointment of receiver by the British court in respect of property situate in an Indian State and observed that the proper course would be to direct the defendant, who was admittedly in possession of the property, to hand over the property to the receiver. Some of the cases discussed by us were referred to and followed.

14. There is a full discussion of the legal position in *Pirithi Sing v. Ganesh Prasad Sing*, ILR (1957) 2 All 703 (at p. 712) = (AIR 1951 All 462 at p. 465), where the question arose, on an application filed by the mortgagor under the provisions of the United Provinces Agriculturists Act, 1934, for a declaration that the mortgage of the properties situate in Benares District and in Banaras State (then a native-State) had become discharged on account of the mortgagee having been in possession of the properties for the period prescribed by the Act. The suit was brought in the court in Benares District and it was held that, though the relief of redemption of the property in Benares State could not be given in view of the provisions of Section 16, Civil P. C. the court in Benaras District had jurisdiction to order on an account to be taken of the rents and profits derived from both sets of properties for the purpose of giving the relief which the applicant actually desired. It was in that connection that the whole question of the jurisdiction of a court in respect

of property in foreign territory was discussed.

The decision in 1946-1 MLJ 310 = ILR 1946 Mad 858 = (AIR 1946 Mad 398) relied on by the learned Subordinate Judge, is clearly distinguishable. The suit there was for partition and some of the assets were immoveable properties in Ceylon where the joint family had been carrying on money lending business. It was a trading family. There was also dispute about title to some of the immoveable properties in Ceylon. One of the objections of the defendants was that the Subordinate Judge's Court of Devakottai had no jurisdiction in respect of the properties in Ceylon. This contention was upheld by the trial court (Subordinate Judge of Devakottai) and relief was given by the trial Court only in other respects. The plaintiff preferred an appeal in respect of the Ceylon properties. His learned counsel sought to get out of the difficulty of jurisdiction by urging that the immoveable properties in Ceylon belonged to the partnership and what was sought was only a division of the assets of the partnership and, if so, the Subordinate Judge's Court, Devakottai, would have jurisdiction. The learned Judges recognised that in the case of a bare partnership owning properties in Ceylon, a suit for the dissolution of the partnership and accounts could be brought in Devakottai, but rejected the contention on the ground that the case before them was that of a trading family and in the case of a trading family even the partnership assets must be deemed to be joint family properties. It was therefore a simple case of partition of immoveable properties belonging to the joint family and from that point of view the Subordinate Judge's Court of Devakottai, had no jurisdiction. In the present case, however, the members forming the partnership did not all belong to a joint family because the first defendant was a stranger. Hence, that decision does not apply. On the contrary, it is pertinent to remark that the very decision recognises that in the case of a partnership, such as the one we have here, it is permissible to bring a suit for accounts of the dissolved partnership, even though some of the assets may be in the shape of immoveable properties outside India where there is no dispute about title. The principle on which the jurisdiction of the Indian Courts has been recognised is that the normal remedy of the parties is only to sell the assets of the partnership and to a share thereof after meeting the debts. That principle has been affirmed by their Lordships of the Supreme Court in *Narayanappa v. Krishnappa*, 1966-2 SCJ 490 = (AIR 1966 SC 1300).

In *Ramanathan Chettiar v. Narayanan Chettiar*, 1955-2 Mad LJ 414 = (AIR 1955 Mad 629) a partition suit was brought by the sons of a joint Hindu family against their father. Some of the properties were

in Ceylon and in Burma. In respect of them the plaintiffs did not seek any partition, but prayed for an account of the income therefrom. Mack and Krishnaswami Nayudu, JJ. held that from the date of severance of the joint family that particular relief could be awarded on the principle that it was an action in personam, arising out of a simple agency or equity, and they distinguished 1946-1 Mad LJ 310 = ILR (1946) Mad 858 = (AIR 1946 Mad 398).

15. For the above reasons we have no hesitation in holding that in this case the Subordinate Judge of Devakottai had jurisdiction to entertain the suit and if it becomes necessary, the court would have jurisdiction to appoint a receiver to realise the assets of the partnership (including immoveable properties) situate in Malaya.

16. Before leaving this point of jurisdiction it is necessary to refer to two matters which were adverted to during the arguments. It was stated by Sri T. R. Srinivasan learned counsel for the contesting respondent—first defendant—that a suit had been brought in Malaya for the same relief which the plaintiff has sought in the present suit. At that stage the learned counsel did not give any particulars of the suit, and Sri A. Sundaram Iyer, the learned counsel for the appellant explained that the suit referred to was a suit for accounting of the income from the thottam properties on the footing that they belonged exclusively to Solayappan and thereafter to the plaintiff and the others and that the suit had nothing to do with the taking of accounts of the dissolved partnership. Sri Sundaram Iyer further admitted that in view of the memorandum filed by the plaintiff before us in this court, accepting the contention of the first defendant that the thottam properties also belong to the partnership and the relief of accounting which the plaintiff would get on that basis in the present suit, the plaintiff would necessarily have to abandon the suit filed in Malaya for that purpose. This was what took place before we reserved judgment. But after we reserved judgment Sri T. Srinivasan took our permission to file the papers in C. S. 120 of 1966 on the file of the High Court in Malaya. It was explained by Sri Sundaram Iyer that that suit was filed by the plaintiff after the Subordinate Judge, Devakottai, dismissed the present suit, O. S. 16 of 1957, and for the same relief of accounting of the dissolved partnership. Sri Sundaram Iyer explained that the plaintiff adopted that course, because he could not be certain that this appeal filed by him would be successful. Sri Sundaram Iyer further pointed out that because of the pendency of this appeal, the defendant himself had obtained stay of the trial of the said suit, C. S. 120 of 1966. It is obvious that the suit C. S. 120 of 1966, cannot be an impediment to the disposal of this appeal.

and a further trial of the suit O. S. 16 of 1957.

17. That brings us to the point of limitation. As already pointed out, the real case of the plaintiff is that after the death of Solayappa on 19-1-1946, a new partnership came into existence between Ayyachami, Periannan and the first defendant and that it was dissolved on 30-3-1959, the date of the death of Ayyachami. The learned Subordinate Judge finds that there was no such partnership and that the only partnership was that between Solayappan and the first defendant which came to an end on 19-1-1946. In coming to this conclusion he was mainly influenced by the recitals in the plaint in O. S. 33 of 1948, Ex. A.1, and he was disinclined to attach any importance to Ex. A.5 and, in fact, in his opinion, Ex. A.5 was inadmissible for want of registration. We shall presently show that this objection of non-registration is not valid and that Ex. A.5 is admissible. If once Ex. A.5 is held to be admissible, it is absolutely clear therefrom that there was a partnership between Ayyachami, Periannan and the first defendant and in that partnership Ayyachami and the sons of Periannan were also entitled to a share. The first clause of Ex. A.5 clearly recites that the original partnership was carried on even after the death of Solayan Ambalam without a break but as a partnership between the three defendants with their shares as before. The share of Solayappa was three and that of the 1st defendant was one. The share of Solayappa was further sub-divided, Ayyachami having $1\frac{1}{2}$ share and Periannan's branch having three shares. In Periannan's branch Periannan was entitled to a half and his two sons were entitled to one share. In our opinion, Ex. A.5 constitutes a contract binding on the parties thereto, including the 1st defendant and it is therefore not open to him to assert anything to the contrary.

18. It has been argued by Sri T. R. Srinivasan, the learned counsel for the first defendant that Ex. A.5 only means that the accounts had been settled till then, and cannot mean that the old partnership was continued without a break upto 5-4-1949. We are entirely unable to accept this argument in view of the clear recital in Clause (1) of Ex. A. 5, and the further recital of the shares of the new partners in Clause (4). After all, there is nothing surprising in the old partnership continuing for practical purposes without a break, though the partners would be different, the assets of the old partnership being utilised for the new partnership. Instances of this can be found in *Ahinsa Bibi v. Abdul Kader*, (1902) ILR 25 Mad 26 and *Mt. Sughra v. Babu*, AIR 1952 All 506, where it is pointed out that the assets of the old partnership would form the capital contribution of the new partnership and in order to determine the capital contribution it may be necessary incidentally

to take an account even of the old partnership.

19. Sri T. R. Srinivasan, however, contends that there was no continuance of the partnership after the date of Ex. A.5 (5-4-1949). That question has not been gone into yet. We propose to remit that question for trial by the trial court, giving an opportunity to both sides to adduce the necessary evidence. But that can only relate to what happened after 15-4-1949. So far as what happened between 19-1-1946 and 5-4-1949 Ex. A.5 is clear and cannot be contradicted by the 1st defendant. The parties must proceed on the footing, and likewise the court must proceed on the footing, that there was a partnership without a break from 19-1-1946 to 5-4-1949, and that the assets of the old partnership were utilised for that purpose.

20. Once we arrive at the above position, it will be seen that the suit is in time even if it should be held hereafter that there was no partnership after 5-4-1949. We shall refer to that later. We proceed straightway to a consideration of the important question whether Ex. A.5 is inadmissible for want of registration. The objection is that it requires registration under Section 17(1)(b) of the Indian Registration Act of 1908. Section 17 (1) (b) reads as follows:

"17 (1): the following documents shall be registered, if the property to which they relate is situate in a district in which and if they have been executed on or after the date on which, Act XVI of 1864 or the Indian Registration Act, 1866 or the Indian Registration Act, 1871 or the Indian Registration Act, 1877 or this Act came or comes into force, namely—

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property."

It is urged that Ex. A.5 declares the rights of the parties in immoveable properties though in Malaya and requires registration under Section 17 (1) (b). In passing it may be noted that no objection has been taken on account of the non-registration of Ex. A.5 in respect of other properties situate in British India and covered by the other schedules in the suit, O. S. 33 of 1948, presumably because they were the subject matter of the suit and registration would be unnecessary in view of Section 17 (2) (vi) of the Act. In our opinion, there is absolutely no substance in this objection that Ex. A.5 requires registration in respect of the immoveable properties of the partnership in Malaya. There are at least three reasons, each of them good, for our view. (1) It merely recites the pre-existing rights of the parties in the immoveable properties

- (1958) AIR 1958 SC 398 (V 45) = 1958 SCR 1240, Nagendra Nath v. Commr. of Hills Division 16
- (1958) AIR 1958 Andh Pra 533 (V 45)=(1958) 2 Andh WR 153, Dhulipudi Namayya v. Union of India 17
- (1958) AIR 1958 Assam 70 (V. 45) (SB), Harinath Das v. State of Assam 19
- (1957) AIR 1957 Mad 449 (V 44)= ILR (1957) Mad 826, Oriental Govt. Security Life Assurance Co., Ltd. (Bombay) v. B. S. Krishnamurthi 22
- (1955) AIR 1955 SC 233 (V 42) = 1955 SCR 1104, Hari Vishnu Kamath v. Ahmad Ishaque 16
- (1953) AIR 1953 Punj 274 (V 40)= 53 Pun LR 424, Union of India v. Narain Singh 18
- (1952) AIR 1952 SC 192 (V 39) = 1952 SCR 583, Veerappa Pillai v. Raman and Raman Ltd. 20
- (1950) AIR 1950 SC 222 (V 37) = (1950) SCR 621, Province of Bombay v. Khushaldas S. Advani 19
- (1947) AIR 1947 Mad 366 (V 34)= ILR (1947) Mad 837, Somasundaram Pillai v. Provincial Govt. of Madras 18
- (1929) AIR 1929 Cal 670 (V 16) = 33 Cal WN 739, Dwijendra Krishna Dutt v. Kedar Nath 17
- (1923) AIR 1923 Mad 582 (V 10)= 45 Mad LJ 67, Muthu Pillai v. Secy. of State 18
- (1892) ILR 16 Bom 561, Haji Abdul Rahman v. Bombay and Persia Steam Navigation Co. 17
- (1885) ILR 9 Bom 358, Dayabhai Tribhovandas v. Lakshmichand Panachand 17

R. K. Manisana Singh, for Petitioners; N. Ibotonbi Singh, Govt. Advocate, for Respondents (Nos. 1 to 5); A. Nilamani Singh, for Respondent No. 6; L. Nandakumar Singh and Y. Imo Singh, for Respondent No. 7.

ORDER:— The petitioners obtained rule nisi under Articles 226 and 227 of the Constitution of India against (1) The Union of India, (2) The Union Territory of Manipur, (3) The Chief Commissioner of Manipur, (4) The Deputy Commissioner of Manipur, (5) The Chief Fishery Officer of Manipur, (6) The Yangai Fishing Co-operative Society Ltd. and (7) Laisram Kumar Singh to show cause why a Writ of Certiorari should not be issued quashing the orders passed by the respondents 3 to 5 (the Chief Commissioner of Manipur, the Deputy Commissioner of Manipur and the Chief Fishery Officer of Manipur) confirming the bid for fishery No. 82/86 Keinou Awangsoi at Rs. 40,000/- per annum for 3 years from 1-4-68 to 31-3-71 and for an appropriate Writ against

them declaring that the auction was for Rs. 40,000/- for 3 years and not for 1 year and directing that the lease should be given to the petitioners.

2. The respondents showed cause.

3. The case of the petitioners is that the sale of the fishery No. 82/86 Keinou Awangsoi and some other fisheries was advertised in the Manipur Gazette dated 1-1-68 for public auction for 3 years 1-4-68 to 31-3-71. Vide Ext. A/1. The sale was fixed on 15-2-68. As intending bidders, the petitioners deposited a sum of Rs. 1,730/- in the Manipur State Co-operative Bank Ltd. at Imphal towards part payment of the security deposit. The petitioners joined the auction and offered a sum of Rs. 40,000/- for fishery No. 82/86 for 3 years. The officer conducting the sale accepted the bid of the petitioners as it was the highest bid. On 16-2-68 the petitioners tendered another sum of Rs. 8,270/- in addition to Rupees 1,730/- already deposited to make up Rs. 10,000/- being one-fourth of Rupees 40,000/- as security amount as contemplated by Fishery Rules of Manipur framed under the Assam Land and Revenue Regulation (Assam Regulation 1 of 1886) and the Indian Fisheries Act (Act IV of 1897); hereinafter called as the Fishery Rules.

But, the 5th respondent, Fishery officer refused to take Rs. 8,270/- stating that the bid of Rs. 40,000/- was only for 1 year and that the security deposit would be Rs. 30,000/- being one-fourth of Rupees 1,20,000/-. Thereafter, on 16-2-68 the petitioners went to the office of the fourth respondent Deputy Commissioner of Manipur with an application to request him to permit the petitioners to deposit the money. But, the fourth respondent was not in the office. The petitioners again went to his office and left the petition with the clerk in charge. The petition was registered on 19-2-68. The fourth respondent communicated an order on 4-3-68 refusing the petitioners' request. The petitioners filed an appeal before the third respondent the Chief Commissioner of Manipur being C. C. Fishery Appeal No. 5 of 1968. But, he dismissed the appeal by his order dated 3-7-68. Vide Ext. A/2. The fourth respondent Deputy Commissioner of Manipur again sent another letter dated 25-9-68 to the petitioner No. 2 demanding him to deposit Rupees 30,000/- by 7-10-68 and to complete the formalities relating to the sale of the fishery by 7-10-68 and stated that, in default, the fishery would be put to auction again at the risk of the 2nd petitioner. He cancelled the sale and put the fishery to re-auction on 30-10-68. Vide Ext. A/3. The respondents 3 to 5 should have held that the petitioners' bid in the auction for

Rs. 40,000/- was for 3 years and not for 1 year. Hence the petition.

4. The respondents 1 to 5 filed joint counter alleging that the auction was held in respect of 241 Government fisheries according to the notification in Ext. B/1 on an yearly basis. In accordance with the practice followed in the case of sale of Government fisheries, the auctioning officer announced just before the commencement of sale of each of the fisheries that the bid would be on yearly revenue basis. The first petitioner was not a bidder. The 2nd petitioner deposited Rs. 1,730/- as an intending bidder towards earnest money, though he should have deposited Rs. 4,200/- representing one-fourth of Rs. 16,800/- which was the total revenue for the proceeding 3 years as shown in column IV of Ext. B/1. On provisional acceptance of the highest bid, the second petitioner transferred the earnest money of Rs. 1,730/- on 15-2-68 as part of the security by deposit-at-call No. 09812 dated 15-2-68 with the Manipur State Co-operative Bank Ltd. in favour of the 4th respondent Deputy Commissioner, Manipur.

The auctioning officer called upon the petitioner No. 2 to deposit a sum of Rs. 28,270/- in addition to the part payment of the security deposit of Rs. 1,730/- within 24 hours of the acceptance of the bid, i.e., before 2 P. M. on 16-2-68, being one-fourth of the revenue of rupees one lakh and twenty thousand for the full term of settlement of 3 years in accordance with the Fishery Rule No. 30 and clause II of the conditions mentioned in Ext. B/1 since he was the highest bidder for the fishery in question, who offered Rupees 40,000/- as yearly revenue. But, the second petitioner made an application mala fide before the fourth respondent on 19-2-68, by dating it as 16-2-68, alleging that his bid for Rupees 40,000/- per year was meant for the full term of 3 years and that he should be permitted to pay the security deposit at the rate of Rs. 13,300/- per annum. Vide Ext. B/3. In the said petition, the second petitioner falsely alleged that the second bidder declared Rs. 11,500/- although the second bidder offered only Rs. 10,000/- Even on the basis that the bid was for Rs. 40,000/- for 3 years, the second petitioner did not tender the security amount of Rs. 13,333.34 paise on 16-2-68. The fourth respondent intimated to him that his allegation that his bid for Rs. 40,000/- was for 3 years was not true. Vide Ext. B/4.

The petitioners filed C. C. Fishery Appeal Case No. 5 of 1968 before the third respondent the Chief Commissioner of Manipur contending that the second petitioner bid for Rs. 40,000/- for the full

term of 3 years on behalf of both the petitioners within the hearing of the auctioning officer and other bidders present at the spot, though all the bidders offered bids on yearly basis. Vide Ext. B/5. One Baldev Sarma, who was second highest bidder, claimed that his bid should be accepted in terms of Rule 30 of the Fishery Rules. The fifth respondent referred the matter to the Government. In the meanwhile, Baldev Sarma also preferred an appeal (C. C. Fishery Appeal No. 4 of 1968) before the third respondent for settlement of the fishery in his favour. The third respondent held that the second petitioner's bid was for Rs. 40,000/- per annum and not for the full term of 3 years and that the application was filed mala fide on 19-2-68 by antedating it to stop other bidders from bidding. The third respondent confirmed the sale at Rs. 40,000/- as annual revenue in favour of the second petitioner under rule 39 of the Fishery Rules and directed that, if he failed to execute the counterpart of the lease in form No. III within two weeks as provided in rule 39 of the Fishery Rules, the fishery should be resold at his risk. The third respondent dismissed C. C. Fishery Appeal No. 4 of 1968. Vide Ext. B/6.

5. The fourth respondent called upon the second petitioner in pursuance of the orders of the third respondent to furnish security deposit of Rs. 28,270/- Vide Ext. B/7. Subsequently, the fourth respondent passed another order calling upon the second petitioner to deposit a sum of Rs. 28,270/- by 7-10-68 to make up the security amount of Rs. 30,000/- and to execute the counterpart of the lease in form no. III as required by Rule 38 of the Fishery Rules and informed him further that, in case he failed to do so, the fishery would be resold at his risk. Vide Ext. B/8. The provision contained in Rule 30 of the Fishery Rules was also mentioned in clause IV of the conditions of Ext. B/1 to apprise the intending bidders that the bid was for 1 year.

6. In all the previous auctions as well as in the auction for the year 1965 (vide Ext. B/9), it was notified that the Government fisheries would be sold for a period of 3 years with the same conditions as those contained in Ext. B/1. The first petitioner was a bidder in the auction sale of the same fishery held on 30-4-65 for the previous term from 1-5-65 to 31-3-68. He offered bid amount of Rupees 5,600/- per annum, which was accepted. He enjoyed the fishery for the said period of 3 years. Vide Ext. B/10. The first petitioner had also filed a petition, which shows that his bid was on yearly revenue basis. Vide Ext. B/11. All the bidders offered bids on annual basis.

There was no occasion for any bidder to bid for an amount for the full term of 3 years.

7. Besides the second petitioner, there were other bidders who offered big amounts with a mala fide intention to stop other bidders from bidding. One Ibomcha Sarma, as is the case of the petitioner no. 2, offered Rs. 25,000/- per annum in respect of fishery no. 64 against the bid of Rs. 6,630/- per annum in the previous year. But, he failed to deposit the security amount. Similarly, one Ahongsangbam Chaoton Singh offered highest bid of Rs. 5,050/- per annum as against the previous bid of Rs. 200/- in respect of the fishery no. 81. The ten cases of the highest bidders including the second petitioner, who failed to deposit the security amounts as required by rule 30 of the Fishery Rules were reported to the Government for necessary orders under R. 39 of the Fishery Rules. Vide Ext. B/15. Fisheries Nos. 64 and 81 when resold fetched Rs. 6,000/- and Rs. 300/- respectively and the re-auctions were confirmed. Vide Exts. B/16 and B/17.

8. As the second petitioner failed to execute the counter part in form no. III despite the notice in Ext. B/8, the fishery was again advertised for resale. Vide Ext. B/12. In the re-auction the respondents 6 and 7 and one Nasib Ali were the bidders. As the fishery did not lie within the area of operation of the sixth respondent, the fourth respondent refused to give it any concession. The seventh respondent was the highest bidder who offered the bid of Rs. 7,600/- per annum and accordingly the fourth respondent referred the matter to the third respondent for confirmation. Vide Ext. B/14.

9. The order of third respondent relating to the confirmation of sale in favour of the second petitioner holding that the bid for Rs. 40,000/- was purely an administrative order, which is not open to review in the Writ petition.

10. The sixth respondent filed counter opposing the petition.

11. The seventh respondent filed a separate counter alleging that he was present on 15-2-68 when the auction took place. There were five bidders who participated in the auction. Nasib Ali, a bidder, colluded with the second petitioner. Both of them planned that the second petitioner should offer a big amount to stop other bidders from bidding and that Nasib Ali should make his offer in such a way that he should be the second highest bidder, so that if the bid was knocked down in favour of the second petitioner the latter could slip away by making default in the payment of the balance security amount of Rs. 28,600/-

and forfeiting only his earnest money of Rs. 1,7300 so that Nasib Ali as the second highest bidder might obtain settlement. The plan fell through due to inadvertence of Nasib Ali and when the bid amount came up to Rs. 11,000/-, Aribam Baldeva Sharma bid for Rupees 12,000/-. The second petitioner mistakenly believed the bid of Rs. 12,000/- to be that of Nasib Ali. As the bid of the second petitioner was the highest, the auctioning officer knocked down the bid in his favour and called upon the second petitioner to pay the balance of security amount of Rs. 28,600/- before 2 P. M. on 16-2-68. Then the second petitioner did not take any objection and did not state that his bid was for a term of 3 years of settlement. All the bidders were fully aware that the bid was on yearly basis. That Nasib Ali entered into conspiracy with the petitioners is evident from the fact that in C. C. Fishery Appeal Case No. 5 of 1968 Nasib Ali filed a false affidavit in support of the claim of the second petitioner that the latter bid for 3 years at a time, although he himself bid on yearly basis. The re-auction was held openly in which the seventh respondent was the highest bidder and the petition is liable to be dismissed.

12. The first question that arises for determination is whether the bid amount of Rs. 40,000/- offered by the second petitioner was for one year or for 3 years, though it is common ground that the term of the lease was for 3 years from 1-4-68 to 31-3-71. There is nothing in the rules 22 to 43 of the Manipur Fishery Rules to show on what basis the bids should be made. Rule 23 lays down that the right of fishing should not ordinarily be leased out for less than 3 years. Rule 24 lays down that the Deputy Commissioner should annually fix a date for the auction of the fisheries. Rule 25 relates to the auction of fisheries in Jiribam. Under rule 26 the fisheries should be sold by public auction. Under rule 27 the intending bidders should furnish proof of financial solvency. Under rule 28 they should deposit earnest money being one-fourth of the average of the accepted bids in respect of the fishery concerned for the proceeding 3 years. Under rule 29 the Deputy Commissioner should normally accept the highest bid. Under rule 30 the accepted bidder should pay the difference between the earnest money deposited by him and one-fourth of the revenue for the full term of the settlement within 24 hours of the acceptance of the bid. Under Rule 31 the earnest money together with such deposit should be treated as the security deposit to be adjusted only towards the payment of the last instalment.

Rule 32 lays down the dates on which the instalments of fishery revenue are payable. Under rule 33 if the lessee relinquishes his lease, the lease will be terminated without any notice and the fishery will be put to resale. Rule 34 lays down that any loss caused to the Government due to the resale should be realised from the defaulting lessee. Rules 35 to 38 are not material. Under rule 39 sale of any fishery in Manipur shall be reported to the Chief Commissioner for confirmation and the sale shall not be final unless it is confirmed by the Chief Commissioner. Rules 40 to 42 relate to offences relating to fisheries. Under R. 43 appeals lie to such authority and in such manner as are prescribed under S. 147 of the Assam Land & Revenue Regulation as applied to Manipur. Ext. A/1, which is of the same form as form no. 1 prescribed by the Manipur Fishery Rules, contains the same provisions. It shows that the lease in question was for 3 years namely, from 1-4-68 to 31-3-71. Condition no. 1 shows that the officer conducting the sale did not bind himself to accept the highest bid or any bid. Condition no. 4 shows that if the purchaser failed to execute a counterpart in Form no. III, the fishery would be resold at his risk and that he was bound to make good the difference between his bid and the amount realised by the subsequent sale. Item No. 15 at Page 100 of Ext. A/1 relates to the fishery in question and mentions that the previous annual rental was Rs. 5,600/-.

13. The learned Counsel for the petitioners pointed out the following two circumstances to show that the bid amount offered by the second petitioner was for 3 years.

(i) Firstly, as already stated, Ext. A/1 shows that the annual rental for the previous term of 3 years was Rs. 5,600/-. Even the reauction fetched only Rs. 7,600/- per annum. So, it is improbable that the second petitioner would have bid for Rs. 40,000/- per annum.

(ii) Secondly, the Government of Manipur published another notification Ext. A/4 dated 23-4-68, in which the respondents 3 to 5 made it clear that the bid should be on annual basis. Vide condition no. 1 in Ext. A/4. But, the subsequent notification might have been made by the respondents 3 to 5 by way of abundant caution to clear any doubt, after the disputes between the parties arose. It cannot be looked into to clarify the previous notification Ext. A/1. Vide page 98 of Craies on Statute Law, 1952 Edition.

14. Thus, though prima facie it looks as though that the bid for Rs. 40,000/- was for the entire period of 3 years, there are the following circumstances

which go to show that every year the auctions were held on the basis of annual rentals and that in the present case also it was held on such a basis:

(i) Firstly, the first petitioner was the highest bidder for the previous term from 1-4-1965 to 31-3-1968. Ext. B/9 is a copy of the notification dated 4-1-65, under which the auction was held regarding the fishery in question. The first petitioner bid for a sum of Rs. 5,600/- per annum. Vide Ext. B/10 copy of the bid list dated 30-4-1965. Ext. B/11 shows that the first petitioner filed an application on 31-10-1966 before the fourth respondent requesting him to extend the time for payment of the annual instalment of the rent and further requesting him not to put the fishery to re-auction, though he could not pay the instalment amount before the due date. So, the fact that the first petitioner was the highest bidder for the previous term in respect of the same fishery for an annual rental of Rs. 5,600/- shows that the petitioners were aware that the bid was on annual rental basis.

(ii) Secondly, the fifth respondent Chief Fishery Officer, Manipur filed an affidavit in the stay petition stating that he announced before the auctions were held that the auctions would be on the basis of annual rental.

(iii) Thirdly, Ext. A/1 shows that on 15-2-1968 30 fisheries were put to auction. The fishery in question was number 15 in the serial order. All the fisheries were sold only on annual rental basis on that day. The petitioners who were present must have been observing that the auctions were being held on the basis of annual rentals. Inasmuch as the second petitioner was the bidder for the fishery in question, which was taken up as serial no. 15 in the course of the auctions, he must have witnessed the previous auctions of the other fisheries and must have clearly known that the auction of the fishery in question was also made on the basis of annual rental.

(iv) Fourthly, Ext. B/2 is a copy of the bid register relating to the fishery in question. It shows that at first Nasib Ali started the bid for Rs. 6,000/-. Then the next bidder was Longjam Tombi for Rs. 10,000/-. Nasib Ali later bid for Rs. 10,500/-. One Senjalal Haokip then bid for Rs. 11,000/-. Next, A Baldev Sharma bid for Rs. 12,000/-. Ext. B/2 shows that thereupon, the second petitioner made a big jump with his bid for Rs. 40,000/-. The fact that the other bidders started with a bid for Rupees 6,000/- and stopped at Rs. 12,000/- clearly indicates that the bids were made on the basis of annual rentals. The second petitioner, who had bid at a stretch for

Rupees 40,000/-, could not be said to have been bona fide, if he really intended to bid for the entire period of 3 years. For, if that was his intention, then his further intention was to scare away the other bidders, as they would not bid for more than Rs. 40,000/- per annum being under the impression that the said bid was for one year.

No doubt, the bid amount of Rupees 40,000/- which is very high suggests that it might have been the bid amount for 3 years. But, in the context in which the second petitioner had bid at a stretch, when the other bidders were bidding only on annual rental basis, the second petitioner could not be stated to have acted bona fide. According to the respondents, the second petitioner was under the impression that his man Nasib Ali was the second highest bidder and the second petitioner thought that nobody else would compete by offering more than Rupees 40,000/- and wanted to drop from the bid, so that the next bid of Nasib Ali might be accepted. There seems to be much force in their contention. But, it so happened that the next highest bidder was Baldev Sharma and not Nasib Ali. That there were some mala fides on the part of the second petitioner and Nasib Ali is clear from Ext. B/18 affidavit filed by Nasib Ali in support of the petitioners' case in C. C. Fishery Appeal Case No. 5 of 1968. Therein Nasib Ali made two palpably incorrect statements.

Firstly, he stated that Baldev Sharma did not bid for Rs. 12,000/- and that yet a false statement was made in the bid list (Ext. B/2) that Baldev Sharma had bid for Rs. 12,000/-. This is a false statement inasmuch as Ext. B/2 shows that Baldev Sharma was the second highest bidder for Rs. 12,000/-. Secondly, Nasib Ali stated in Ext. B/18 that the second petitioner offered Rs. 40,000/- as the bid amount for 3 years. But, he and the other bidders bid in the auction on the yearly rental basis. So, Ext. B/18 shows that Nasib Ali might have been a collusive bidder with the second petitioner and that the latter was under the impression that Nasib Ali's bid was the second highest, so that if the second petitioner dropped, Nasib Ali's bid on the annual rental basis would be accepted, though this might involve forfeiture of a small amount deposited by the second petitioner.

15. Exts. B/15 to B/17 show that there were at least 9 other bidders of the type of the second petitioner, who bid for abnormal amounts and subsequently withdrew. So, it looks as though there were a number of such bidders like the second petitioner, who bid for abnormal amounts with a mala fide motive to frighten away the other bidders.

16. Thus, it is not as though the petitioners' case that the second petitioner had bid on the basis of the full term of 3 years is correct. The contention of the respondents 3 to 5 that the bids were made on annual basis is also sustainable. When two views are possible, it cannot be said that there is any error apparent on the face of the record within the meaning of Article 226 of the Constitution of India, which can be rectified by the High Court. Vide *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233 and *Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumala*, AIR 1960 SC 137. Besides, the respondents 3 and 4 gave findings of fact that the auction was held on an yearly rental basis and the High Court does not interfere with such a finding. Vide *Nagendra Nath v. Commissioner of Hills Division*, AIR 1958 SC 398 and *Kaushalya Devi v. Bachittar Singh*, AIR 1960 SC 1168.

17. The contention of the learned Counsel for the petitioners is that the petitioners were under a bona fide mistake that the auction was held on the basis that the rental was for 3 years and not yearly and that, therefore, the auction is liable to be set aside. But, under Section 20 of the Indian Contract Act the mistake must be a mutual one and not unilateral which would render an agreement void. Under S. 22 of the Indian Contract Act, a contract is not voidable mainly because one of the parties to it was under a mistake as to a matter of fact. Vide also *Dayabhai Tribhovandas v. Lakhmichand Panachand*, (1885) ILR 9 Bom 358, *Haji Abdul Rahman v. Bombay and Persia Steam Navigation Co.*, (1892) ILR 16 Bom 561, *Dwijendra Krishna Dutt v. Kedar Nath*, AIR 1929 Cal 670 and *Dhulipudi Nama-yya v. Union of India*, AIR 1958 Andh Pra 533. In the present case the mistake, if at all, was only unilateral on the part of the second petitioner. It was not a mutual mistake and the respondents were never under the mistake that the auction was being held on the basis that the bid amount represented the rental for the entire period of 3 years. So, this contention fails.

18. The next contention of the petitioners' Counsel is that before the bid was accepted by third respondent Chief Commissioner, the second petitioner had withdrawn the bid, firstly, by refusing to deposit the security amount and secondly, by filing a petition on 16-2-68 before the fourth respondent withdrawing the bid. Regarding the first aspect of the case the learned Counsel for the petitioners relied on sections 3 and 6 of the Indian Contract Act. Under section 3 of the Indian

Contract Act the communication of a proposal or its acceptance and the revocation of a proposal and acceptance, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Under section 6 of the Indian Contract Act, a proposal is revoked by the communication of revocation by the proposer to the other party etc. This ground was not taken by the petitioners in their Writ petition. The mere failure on the part of the petitioners to deposit the balance of the security amount after the auction was held could not, under the circumstances of the case, be held to have the effect of its revocation and of communicating it to the respondents 3 to 5. For, the second petitioner had time till 2 P. M. on 16-2-1968 for making the deposit. In fact, his case is that he offered to make the deposit, but that the 4th respondent refused to accept the deposit. Regarding the second contention that the second petitioner filed a petition on 16-2-68 before the fourth respondent revoking the bid, it is seen from Ext. B/3 true copy of the petition that though it purported to be dated 16-2-68, according to the respondents it was filed on 19-2-68 after the third respondent accepted the bid on 16-2-68. The third respondent stated in Ext. A/2 that the petition was antedated and filed on 19-2-68 with a mala fide motive. Under rule 39 of the Manipur Fishery Rules the offer did not ripen into a contract until the bid was accepted by the third respondent. The second petitioner purported to withdraw the bid after the bid was accepted by the third respondent. So, he could not be permitted to withdraw the bid after it was confirmed. Vide *Muthu Pillai v. Secretary of State*, AIR 1923 Mad 582, *Somasundaram Pillai v. Provincial Government of Madras*, AIR 1947 Mad 366, *Union of India v. S. Narain Singh*, AIR 1953 Punj 274 and *Raghunadhan Reddy v. State of Hyderabad*, AIR 1963 Andh Pra 110. There is no reason why the second petitioner did not withdraw his bid on 15-2-1968 itself.

19. The contention of the respondents' Counsel is that even under the terms of Ext. A/1 or according to the Manipur Fishery Rules the third respondent was not bound to accept the highest bid, as the Government had its own policy in accepting the bids, that the orders of the respondents 3 and 4 were merely administrative and that, therefore, no Writ lies. They relied on *Province of Bombay v. Khushaldas S. Advani*, AIR 1950 SC 222, *Harinath Das v. State of Assam*, AIR 1958 Assam 70 and *Harinagar Sugar Mills*

Ltd. v. Shyam Sunder, AIR 1961 SC 1669. In AIR 1958 Assam 70 the construction of Assam Settlement of Fisheries Rules (which were incorporated in Manipur Fishery Rules) was in question. It was held that there was nothing in rule 8 of the Assam Settlement of Fisheries Rules (corresponding to rule 39 of the Manipur Fishery Rules) which precluded the Commissioner, while examining the report of the Deputy Commissioner, sent to him for confirmation of the sale to consider various matters and to advise the Deputy Commissioner about the manner in which the settlement was to be made and the particular bidder in whose favour the settlement should be made. It was further held that it could not be said that the Commissioner in making any such recommendation should be held to have acted illegally or arbitrarily so as to give power to the High Court to interfere with his order under Article 226 of the Constitution of India. So, the auction of the fishery in question was not only held but accepted according to some policy of the Government and must be said to be administrative in character.

20. Though the petitioners gave up their prayer that the respondents 1 to 5 should be directed to grant the lease of the fishery in question in their favour, such a direction cannot be made. Vide *Veerappa Pillai v. Raman and Raman Ltd.*, AIR 1952 SC 192. The entire controversy between the parties is based on the terms of the contract, its alleged revocation and its alleged breach, for which the more appropriate remedy is by way of a suit and not by way of a Writ petition. Vide *C. K. Achutan v. State of Kerala*, AIR 1959 SC 490, *Nameirakpam Pishak Singh v. Forest Officer, Manipur Forest Department*, AIR 1962 Mani 47, *State of Punjab v. Suraj Parkash Kapur*, AIR 1963 SC 507, *State of Orissa v. Ram Chandra Dev*, AIR 1964 SC 685 and my judgment in *Imphal Sporting Club v. All Manipur Sports Association, Imphal*, (Civil Writ Petn. No. 21 of 1968 = (AIR 1969 Mani 41) on the file of this Court).

21. The learned Counsel for the petitioners, however, argued that the order of the third respondent contained in Ext. A/2 imposed liability on the petitioners, who were held responsible for loss on resale in case the second petitioner did not abide by the acceptance of the bid, that the petitioners' legal right had been infringed and that, therefore, the Writ petition lies. He relied on the passages at page 384 of Vol. 3, Basu's 1967 edition of *Commentary on the Constitution of India*. But, this alleged legal right of the petitioners flows from the alleged breach of a right which ripened into a contra-

ctual right after the bid was accepted by the third respondent. So, the various questions raised by the petitioners, viz., whether the second petitioner had bid on the basis of annual rental or on the basis of rental for 3 years, whether the petitioners had revoked the bid before it was accepted by the third respondent, and whether there was any mistake under which the petitioners could avoid the contract are essentially matters for determination in a Civil suit.

22. No doubt, the petitioners might be put to hardship if the amount deposited by the petitioners is forfeited and the petitioners are made liable for loss occasioned by the re-auction. But, hardship is no criterion in a Writ Petition. Vide *Oriental Government Security Life Assurance Co. Ltd., Bombay, v. B. S. Krishnamurthi*, AIR 1957 Mad 449.

23. It may be noted that the second petitioner had alone bid in the auction and there is no record to show that he had bid on behalf of the first petitioner also. So, the Joint Writ petition filed by both the petitioners is bad.

24. Thus, there are no grounds for invoking the extraordinary jurisdiction of the High Court and the rule is discharged. The petition is dismissed with costs. Pleadar's fee Rs. 100/- one set.

Petition dismissed.

AIR 1970 MANIPUR 23 (V 57 C 7)

R. S. BINDRA, J. C.

Chingangbam Ibomcha Singh, Petitioner v. Okram Tombi Singh, Respondent.

Criminal Revn. Case No. 19 of 1967, D/- 9-7-1969, against Judgment of Ist Class Magistrate, D/- 4-9-1967.

(A) Criminal P. C. (1898), Ss. 435, 439 — Revision petition should be filed in the Court of Sessions Judge in first instance, rather than directly in High Court — Revision petition admitted and pending in High Court for 20 months — Arguments on merits heard — Petition should not be thrown out on this technical objection — (Advantages of the practice shown).

(Paras 4, 5)

(B) Evidence Act (1872), S. 13 — Complaint under Ss. 426, 447 and 506 I. P. C. — Rent note executed by tenant of complainant in respect of land in question and copy of judgment of Nyaya Panchayat in rent recovery case filed by complainant — Documents are not irrelevant, but are admissible to prove the offences.

(Para 6)

(C) Tenancy Laws — Manipur Land Revenue and Land Reforms Act (1960), Ss. 119, 126 — Scope — Tenant surren-

dering land — Landlord entering into possession — Such possession can be availed of, for purposes of S. 426 or 447 I. P. C. — (Penal Code (1860), Ss. 426, 447) — (Criminal P. C. (1898), S. 200).

It is not inconceivable that after the tenant surrenders the possession voluntarily the landlord occupies the land despite the knowledge that S. 126 (1) interdicts such a step. His entry into possession of the land in such circumstances will at the best prompt the Government into adopting measures to evict him for the purpose of securing the ends mentioned in Section 126 (3). However, the physical act of his possession over the land cannot be ignored either by the Court or by anybody else. Where the tenant surrenders possession to the landlord and the competent authorities mentioned in S. 126 either do not come to know of that development or fail to take steps mentioned in S. 126 (3) the landlord can enter into possession of the land after the tenant has abandoned his tenancy and such possession of the landlord can be availed of for the purposes of either S. 426 or Section 447 of Penal Code. Thus landlord is competent to file complaint under Sections 447 and 426 I. P. C.

(Para 7)

(D) Penal Code (1860), S. 506 — Charge under — Intention which weighs with accused in entering upon land in possession of another has no relevancy to charge under S. 506 — Complaint under S. 506 cannot be thrown out on ground that dominant intention of accused in entering upon land was in his capacity as its owner.

(Para 8)

Cases Referred: Chronological Paras (1965) AIR 1965 Pat 509 (V 52)

Ishari Ram v. Ganga Bhagat 8
T. N. Bhattacharjee, for Petitioner; T. Bhubon Singh, for Respondent.

ORDER: This revision petition filed by the complainant Ch. Ibomcha Singh is directed against the order dated 4th of September 1967 by which Shri C. Upendra Singh, Magistrate First Class, Manipur, discharged the accused O. Tombi Singh. The prayer made is for the reversal of that order and for remand of the case to the trial Court for proceeding with it in accordance with the provisions of law.

2. In the complaint lodged by C. Ibomcha Singh it was alleged that he had purchased the land in dispute per registered sale deed dated 31-1-1961 from its owner Yumnam Ibopal Singh and that the latter had delivered the possession to him on the same day. The land was then made over by the complainant to O. Achou Singh for cultivation as tenant and the latter continued to cultivate it until the year 1966. Thereafter, the complainant engaged Ch. Ibomtombi Singh

as the tenant for cultivation of the land and this Ibotombi Singh after ploughing the land sowed paddy seeds therein on 23-6-1967. However, on the morning of 24-6-1967, when Ibotombi Singh was working on the land, the accused O. Tombi Singh entered upon the land and over-ploughed the same forcibly. Ch. Ibotombi Singh protested against the high-handedness committed by the accused, but the accused scared him into silence by brandishing a dao and threatening to behead him therewith. The owner Ibomacha Singh lodged a complaint against Tombi Singh on 28-6-1967 under sections 426, 447 and 506 I. P. C. After recording the preliminary evidence, the Court summoned the accused under those three sections of the Indian Penal Code. The accused defended himself and the Court ultimately discharged him on the finding that the complainant had failed to establish a prima facie case. Having felt aggrieved with that order of discharge, the complainant has come up in revision to this Court.

3. Before proceeding to examine the points canvassed before me by the complainant's counsel Shri Bhattacharjee, I may mention that the defence set up by the accused was that he had purchased the land by a registered sale deed dated 7-3-1967 from the owner Y. Ibohal Singh, that on that very day he was placed into possession of the land by the vendor himself, and that since then he had been in continuous occupation of the land. He denied that the complainant was the owner of the land, or that he had ever leased it out to O. Achou Singh, or that he had subsequently leased it to Ch. Ibotombi Singh, or that he (accused) had either committed criminal trespass on the land, or committed any mischief by over-ploughing the field, or that he had threatened Ch. Ibotombi Singh on 24-6-1967.

4. Shri T. Bhubon Singh, representing the accused, raised the preliminary point that the complainant had gone wrong in filing the revision petition directly in this Court instead of first approaching the Court of the Sessions Judge. He, therefore, urged that the revision petition should be thrown out on that score alone. Shri Bhattacharjee, the counsel for the complainant, submitted, on the other hand, that this Court has concurrent jurisdiction with the Sessions Judge to entertain revision petitions and as such the objection raised by Shri Bhubon Singh is without any merit. Shri Bhattacharjee also emphasised that the revision petition having been admitted by my learned predecessor it would be unjust to reject it more than 20 months after its admission on the sole ground that as a matter of practice the revision

should have first been instituted in the Court of Sessions Judge.

The views of the various High Courts in India on the point at issue are not unanimous though there appears to be consensus that in fairness to the High Court the revision petition should be filed in the Court of Sessions Judge in the first instance. That practice has two distinct advantages. Firstly, the time of the High Court being more precious it is only reasonable that the case should be disposed of by a subordinate Court where it has jurisdiction in the matter and thereby lessen the pressure of work on the High Court. Secondly, the High Court will have the benefit of the opinion of the Sessions Judge if the matter eventually comes before it after having been dealt with by the Sessions Judge. Therefore, it is highly desirable that the aggrieved party should first file the revision petition in the Court of Sessions Judge and not come directly to the High Court. I hope this salutary practice shall be adopted in this territory by the litigants and the bar members alike. I make it clear that in future I would be most reluctant to admit the revision petition directly in this Court, unless, of course, there are special reasons for departing from the practice mentioned.

5. In the present case, however, I have decided not to throw out the revision petition on the basis of objection raised by Shri Bhubon Singh. The reasons that have weighed with me in adopting that course are that the revision petition had been admitted by my learned predecessor and so it would be improper for me to interfere with the discretion exercised by him, that the revision petition has been pending in this Court for more than 20 months now and so if it were presented in the Court of Sessions Judge it shall be rejected summarily as barred by limitation, and that I have already heard full arguments respecting the merits of the petition and so it would be only fair that I should dispose of it on merits rather than throw it out on the technical objection raised by the respondent's counsel. The course that I have adopted is not very unusual. There is abundant authority for the proposition that once a revision petition has been admitted it should be disposed of on merits.

6. Now coming to the merits of the case. The trial Court refused to attach importance to the documents Exts. P/1 and P/3 placed on the record by the complainant to prove the facts that he had after purchase of the land leased the same to Achou Singh and that subsequently Achou Singh was proceeded against by him for recovery of the arrears of rent. In the view of the trial Court these two documents had no relevancy

to the charges because the accused was not a party to either of the two documents. I think the trial Court was clearly in error in holding the two documents as irrelevant. Section 13 of the Indian Evidence Act enacts that where the question is as to the existence of any right or custom, the following facts are relevant:

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

That in face of this statutory provision the documents Exts. P/1 and P/3 are admissible for proving the charges formulated against the respondent can admit of no doubt. I may point out that Ext. P/3 is the rent note which Achou Singh had executed in favour of the complainant Ibomacha Singh, while Ext. P/1 is the copy of the judgment given by Nyaya Panchayat of Imphal West in the case filed by the complainant against Achou Singh for recovery of the arrears of rent respecting the land in dispute. By executing the document Ext. P/3 Achou Singh had admitted the right of the complainant to lease out the land in dispute, and per Ext. P/1 the Panchayat had recognized that the complainant was the landlord of Achou Singh respecting that land. Therefore I fail to see how the trial Court ignored these two valuable pieces of evidence which lent corroboration to the assertion of the complainant that he had leased out the land in dispute on 17-3-1963 and had been in possession of it for a long time before the date of occurrence out of which the present case has arisen.

7. The trial Court pressed into service the provisions of sections 119 and 126 of the Manipur Land Revenue and Land Reforms Act, 1960, hereinafter referred to as the Act, in support of the view that the complainant could not have entered into possession of the land in dispute after his tenant Achou Singh had vacated the same. Section 119 provides, in substance, that a tenant cannot be evicted from the land held by him except under the order of competent authority made on some one of the grounds mentioned therein. Sub-section (1) of S. 126 enacts that after the commencement of the Act no tenant shall surrender any land held by him as such, and no land owner shall enter upon the land surrendered by the tenant, without the previous permission in writing of the competent authority. According to the opinion of the trial Court, it was not legally open

to the complainant to enter upon the land after Achou Singh had relinquished possession over it, and that in consequence his possession over the land through the tenant Ch. Ibotombi Singh on 23rd or 24th of June 1967 cannot be countenanced in law. Here, too, it is not possible to agree with the trial Court.

It is not inconceivable that after the tenant surrenders the possession voluntarily the landlord occupies the land despite the knowledge that the provisions of sub-section (1) of section 126 of the Act interdict such a step. His entry into possession of the land in such circumstances would at the best prompt the Government into adopting measures to evict him for the purpose of securing the ends mentioned in sub-section (3) of Section 126. However, the physical act of his possession over the land cannot be ignored either by the Court or by anybody else. Sub-section (2) of Section 126 provides that permission to the landlord to occupy the land as contemplated by sub-section (1) shall not be given unless the conditions stated in sub-section (2) are satisfied, and sub-section (3) enacts that where permission is refused and the tenant gives a declaration in writing relinquishing his rights in the land, the competent authority shall, in accordance with the rules made in this behalf, lease out the land to some other person who shall acquire all the rights of the tenant who relinquished his rights.

All these eventualities arise only if the matter comes to the notice of the competent authorities. However, it is not difficult to visualise a case where the tenant surrenders possession to the landlord and the competent authorities mentioned in section 126 either do not come to know of that development or fail to take steps mentioned in sub-section (3) of S. 126. In that context, the trial Court was not justified in concluding that in the face of section 126 of the Act the complainant could not have entered into possession of the land after Achou Singh had abandoned his tenancy or that such possession of the landlord cannot be availed of for the purposes of either section 426 or section 447 of Indian Penal Code.

8. While discussing the facts relevant to the charge under section 506 I. P. C., the trial Court held on the authority of AIR 1965 Pat 509, Ishari Ram v. Ganga Bhagat that it is the dominant intention of the accused in entering upon possession of the land which would be decisive in determining whether the offence under section 506, I. P. C. had been made out. This view of the Court is manifestly erroneous. The intention which weighs with the accused in entering upon the land in possession of another has no rele-

vancy to the charge under section 506 I. P. C. In the Patna case, one of the charges levelled against the accused was under section 448 I. P. C. and it is in connection with that charge that the question of dominant intention was brought into discussion. Therefore, the trial Court was wholly unjustified in discharging the accused for the offence under section 506 I. P. C. on the score that his dominant intention in entering upon the land was that in his capacity as its owner he had the right to do so.

9. A perusal of the judgment under revision gives the impression that in the opinion of the trial Court the complainant had not examined any independent witness in proof of various charges formulated against the accused. However, the court was unable to point out what interest P. W. 2 Bira Singh had in the complainant or what grudge he bore to the accused. This witness, it is proved, has a paddy field close to the land in dispute. Therefore, he was a natural witness of the occurrence.

10. I restrain myself from examining in detail the evidence led by the complainant with a view to assess its value. It is for the reason that any expression of opinion made by this Court is bound to influence the mind of the trial Court. However, I have no misgiving in my mind that the trial Court was wrong in discharging the accused at the stage at which he did. The Court was clearly wrong, as shown above, in refusing to attach any value to the documents Exts. P/1 and P/3, in utilising the provisions of section 126 of the Act to support the finding that the complainant could not have entered into possession of the land in June 1967, in discharging the accused of the offence under section 506 I. P. C. on the ground that the dominant intention which actuated the accused in entering upon the land was his title thereto on the basis of sale deed dated 7-3-1967, and in holding that none of the witnesses examined by the complainant was independent.

I may point out that after Y. Ibohah Singh had sold the land to the complainant per registered deed dated 31-1-1961 he could not have executed another sale deed respecting the same land in favour of the accused on 7-3-1967. Shri Bhattacharjee, the counsel for the complainant, may not therefore be wrong in contending that the sale deed dated 7-3-1967 had been prepared mischievously to arm the accused with a weapon with which to dispossess the complainant from the land in dispute.

11. For the reasons stated above, I allow the revision petition and on quashing the discharge order remand the case to the trial Court with the direction that

it should proceed with it further in accordance with the provisions of law.

12. Announced.

Petition allowed;
and case remanded.

AIR 1970 MANIPUR 26 (V 57 C 8)

R. S. BINDRA, J. C.

Aribam Tuleswar Sharma, Petitioner v. Aribam Pishak Sharma and others, Respondents.

Civil Misc. Appln. Case No. 26 of 1968, D/- 19-8-1969, against order of this Court D/- 7-12-1967 in C. R. Case No. 2 of 1965 reported in AIR 1968 Manipur 74.

(A) Civil P. C. (1908), O. 47 R. 8 — Review application—Rehearing of parent proceedings should start only after application is allowed.

The principles which govern and the materials which are taken into consideration by the Court while deciding a review application are not necessarily identical with those which may weigh with it while adjudicating upon the merits of the parent proceeding. The considerations which influence the Court in deciding the review application can quite often be different from those which determine the fate of the parent proceeding. Hence, it would be only just that order allowing the prayer for review should first be recorded and re-hearing of the original case started thereafter. Moreover, while hearing the review application there is no notice to the party who had won the parent case that the merits of that case shall be adjudged in the light of fresh material sought to be brought in by the opposite party by means of the review application. (Para 4)

(B) Constitution of India, Article 226 —Orders made under Article—Inherent power of High Court to review — (Civil P. C. (1908), S. 151, O. 47, R. 1).

High Court being a Court of plenary jurisdiction has the inherent power to review to prevent miscarriage of justice or to correct grave and palpable errors committed by it, such as, when there has been non-compliance with the principles of natural justice. If the party has not founded his claim or defence on a particular plea, he cannot be heard subsequently to assert that either injustice had been done to him or that the court had gone wrong in not taking such claim or defence into consideration while making the final order. AIR 1963 SC 1909 Foll.

(Para 8)

(C) Constitution of India, Art. 226 — Joint Writ Petition against certain separate orders — Objection to maintainabi-

HM/JM/D729/69/CWM/D

lity of petition should be taken at earliest opportunity:

The general rule that there should be a separate petition for each writ claimed appears to be a rule dictated by considerations of practical convenience and is probably warranted by the special nature of the writ proceedings. This is not at any rate a rule of law. Therefore, an objection founded on this rule must be taken in the parent proceeding and at the earliest possible opportunity. Just procedure to follow, even if the court is of the opinion that the joint writ petition challenging the validity of certain separate orders is not maintainable, in fairness to the writ-petitioner is that he should be given an opportunity to amend the petition so as to confine it to one such order. (Paras 11, 12)

(D) Constitution of India Art. 133 (1) (c) — Questions of law — Question whether the provisions of Order 47 Rule 1 CPC can be invoked respecting an order made under Article 226 with the aid of Section 141 of the Code and whether the procedural provisions of the Code, such as those enacted in orders 1 and 2 can be availed of in connection with writ cases—
— Conflict of judicial opinion between various High Courts on the points — Authoritative pronouncement by Supreme Court on the questions necessary—Leave to appeal to Supreme Court granted.

(Paras 9, 10A, 13)

Cases Referred: Chronological Paras

- (1963) AIR 1963 SC 1909 (V 50), Shivdeo Singh v. State of Punjab 7, 8
(1962) AIR 1962 Tripura 7 (V 49), Subodh Chandra v. Union of Tripura 10A
(1958) AIR 1958 Andh Pra 16 (V 45)=ILR (1957) Andh Pra 678, Annam Adinarayana v. State of Andh Pra 9
(1958) AIR 1958 Pat 314 (V 45)=1958 BLJR 239, Bankim Chandra Chakravarty v. Regional Provident Fund Commr. 10A
(1958) AIR 1958 Pat 653 (V 45)=ILR 37 Pat 462, Bishwaranjan Bose v. Honorary Secy. Ram Krishna Mission 10A, 12
(1957) AIR 1957 Cal 702 (V 44)=61 Cal WN 694, Bharat Board Mills Ltd. v. Regional Provident Fund Commr. 9
(1957) AIR 1957 Mad 570 (V 44)=1957-2 Mad LJ 145, Shanmuga Rajeshwara Sethupathi v. State of Madras 10A
(1956) AIR 1956 Cal 291 (V 43), Manindra Nath Pal v. Municipal Commr. of Baranagore Municipality 10A

(1955) AIR 1955 Pepsu 159 (V 42)=ILR (1955) Patiala 622, Mandir Thakar Dawara Dhuri v. State of Pepsu 10A

(1952) AIR 1952 Raj 39 (V 39)=ILR (1951) Raj 289, Hari Ram v. Nathi 4

(1939) AIR 1939 Mad 137 (V 26)=ILR (1959) Mad 75, Management of Rain Bow Dyeing Factory v. Industrial Tribunal 9

L. Nandakumar Singh, for Petitioner; N. Shyamasundor Singh, for Respondents Nos. 1 to 4 (d); N. Ibotombi Singh, Govt. Advocate, for Respondents Nos. 5 to 11.

ORDER:— In the writ petition No. 9 of 1962 filed by Aribam Tuleswar Sarma on 14-9-1962 against Irengbam Yaima Singh, Aribam Pishak Sarma, Aribam Ningol Ngambi Devi, and Pangabam Doya Singh, hereinafter referred to as the principal respondents, and seven officers of the Manipur Administration including its head, the Chief Commissioner, the prayers made were that the latter be commanded to recall the orders dated 11-8-1961 and 30th September 1961 by which he had settled certain Government plots adjoining Imphal—Kangchup road and situate within the Municipal limit of Imphal, with the principal respondents, and that the remaining six officers should be directed to discharge their statutory duties in the matter of evicting the principal respondents from the said plots.

2. Those prayers were granted by Shri Rajvi Roop Singh, the then Judicial Commissioner of this Court, by his order dated 25th of May 1965. The principal respondents having felt aggrieved filed an application on 2-7-1965 under Ss. 151 and 114 read with Order 47 Rule 1 of the Civil Procedure Code, hereinafter called the Code, praying for review of that order and for dismissal of the writ petition. Though the review application was made when Shri Rajvi Roop Singh was still in office, the application came up for decision before his successor Shri C. Jagannadhacharyulu who allowed the review application and simultaneously dismissed the writ petition by his order dated 7th December 1967. The writ petitioner Tuleswar Sarma then made an application on 14-2-1968 under Article 133 (1) (c) of the Constitution praying that a certificate be issued to the effect that the present is a fit case for appeal to the Supreme Court. This prayer was vehemently opposed by the principal respondents.

3. Shri C. Jagannadhacharyulu allowed the review application on two grounds, namely, (i) that Shri Rajvi Roop Singh had failed to take into consideration the documents Ext. A/1 and Ext. A/3 which had been placed on the record by the principal respondents, and (ii) that Shri

Rajvi Roop Singh had erred in entertaining one joint writ petition against the principal respondents, who are four in number, despite the facts that they were in occupation of different plots and that the causes of action against those respondents had nothing in common. It was pointed out by Shri C. Jagannadhacharyulu that if the writ petitioner succeeded against the four principal respondents, not one but four separate writs shall have to be issued. In his opinion, the writ petitioner had "committed a patent illegality in filing a single writ petition questioning the various settlements made in favour of the various petitioners separately", and that Shri Rajvi Roop Singh "committed an error in allowing the first respondent (the writ-petitioner) to file a joint writ petition against the petitioners, whose cases are quite different". It was further mentioned that these facts constituted an error apparent on the face of the record. It may be mentioned here that Shri C. Jagannadhacharyulu did not mention in his order dated 7th December, 1967, under which provision of law he had exercised the power of review.

4. The first flaw which Shri Nandakumar Singh, representing the writ-petitioner, pointed out was that on accepting the review application the proper course for the Court to follow was to fix the writ petition for re-hearing and not to dispose of the writ petition along with the review application. In this connection Shri Nandakumar Singh placed reliance on Rule 8 of Order 47 of the Code. Evidently, this argument presumes that the review was made under O. 47, R. 1, of the Code. The opposite counsel, Shri Shyamsundor Singh, did not challenge that assumption during the course of arguments, though, in fairness to him, it must be stated that his stand was that review may have been ordered by the Court under Section 151 of the Code. Rule 8 provides that when an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit. According to this provision, the re-hearing of the original case has to be done after the review petition has been granted. This statutory provision is really sensible for while adjudicating the merits of the review application made under Rule 1 of Order 47, the attention of the Court and of the parties shall be concentrated in determining whether the conditions prescribed by that Rule for permitting review are satisfied and the data relied upon warrants acceptance of the prayer for review. That data may not in each case necessarily be decisive of the merits of the parent proceeding;

its value and merit may be adjudged while re-hearing the parent case. This point is clearly brought out by the facts of the case reported in AIR 1952 Raj 39, Hari Ram v. Nathi. In that case, A brought a suit for redemption of a house against the original mortgagee B and one C who happened to be in possession of that house. The defence set up was that A had sold the house to B and thereafter B had transferred the house to C. The trial Court found that A had not sold the house to B and that that was evident from the fact that A had paid interest to B after the alleged date of sale in the latter's favour. The suit was consequently decreed by the trial Court. On appeal, the High Court reached the conclusion that the sale by A in favour of B was proved. However, no finding was given on the issue whether any interest had been paid by A to B after the alleged date of sale. The High Court consequently allowed an application for review made by A because no decision had been recorded in the appellate judgment on the issue respecting the payment of interest, and if, as held by the trial Court, A had paid interest to B after the alleged date of sale, that fact would militate against the finding in the appellate judgment that A had sold the house to B. In such circumstances, though the review was allowed and the decree of the High Court set aside for reason of an apparent error on the face of the record, yet no finding was given while accepting the review whether or not interest had been paid by A to B. That point was left open to be argued during the course of re-hearing of the appeal. While re-hearing the appeal, it is too obvious, the High Court could still reach the conclusion that the finding of the trial Court on that point was wrong. It would follow that the principles which govern and the materials which are taken into consideration by the Court while deciding a review application are not necessarily identical with those which may weigh with it while adjudicating upon the merits of the parent proceeding. Put in other words, the considerations which influence the Court in deciding the review application can quite often be different from those which determine the fate of the parent proceeding. Hence, it would be only just that order allowing the prayer for review should first be recorded and re-hearing of the original case started thereafter. Moreover, while hearing the review application there is no notice to the party who had won the parent case that the merits of that case shall be adjudged in the light of fresh material sought to be brought in by the opposite party by means of the review application. It is for these reasons that I happened to remark above

that provisions enacted in Rule 8 of Order 47 are eminently reasonable and sensible.

5. In the instant case, the writ-petitioner had denied in the written statement filed in reply to the review application that documents Exts. A/1 and A/3 related to the plots in dispute. Shri C. Jagannadhacharyulu did not give any finding on this question of fact. He appears to have presumed that the documents relate to those plots. In fairness to him, the writ-petitioner should have been given an opportunity of addressing arguments in the writ case to explain his stand about the bearing of the documents A/1 and A/3 on the merits of writ petition after they had been admitted on acceptance of the review application. Such a procedure would have allowed full opportunity to the parties' counsel to address the Court afresh on the merits of the writ petition itself. In view of non-compliance with the statutory provisions enacted in Rule 8 of Order 47, there has been real miscarriage of justice, specially in the context that the aforementioned question of fact raised by the writ-petitioner was neither referred to nor decided in the composite order by which the review application was granted and the writ petition dismissed.

6. Another point connected with the one referred to above may also be noticed. According to the finding of Shri C. Jagannadhacharyulu, the documents Exts. A/1 and A/3 pertain to the plots in the occupation of the principal respondents Nos. 1 and 2, namely, A. Pishak Sarma and I. Yaima Singh. The Court did not hold that there was any allotment in favour of principal respondents Nos. 3 and 4 other than the one made to them by the Chief Commissioner in the year 1961, nor it upheld the validity of the latter allotment. Consequently, it is not clear how the Court happened to equate the case of principal respondents Nos. 1 and 2 with that of principal respondents Nos. 3 and 4 and dismiss the writ petition even against the latter.

7. The main point canvassed in this application is whether an order made under Article 226 is open to review by the High Court. Broadly speaking, the problem can be looked at from three angles. Shri Shyamsundor Singh, appearing for the principal respondents, submitted that the provisions of Order 47 Rule 1 apply to an order made under Article 226. Alternatively he urged, the power of review can be exercised under Section 151 of the Code. Thirdly, he argued on the authority of Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909, that the power of review inheres in the High Court respecting cases decided

under Article 226. It is in order to mention that the review application by the principal respondents was made under Section 151 and Order 47 Rule 1 of the Code, and that it was not asserted or claimed in the review application that the High Court is possessed of inherent right to review the orders made under Article 226. Shri Nandakumar Singh, representing the writ-petitioner, submitted on the other hand that since review was not sought in exercise of the inherent powers of the High Court and since there is sharp conflict in the judicial opinion on the point whether the High Court can review its order made under Article 226 by virtue of Order 47, Rule 1 or Section 151 of the Code, an authoritative pronouncement by the Supreme Court is urgently required to put an end to that controversy and as such the present is a fit case for appeal to the Supreme Court. I find considerable merit in this submission of Shri Nandakumar Singh.

8. In the case of Shivdeo Singh AIR 1963 SC 1909 (supra) the point urged before the Supreme Court was that the High Court has no power of review respecting orders made under Article 226. The Supreme Court observed, while repelling that contention, that

"It is sufficient to say that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it".

Respecting the specific case before the Supreme Court it was observed that the review by the High Court was justified because while making the first order the High Court had committed breach of the principle of natural justice requiring that no adverse order should be made against a person who is not a party to the proceeding. The principle enunciated by the Supreme Court would, therefore, appear to be that the High Court being a Court of plenary jurisdiction has the inherent power of review to prevent miscarriage of justice or to correct grave and palpable errors committed by it, such as, when there has been non-compliance with the principles of natural justice. As stated above, this Court reviewed the order dated 20th May 1965 on the basis that Shri Rajvi Roop Singh had failed to take into consideration the documents Exts. A/1 and A/3 though they had been placed on the record by the principal respondents in support of their defence, and that the writ petitioner could not have brought one writ challenging the validity of four separate orders made by the Chief Commissioner in favour of the prin-

principal respondents. However, a reference to the counter affidavit jointly filed on behalf of principal respondents would bring out that it was not their contention that apart from the settlement orders made in their favour in 1961 there was any other settlement or allotment standing in their names. Nor did they contend in that counter affidavit that one joint writ challenging the validity of four separate orders was not maintainable. The order dated 20th May 1965 made by Shri Rajvi Roop Singh is also silent respecting those points, and so it looks obvious that those points were not raised before him. In the background of these established facts, it can be legitimately contended on behalf of the writ petitioner that the principal respondents could not have claimed review on the basis of submissions which had not been adopted by them in their counter-affidavit. The writ petitioner's counsel was consequently justified in making the submission before me that if a party has not founded his claim or defence on a particular plea, he cannot be heard subsequently to assert that either injustice had been done to him or that the Court had gone wrong in not taking such claim or defence into consideration while making the final order. Hence, the prayer for review by the principal respondents could not be founded on the inherent right possessed by the High Court to review its orders.

9. That judicial opinion in India is sharply divided on the point whether the High Court has power of review under Order 47 Rule 1 admits of no doubt. Order 47, Rule 1 does not apply directly to the orders made under Article 226. Its application can be invoked only by the aid of Section 141 of the Code. Section 141 states that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction. Apparently, only the procedure prescribed by the Code can, at the best, be made applicable to the writ proceedings. The right of review, however, falls in the category of a substantive right and not a procedural matter. There is complete unanimity in the judicial opinion on the point that like the right of appeal the right of review cannot be assumed unless it is expressly given by a statute or by some provision having the force of law. Hence, there appears to be substance in the contention that the right of review respecting writ proceedings cannot be claimed under Order 47 Rule 1 with the help of S. 141 of the Code. It is in order to mention that, Article 137 of the Constitution enacts that the Supreme Court shall have power to review any judgment pronounced or

order made by it, of course, subject to the provisions of any law made by Parliament or any rules made under Article 145. There is no constitutional provision giving the power of review to the High Court in respect of proceedings under Article 226. Hence, there is much to be said in favour of the proposition that the High Court has no statutory powers of review in regard to orders made under Article 226. Further, there is no consensus of judicial opinion in India on the point whether or not writ proceedings are "proceedings in any Court of civil jurisdiction". Though it was held in the case of *Annam Adinarayana v. State of Andhra Pradesh*, AIR 1958 Andh Pra 16, that an application under Article 226 is a proceeding in a Court of civil jurisdiction and as such section 141 of the Code applies to such proceedings, the Calcutta High Court took a contrary view in the case of *M/s. Bharat Board Mills Ltd. v. Regional Provident Fund Commr.* AIR 1957 Cal 702, by holding that the jurisdiction which the High Court exercises under Article 226 is a special and limited jurisdiction and so the provisions of S. 141 are not attracted to writ cases. The Madras High Court expressed the opinion in the case of *Management of Rain Bow Dying Factory v. Industrial Tribunal*, AIR 1939 Mad 137, that Section 141 of the Code does not apply to writ proceedings inasmuch as such proceedings cannot be held to be in the nature of a civil suit. Therefore, the matter is not free from doubt whether the provisions of Order 47 Rule 1 can be invoked in reference to writ proceedings with the help of section 141 of the Code. Hence, I have no hesitation in holding that a really good case has been made out by the writ-petitioner for grant of a certificate enabling him to file an appeal in the Supreme Court.

10. Before proceeding to consider the next point canvassed by Shri Nandakumar Singh, I may state that apart from the objection that the documents Ext. A/1 and Ext. A/3 do not relate to the plots in dispute, there is no material to support the conclusion that the leases mentioned therein are continuing till this day. If such were the stand of the principal respondents, there could have been no occasion for their feeling panicky when the Settlement Officer adopted measures to evict them as trespassers. They could have opposed their eviction on the basis of their possession founded on lease agreements instead of rushing to the Chief Commissioner with the prayer that the plots should be settled with them.

10-A. This brings us to the consideration of the merits of second ground on

which the review application was accepted and the writ petition dismissed, namely, that the writ-petitioner could not have challenged the validity of four different orders made by the Chief Commissioner settling the plots with the principal respondents in one joint writ petition. In support of that ground Shri C. Jagannadhacharyulu placed reliance on the authorities reported in *Mandir Thakar Dawara Dhuri v. State of Pepsu*, AIR 1955 Pepsu 159, *Sri Shanmuga Rajeswara. Sethupathi v. State of Madras*, AIR 1957 Mad 570, *Bankim Chandra Chakravarty v. Regional Provident Fund Commissioner*, AIR 1958 Pat 314, and *Bishwaranjan Bose v. Honorary Secretary, Ram Krishna Mission*, AIR 1958 Pat 653. The first point that has to be emphasised in this connection is that in the counter affidavit none of the respondents to the writ petition including the principal respondents had raised the objection that consolidated writ petition challenging the four distinct orders was not maintainable. Shri Rajvi Roop Singh was not at fault, therefore, in not taking note of such an objection while disposing of the writ petition. Hence, it is doubtful if such a point could be raised for the first time in the review application. The proper course to follow, it seems, was to crave leave for appeal to the Supreme Court. Secondly, the judicial opinion is divided on the point whether the provisions of the Code bearing on the joinder of parties and the causes of action apply to the writ petition. If those provisions apply to writ petitions, then the consolidated petition made by Tuleswar Sharma may have legal justification in view of O. 2, R. 3, of the Code. The authorities relied upon by Shri C. Jagannadhacharyulu undoubtedly lend support to the view taken by him. However, it was held in the case of *Manindra Nath Pal v. Municipal Commissioners of Baranagore Municipality*, AIR 1956 Cal 291, that where mandamus is sought by several persons having different causes of action, the provisions of Order 1 of the Code would apply by analogy. Again, in the case of *Subodh Chandra v. Union of Tripura*, AIR 1962 Tripura 7, the view taken was that the writ applications are in the nature of civil proceedings and as such the provisions of Orders 1 and 2 of the Code may apply in appropriate cases by virtue of section 141 of the Code. In face of this judicial conflict it is only just and proper that the matter should be taken to the Supreme Court for an authoritative pronouncement.

11. The general rule that there should be a separate petition for each writ claimed appears to be a rule dictated by considerations of practical convenience and is

probably warranted by the special nature of the writ proceedings. This is not at any rate a rule of law. Therefore, an objection founded on this rule must be taken in the parent proceeding and at the earliest possible opportunity. In the instant case such an objection was taken only when the review application was filed and never before. Hence, I have my doubts that it could be adopted at such a belated stage and by means of a review application. In all the four authorities relied upon by Shri C. Jagannadhacharyulu, such objection was raised in the writ petition itself and therein lies the distinction between those cases and the case in hand.

12. In the Pepsu authority relied upon by Shri C. Jagannadhacharyulu, reference was made to the following statement of law mentioned at page 783, para 1325, of Halsbury, Vol. IX, Second Edition:

"Two or more persons cannot join in a single application for a writ of mandamus to enforce separate claims. There must be separate applications for separate writs, and this although the several applicants are successors in the office in respect of which the claims arise".

This very passage was relied upon in the case of *Bishwaranjan Bose* AIR 1958 Pat 653 (Supra) as well. Apparently, this passage does not appear to cover our case inasmuch as here the writ petition was filed by one person and not two or more persons. Moreover, the Pepsu High Court did not dismiss the writ petition in its entirety. It allowed, instead, one month's time to the petitioner to make up his mind to what cause of action out of 14 he shall confine his writ petition. In my opinion, that was an eminently just procedure to follow if only because it helped cutting short the multiplicity of proceedings. Therefore, even if this Court was of the considered opinion that the joint writ petition challenging the validity of four separate orders was not maintainable, in fairness to the writ-petitioner he should have been given an opportunity to amend the petition so as to confine it to one such order. I think this consideration also justifies the prayer made for taking the matter in appeal to the Supreme Court.

13. The conclusions recorded above may now be briefly summarised. They are:

(1) There was no compliance with the provisions of Rule 8 of Order 47 while accepting the review application;

(2) Before passing the composite order allowing the review application and dismissing the writ petition, the Court did not give notice to the writ petitioner that it would take into consideration the prac-

tical bearing of the documents Exts. A/1 and A/3 on the merits of the writ petition while deciding the review application;

(3) There is no material on the record to sustain the contentions that Ext. A/1 and Ext. A/3 pertain to any of the plots in dispute or that the lease agreements mentioned therein are still in operation;

(4) At any rate, since admittedly Ext. A/1 and Ext. A/3 relate only to two out of four plots, and since the impugned order, dated 7-12-1967, upholds the finding of Shri Rajvi Roop Singh that the Chief Commissioner could not have settled the plots with the principal respondents, there is no justification for dismissing the writ petition respecting the other two plots;

(5) The review was not claimed on the basis of inherent right of the High Court to review its order made under Art. 226, nor it is clear from the order dated 7th of December 1967 that the review was allowed on that footing;

(6) There is sharp conflict between the various High Courts in India on the point whether the provisions of Order 47 R. 1 can be invoked respecting an order made under Article 226 with the aid of S. 141 of the Code, and as such an authoritative pronouncement by the Supreme Court is required to settle that controversy. In this respect two points require determination, namely, (i) whether writ proceedings are "proceedings in any Court of civil jurisdiction", and (ii) whether the expression "procedure" used in Section 141 can cover a prayer for review; and

(7) That the conflict of judicial opinion between the various High Courts on the point whether the procedural provisions of the Code, such as those enacted in Orders I and II, can be availed of in connection with writ cases urgently requires settlement by the Supreme Court.

In view of these vital points that call for determination, I feel satisfied that this is a fit case for appeal to the Supreme Court and so direct that a certificate do issue in terms of clause (c) of Art. 133 (1) of the Constitution. The applicant may well have also claimed the certificate under Art. 132 (1), for substantial questions of law as to the interpretation of the Constitution do arise in the case. Tuleshwar Sharma shall get costs of this application from the principal respondents. Advocate's fee Rs. 50/-.

Leave to appeal to Supreme Court granted.

AIR 1970 MANIPUR 32 (V 57 C 9)

R. S. BINDRA, J. C.

Union of India and others, Petitioners v. Chingangbam Indra Singh, Respondent.

Judicial Misc. Case No. 17 of 1969, D/-11-8-1969.

Limitation Act (1963), S. 5 — Government as an applicant under S. 5 — Special consideration, if can be claimed.

Though the Limitation Act does not make any distinction between Government and private individual in the matter of condonation of delay under S. 5 of the Limitation Act, yet its case can be said to be different from that of an individual who has to make up his own mind and who can normally be presumed to be aware of or familiar with all the relevant factors of the case. The Government on the other hand, has to take into consideration the public interest involved and so, longer time may be required for enquiry and consideration before taking a final decision, in the matter. However, the real difficulty arises in their application to individual cases. It must at the same time be emphasised that the Government officers charged with the double duty of taking the decision and instituting the proceedings in courts must not carry the impression that they can bank on the indulgence of courts even if they take their own time in processing the papers or making up their mind. The court would certainly not put up with any laches or smug nonchalance on the part of Government officials in the matter of court proceedings, just as it would not do in the case of a private litigant. (Para 3)

There was, in all, a delay of 33 days in presenting the review application against the judgment in a writ petition after excluding the time taken for obtaining copy of the order. The Government had no explanation justifying a delay of 7 days in sending the copy of the judgment to the Government after it was received by the Government Advocate from court and delay of 5 days in his filing the review application after receiving the approved draft from the Government. Held, that the delay could not be condoned. AIR 1962 Punj 308 Ref. (Paras 5 and 6)

Cases Referred: Chronological Paras (1962) AIR 1962 Punj 308 (V 49) = ILR (1961) 2 Punj 721, K. R. Beri and Co. v. Employees State Insurance Corporation

3 N. Ibotombi Singh, for Petitioners; R. K. Manisana Singh, for Respondent.

ORDER: This is a miscellaneous application under Section 5 of the Limitation Act of 1963 for condonation of delay in

AIR 1970 MYSORE 49 (V 57 C 11)

T. K. TUKOL AND B. VENKATA-SWAMI, JJ.

Dalmia Cements (Bharat) Ltd., Petitioner v. Regional Transport Officer, Bellary, Respondent.

Writ Petn. No. 226 of 1966, D/- 28-3-1969.

(A) Motor Vehicles Act (1939), Section 22 — “Any other place” — Expression covers even a private place.

Under Section 22 of the Motor Vehicles Act, a motor Vehicle as defined under the Act, cannot be driven or caused to be used in any public place or any other place for any of the purposes indicated therein without the requisite registration. The words “any other place” in that provision are intended to cover cases of user of a vehicle even in a private place. (Para 8)

(B) Motor Vehicles Act (1939), Secs. 22, 2 (18) — “Motor Vehicles” — Exemption when attracted — Incapability of being used outside factory or enclosed premises is the criterion.

The definition of ‘motor vehicle’ in section 2 (18) of the Motor Vehicles Act incorporates an exemption therein relating to “vehicles of a special type adapted for use only in a factory or in any other enclosed premises”. The word “only” is not without significance. It confines the operation of the exemption to vehicles which are incapable of being used in any other manner and in any other place, as a goods vehicle, omnibus, stage carriage or cab or such other vehicle as defined in the Act. In other words, a vehicle which is designed for use only in a factory or in any other enclosed premises is excluded from the definition of “motor vehicle”. (Para 11)

In a case, vehicles commercially known as Diesel Mogurt Dumpers — DR. 50 Model were required to be registered under the Motor Vehicles Act. The company resisted it on the ground that these dumpers, specially designed for digging earth and ore and carrying it, were for use within the well-defined limits of the mining area of the company and hence attracted the exemption embodied in the definition of ‘Motor Vehicle’ in Section 2 (18) of the Act. It was also contended that merely because such vehicles were capable of moving on roads would not be a sufficient ground to attract the provisions relating to registration under the Act. So long as it was not used like any other public carrier or goods vehicle, it would not be a motor vehicle within the meaning of the Act.

Held, that since the dumpers in question could be used for carrying loads even outside the Mining area or any other enclosed premises, like any other ‘goods vehicle’ they should also be registered under the Act.

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The mere circumstance that it was not as convenient or advantageous as any other public carrier or goods vehicle, commonly used for a similar purpose outside a factory or any enclosed premises, was not sufficient to bring the vehicle within the scope of exemption. For the exemption to apply, the very design and manufacture must be such as would confine its capability for use only in a factory or enclosed premises. The fact that the manufacturers have made or intended a particular vehicle for one purpose or the other or the dealers have sold it for a particular purpose or that a particular vehicle was described by a particular name or description, was no criterion to decide whether the vehicle was adapted for use upon the roads within the meaning of the definition given in Section 2 (18) of the Act. 1961-1 All ER 552, Dist.; AIR 1968 Orissa 1 & AIR 1967 SC 1424, Foll.

(Paras 12, 15 & 19)

Cases Referred: Chronological Paras.

(1968) AIR 1968 Orissa 1 (V 55)=33

Cut LT 1006, Bolain Ores Ltd. v.

State of Orissa

16

(1967) AIR 1967 SC 1424 (V 54)=

1967-2 SCR 673, State of Mysore

v. Syed Ibrahim

16

(1961) 1961-1 All ER 552 = 1961-1

WLR 487, Daley v. Hargreaves

6

Rangavittalachar for N. S. Narayana Rao, for Petitioner; K. S. Puttaswamy for High Court Spl. Govt. Pleader, for Respondent.

VENKATASWAMI, J.: This Petition, under Article 226 of the Constitution, is directed against a communication made by the Regional Transport Officer, Bellary, on 29/31-1-1966, calling upon the petitioner to produce vehicles commercially known as ‘Diesel Mogurt Dumpers — DR 50 Model’ for registration under the Motor Vehicles Act, 1939, to be hereinafter referred to as the “Act”. The communication has further cautioned the petitioner that it would be an offence to use the vehicles without proper registration under the Act.

2. The prayer of the petitioner is for the issue of a writ in the nature of Certiorari quashing the said communication with a further direction to the R. T. O. (respondent) to forbear from insisting upon the registration of the Dumpers belonging to the petitioner, under the provisions of the Act, and from visiting the consequences of non-registration on the petitioner.

3. The few facts relevant for the disposal of this petition are as follows: The Petitioner-company is a holder of a lease in regard to 819 acres of land under the Mines Act and Regulations. The petitioner, during his mining operations, has been using 4 Dumpers which will be more fully described hereafter. According to him, the vehicles are used to carry loads of earth and ore from one place to another within the mining area. It is stated that this operation

is essential for carrying on its mining operations effectively and economically. On 2-6-1965 the Company appears to have addressed a letter to the Commissioner for Transport, Bangalore, making an enquiry in regard to the registration of these Dumpers. A reply was received by the petitioner on 26-6-1965 (Annexure A) to the effect that even though the vehicles were proposed to be used within the Mining Area, they were required to be registered under Chapter III of the Act. Further correspondence seems to have ensued culminating in the issue of an endorsement (Annexure C), whereunder the Company was called upon to produce the vehicles for registration with a note of caution that it would amount to an offence to use such vehicles without registration. Aggrieved by this communication, the petitioner has approached this Court for the issue of a Writ or direction as detailed earlier.

4. The petitioner has filed a reply affidavit producing a 'Brochure' relating to Dumper DR 50, with which we are concerned in the present petition. It is also stated that the Mining Area was a well defined area and enclosed by trench measuring 4'x4'x 2' all round. It may, however, at this stage be stated that this fact relating to the enclosing of the Area, has been denied in the counter affidavit produced by the respondent.

5. A few details regarding the dumper may conveniently be mentioned, with reference to some photographs which have been made available in addition to the 'Brochure' referred to: The vehicle is a four-wheeled one. It has a 60 HP Diesel Engine. It has a robust frame-work and a front axle with full-floating axle Shafts, with wheels of large dimensions suitable for the performance of work under heaviest road conditions. It has a dual steering with six forward speeds and two reverse. It has also a hydraulic four wheeled brake and a device for easy and quick release of the tipping body, so as to ensure speedy work and good exploitation of the working time. The tipping body which is intended to carry loads is provided with a locking device, which if released would easily tilt it by its own weight. It is also capable of turning round the axis of its centre of gravity. After the contents are unloaded it regains its original position once again under the effect of its own weight. This tipping body is capable of carrying loads upto six tons at a time. It is further seen from the 'Brochure' that the Dumper is a single purpose machine for it performs in the best possible way the transport of load on cross-country terrain and its discharge. The maximum speed of a Dumper under full load is stated to be 34 KM per hour.

6. Sri H. Rangavittalachar, the learned Counsel appearing on behalf of the petitioner, submits that by the mere fact that a motor vehicle of this nature is capable of moving on roads would not be a sufficient

ground to attract the provisions relating to registration under the Act. According to him, almost every vehicle which is adapted for use for a special purpose will have to be transported to the site on which it is intended to be operated, only by road. Such a user would not bring it within the scope of the provisions of Section 22 of the Act. It is further his contention that the purpose for which the vehicle is used is also a relevant circumstance, meaning that so long as it is not used like any other public carrier or goods vehicle, it would not be a motor vehicle within the meaning of the provisions of the Act, which require registration of such vehicles. He submits that the Mining Area is a well defined and demarcated area and as such it must be deemed to be an enclosed area under Section 2 (18) of the Act. He, however, does not seriously dispute the stand taken on behalf of the respondent that it was not enclosed by a fence or trench.

The learned Counsel further argues that the vehicle is not at all adapted for use like other motor vehicles requiring registration under the Act, as for instance, a stage carriage, goods truck, cab or omnibus. The 'dumper' is specially adapted for use only in mining operations or works which involve digging and transport of earth on a large scale. Such works are always done on well defined and demarcated areas which are not open to the public at large. It is, therefore, his contention that such a vehicle falls clearly within the exemption contained in Section 2 (18) of the Act. In support of these submissions he relied on a decision reported in *Daley v. Hargreaves*, 1961-1 All ER 552.

7. In order to appreciate the above contentions, it would be necessary to set out some of the relevant provisions of the Act. Section 22 of the Act, which refers to the requirement of registration of a motor vehicle, as defined under the Act, runs thus:

"No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place for the purpose of carrying passengers or goods unless the vehicle is registered in accordance with this Chapter and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner."

8. It is clear from the above provisions that a motor vehicle as defined under the Act, cannot be driven or caused to be used in any public place or any other place for any of the purposes indicated therein. It is also clear that the words "any other place" in that provision are intended to cover cases of user of a vehicle even in a private place.

9. Section 2 (7) defines 'goods' which may be carried in a motor vehicle designed for such purpose, as follows:

"Goods" includes live-stock and anything (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle;

Section 2 (8) defines "goods vehicle" thus:

"Goods vehicle" means any motor vehicle constructed or adapted for use for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers;

10. Section 2 (18) defines "motor vehicle", with which we are primarily concerned herein, thus:

"Motor vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises;" (underlining (hereinto ' ') is ours).

11. It will be seen from the definition of a "motor vehicle" that an exemption is incorporated therein relating to "vehicles of a special type adapted for use only in a factory or in any other enclosed premises." The word "only" is not without significance. It confines the operation of the exemption to vehicles which are incapable of being used in any other manner and in any other place, as a goods vehicle, omnibus, stage carriage or cab (sic) such other vehicle as defined in the Act. In other words, a vehicle which is designed for use only in a factory or in any other enclosed premises is excluded from the definition of "motor vehicle".

12. In the instant case, it is clear from what has been stated earlier, the "dumper" in question can be used for carrying loads even outside the Mining Area or any other enclosed premises, like any other 'goods vehicle' which is required to be registered under the Act. It may be that it is not as convenient or advantageous as any other public carrier or goods vehicle, which is commonly used for the transport of goods, when it is used for a similar purpose outside a factory or an enclosed premises. This circumstance in itself is not sufficient to bring the vehicle within the scope of the exemption mentioned in the definition of a "motor vehicle".

13. But Sri Rangavittalachar submits that the purpose for which it is used or the intention of the manufacturers as regards its use would be a material circumstance to be taken into account. In elaborating on this aspect he submits that its adaptability for use for a special purpose is a critical fact to be taken into account. It is in this con-

text that he refers to the decision mentioned earlier. We are unable to accede to this argument. Firstly, the decision in question is based on a specific statutory provision in force in the United Kingdom, particularly the provision of Sections 1, 3 (1) of the Road Traffic Act, 1930 and Section 36 of the Road and Rail Traffic Act, 1933. It is clear from the provisions which have been extracted in the said decision that the intention as manifested by the use of the words "mechanically propelled vehicle intended or adapted for use on roads" is an element to be taken into consideration. The position is not the same with the provisions of the Act with which we are concerned, particularly the exemption referred to in the definition of "motor vehicle" in Section 2 (18) of the Act.

Secondly, it is also clear from the said decision that their Lordships have made ample reservations indicating that the decision ought not to be treated as a precedent. This is clear from the following passages in the opinions expressed by their Lordships. Salmon, J., observes at page 556 thus:

"The view that I have reached is based strictly on the particular facts of this case and is not intended to apply to dumpers generally. My conclusion might, and probably would, have been different if the findings had shown that the dumpers were reasonably suitable for being driven along the public roads in transit or for the purpose of carrying material from one site to another. Nor must it be thought that I am acceding to the appellants' submission that the intention referred to in the relevant sections is the manufacturers' intention alone. It may be that the legislature had no particular person's intention in view, whether manufacturer's, wholesaler's, retailer's, owner's or user's. "Intended . . . for use on roads" may mean no more than suitable or apt for use."

Lord Parker, C. J., in agreeing makes the following observations:

"I would only like to emphasise that it must not be taken as the result of this decision that dumpers of the type used in this case are not motor vehicles intended or adapted for use on the road. For my part, I have come to the same conclusion as Salmon, J., merely because that was not proved in this case. It may well be that in another case on fuller evidence the Court will be able to say that dumpers of this kind were clearly motor vehicles intended or adapted for use on the road."

14. It is clear from the above observations that their Lordships rested the decision on the facts of that case.

15. Further, we are concerned with the statutory provisions of the Act relating to exemption or exclusion of certain types of machines from the category of motor vehicles as defined therein. Such exclusion is made subject to the condition that vehicles must be such which are of special types ad-

adapted for use only in a factory or in any other enclosed premises. As explained earlier, they must be such as are incapable of use in any other place for the purpose of transport of goods or passengers. Only in this limited sense will be the test of purpose become relevant. This is not the same thing as saying that if the vehicle is not put to use elsewhere, or used for a special purpose, it must be exempted from registration under Section 22 of the Act. The test of purpose, as argued by the learned Counsel, does not also, in our view, fall clearly within the purview of the statutory exemption in Section 2 (18) of the Act. On the other hand, what is enjoined is that its very design and manufacture must be such as would confine its capability for use only in a factory or enclosed premises.

16. In this connection, our attention has been invited by the learned Counsel for the respondent to a decision reported in AIR 1968 Orissa 1, Bolain Ores Ltd. v. State of Orissa. Their Lordships were dealing with two appeals arising from two suits filed by the plaintiffs for a declaration that the machineries in their possession and as described in the Schedule to the plaint thereto, were not liable for registration under Section 22 of the Act and as such not liable to be taxed under Section 6 of the Bihar and Orissa Motor Vehicles Taxation Act, 1930. Among the items mentioned in the Schedule were 'Euclid Dumpers'. After referring to the decision of the Supreme Court reported in AIR 1967 SC 1424, in regard to the words "adapted for use" their Lordships observe thus: (at para 9 of the judgment):

"..... Thus the legal position is clear that it is the user of a particular vehicle that determines the category and not the mere fact of its adaptation or construction. Thus if a particular vehicle is capable of being used in a particular way, it must be taken to have been adapted for such use."

17. But, it may also be noted that in the decision of the Supreme Court, above referred to, what was in question was whether the owner of a Motor Car, which was used for transporting passengers for hire was liable for prosecution under Section 42 (1) of the Act. The exemption under Section 2 (18) did not fall for consideration in the said decision. It was in this context that the Supreme Court laid down that if a Motor Vehicle is used as a transport vehicle, the owner who so uses it or permits it to be so used is required to obtain the necessary permit. It is the use of the vehicle for carrying passengers for hire or reward which determines the application of Section 42 (1) of the Act.

18. Their Lordships of the Orissa High Court further laid down the true test in such matters with particular reference to Section 2 (18) of the Act thus in para 10 of the judgment:

"The test in all these cases would be if the vehicle are reasonably suitable for being used along with the public roads, the fact that the manufacturers have made or intended a particular vehicle for one purpose or the other or the dealers have sold it for a particular purpose or that a particular vehicle is described by a particular name or description, is no criterion to decide whether the vehicle is adapted for use upon the roads within the meaning of the definition given in Section 2 (18) of the Act."

19. Further in the same decision with regard to "dumpers" employed by the plaintiffs therein, their Lordships observe thus at para 16 of the judgment:

".... The word 'road' has not been defined in the Act for the purpose of Section 2 (18). If a vehicle is fit and suitable for being used on a road, it is immaterial whether it runs on a private road or on a public road unless it is shown that it is for a special type adapted for use only in factories or enclosed premises and incapable of running on any other type of roads or public roads. The Rockers and Dumpers (items 5 and 7) must therefore be held to be Motor Vehicles within the meaning of the Act and are liable for registration under Section 22 of the Act and for payment of appropriate tax as provided under the Taxation Act."

We are in respectful agreement with the above enunciations of their Lordships of the Orissa High Court. In this view, it is unnecessary to discuss fully whether the premises in question is an "enclosed premises" within the meaning of Section 2 (18) of the Act, although it may be relevant to note that on the material placed before us, we are not in a position to hold that the "mining areas" in this case is an "enclosed premises". We are therefore clearly of the opinion that the "dumpers" in question are not such as would come within the purview of the exemption contained in Section 2 (18) of the Act.

20. In this view of the matter, the petitioner is clearly disentitled to relief.

21. In the result, this petition deserves to fail and is dismissed with costs. Advocate's fee Rs. 100/-.

Petition dismissed.

AIR 1970 MYSORE 52 (V 57 C 12)

A. R. SOMNATH IYER AND
AHMED ALI KHAN, JJ.

M/s. Elkal Padmasettappa Ajjappa and others, Petitioners v. Commercial Tax Officer, Chitradurga and others, Respondents.

Writ Petns. Nos. 1333 of 1967 and 1180, 1849, 2426, 2320 to 2323, 2327 to 2330, 2382 to 2394, 2515 to 2518, 2777 to 2780, 2786 to 2802, 3476 to 3496 and 3552 of 1968, D/- 12-3-1969.

HM/JM/D456/69/JHS/D

Sales Tax — Mysore Sales Tax Act (25 of 1957), Section 5 (4) — Validity — Does not contravene Article 14 or Article 301 of Constitution — Not repugnant to provisions of Section 15 (a) of Central Sales Tax Act.

It is true that a dealer who purchases declared goods in the State of Mysore but makes an inter-State sale of those goods gets a refund of the State Tax paid by him at the purchase point and is also not liable to pay any sales tax under the Central Sales Tax Act. But, the fact that under the first proviso to Section 5 (4) of the Mysore Sales Tax Act, which is a mere reproduction of Section 15 (b) of the Central Act, the sales tax has to be refunded when there is an inter-State sale of declared goods, does not support the argument that the State tax was not exigible in respect of the declared goods when they were purchased by the person who made a subsequent inter-State sale of those goods. Such purchase tax is charged by sub-section (4) of Section 5 and so it has to be paid. But, when there is a subsequent inter-State sale, the tax so payable has to be paid back to the dealer if he has paid it. The imposition of the tax by sub-section (4) of Section 5 does not disappear by reason of the proviso which merely gives effect to clause (b) of Section 15 of the Central Act in order to clothe the dealer who has made an inter-State sale with the right to either seek a refund of the tax if it has been paid or to contend that since there has been a subsequent inter-State sale, he should not be called upon to pay the tax the refund of which could be claimed by him. (1967) 20 STC 89 (Mys) & (1967) 11 Law Rep 877 (Mys) & AIR 1969 Mys 303, Explained.

(Paras 11 and 12)

An inter-State sale is a transaction which in material respects is distinct from a sale on a consignment basis as it is called. In the case of an inter-State sale what causes the movement of the goods is the inter-State sale whereas in the case of a sale on a consignment basis the goods are moved from one State into another so that after they are taken into the other State there may be a sale of those goods either by the dealer himself or by his agent on his behalf. The point of time at which the title in the goods passes from the seller to the buyer is not the same in the one case as it is in the other, and, although it may be that in the ultimate analysis the goods of the dealer in the Mysore State become the goods of the dealer in the other States at same point of time or the other, there is the essential distinction between the two transactions and that distinction is the well recognised distinction between a transaction which takes place in the course of an inter-State trade or commerce and one which takes place in some other way. So, the sale in the course of inter-State trade or commerce to which Section 15 (b) of the Central Act and the first proviso to Section 5 (4) of the State

Act refer falls within an entirely different classification between which and a sale which takes place on a consignment basis there is an intelligible differentia which has a rational relationship to the purpose of the relevant statutory provisions whose main object is to promote inter-State trade and commerce. Moreover, Section 15 (b) of the Central Act makes provision for a refund when there is the subsequent inter-State sale and all that the first proviso to Section 5(4) of the State Act does is to incorporate the provision contained in clause (b) of Section 15 of the Central Act. The fact that the proviso authorises a refund only in the case where there is a subsequent sale in the course of an inter-State trade or commerce cannot invalidate the provisions of Section 5(4) of the State Act which charges tax on all sales or purchases of declared goods inside the State without discrimination between the sellers and the purchasers who fall within the same classification. Hence the argument that Section 5 (4) is violative of Article 14 of the Constitution has no substance.

(Paras 14, 15, 16, 17 and 18)

The imposition of the purchase tax by Section 5 (4) with respect to the purchase of declared goods at the rates specified in the fourth schedule to the State Act does not either directly or immediately restrict or hamper the flow of trade. That tax has to be paid when the declared goods are purchased inside the State and the fact that it is so payable does not to any extent directly or immediately impede the course of the transaction which takes place in the course of the sale on a consignment basis which the dealers make in the other States. Article 301 cannot, therefore, constitute a proper foundation for the denunciation of Section 5 (4) of the State Act. AIR 1969 SC 147, Foll. (Para 23)

Section 5 (4) of the State Act specifies the point of time at which the tax is to be levied. There is no repugnancy between the provisions of that section and the provisions of Section 15 (a) of the Central Act. The provisions of Section 5 (4) which as they stand and on their own language do not authorise as such any plurality of levy and do not become invalid by reason of the rule of evidence which Section 6-A of the State Act incorporates. The invalidity of Section 6-A (2), if it is invalid, does not contaminate Section 5 (4) which otherwise is a perfectly constitutional piece of legislation. AIR 1967 SC 1616 & (1968) 22 STC 365 (Punj), Ref. (Paras 25 and 31)

| Cases | Referred: | Chronological | Paras |
|----------------------------------|-----------|---------------|-------|
| (1969) AIR 1969 SC 147 (V 56) = | | | |
| 22 STC 376, State of Madras v. | | | |
| N. K. Nataraja Mudaliar | | | 22 |
| (1969) AIR 1969 Mys 303 (V 56) = | | | |
| 17 Law Rep 298, Mallick Hashim | | | |
| & Co. Bijapur v. Commercial Tax | | | |
| Officer | | | 8 |

- (1968) W. P. No. 133 of 1968, D/-
29-10-1968 (SC), Ratanlal v. Assess-
sing Authority 26, 32
- (1968) 22 STC 365=ILR (1969) 1
Punj 426, Niamat Rai Milkh Raj
Ahuja v. State of Punjab 28
- (1967) AIR 1967 SC 1616 (V 54)=
20 STC 290, Bhawani Cotton Mills
v. State of Punjab 24, 26, 28, 32
- (1967) 11 Law Rep 877=1967-2 Mys
LJ 404, Bhandari Rajmal Kusaraj
v. State of Mysore 8
- (1967) 20 STC 89=1967 Kant LJ 52,
Munshi Abdul Rahiman & Bros. v.
Commercial Tax Officer, 1 Circle, Hubli 8
- (1965) AIR 1965 SC 1510 (V 52)=
16 STC 231, State of Mysore v. Yeda-
lam Lakshminarasimhaiah Setty &
Sons 11

K. Srinivasan, for Petitioners (in all Ap-
peals); E. S. Venkataramaiah, High Court
Spl. Govt. Pleader, for Respondents (in all
Appeals).

SOMNATH IYER, J.: The questions of
law arising in these Writ petitions are com-
mon and so can be disposed of by a com-
mon judgment.

2. The material facts are these: The
petitioners are registered dealers in the State
of Mysore and they carry on a trade either
in hides and skins or in copra and coconuts
or in oil seeds. All these goods are de-
clared goods as defined by explanation to
Section 5 (4) of the Mysore Sales Tax Act,
which will be referred to in this order as
the State Act, and, as stated in the third
item of the fourth schedule to that Act, the
point of levy of sales tax is the purchase by
the last dealer in the State. Similarly, item
5 (b) in that schedule states that in respect
of coconut and copra, the first of the ear-
liest of purchasers in the State is liable to
pay the tax. Item 5 (d) of that schedule
makes the first of the earliest of the suc-
cessive purchasers in the State liable to pay
sales tax on oil seeds.

3. In respect of hides and skins, Item 3
was subjected to an amendment which came
into force on October 1, 1964 and from that
date the last purchaser became liable to pay
sales tax.

4. The petitioners purchase the declared
goods to which we have referred and send
them either to the State of Bombay or to
the State of Madras for sale on what is de-
scribed as the consignment basis. What they
really do is to send the goods to their agent
in the other State so that he could sell the
goods to a person in that State on their be-
half.

5. In respect of the purchases made by
the petitioners in respect of the periods com-
mencing with the assessment year 1959-60
and ending with the assessment year 1965-
66, the commercial tax officer made assess-
ments of the taxable turnover and taxed all
the purchases made by them.

6. The prayer in these writ petitions is
that we should quash those assessments and
in support of that prayer, Mr. Srinivasan ad-
vanced the contention that the assessments
are unsustainable since Section 5 (4) of the
State Act is an unconstitutional piece of legis-
lation. The three grounds on which he sup-
ported his argument are firstly that that sub-
section was void since it offended against
Article 14 of the Constitution, secondly that
it transgressed the provisions of Article 301
of the Constitution, and thirdly that it was
repugnant to the provisions of Section 15 of
the Central Sales Tax Act, which will be
referred to in this order as the Central Act.

7. Section 5 (1) of the State Act states
that every dealer shall pay for each year tax
on his taxable turnover at the rates speci-
fied in that Section, and, sub-section (4) of
that Section which was subjected to the im-
peachment of unconstitutionality reads:

"5 (4) Notwithstanding anything contain-
ed in sub-section (1) a tax under this Act
shall be levied in respect of the sale or
purchase of any of the declared goods men-
tioned in column (2) of the Fourth Sched-
ule at the rate and only at the point spe-
cified in the corresponding entries of
columns (4) and (3) of the said Schedule
on the dealer liable to tax under this Act
on his taxable turnover of sales or purchases
in each year relating to such goods.

Provided that where tax has been paid in
respect of the sale or purchase of any of the
declared goods under this sub-section and
such goods are subsequently sold in the
course of inter-State trade or commerce, the
tax paid under this Act shall be refunded to
such person in such manner and subject to
such condition as may be prescribed.

Explanation: The expression "declared
goods" means goods declared under Sec-
tion 14 of the Central Sales Tax Act, 1956
(Central Act 74 of 1956) to be of special
importance in inter-State trade or commerce."
Section 15 of the Central Act, to Section 14
of which the explanation refers reads:

"15. Every sales Tax law of a State shall,
in so far as it imposes or authorises the
imposition of a tax on the sale or purchase
of declared goods, be subject to the follow-
ing restrictions and conditions, namely:—

(a) the tax payable under that law in
respect of any sale or purchase of such
goods inside the State shall not exceed three
per cent of the sale or purchase price there-
of, and such tax shall not be levied at more
than one stage;

(b) where a tax has been levied under that
law in respect of the sale or purchase inside
the State of any declared goods and such
goods are sold in the course of inter-State
trade or commerce, the tax so levied shall
be refunded to such person in such manner
and subject to such conditions as may be
provided in any law in force in that State."
Clause (a) of this Section has no relevance

to the present discussion and it will be observed that clause (b) corresponds to the first proviso to Section 5 (4) of the State Act. That proviso incorporates the same provision which Section 15 (b) of the Central Act contains.

8. Mr. Srinivasan who made the criticism that Section 5 (4) became unconstitutional by reason of the first proviso to that sub-section placed dependence in support of that contention on three pronouncements of this Court. In *Munshi Abdul Rahiman & Bros. v. The Commercial Tax Officer, 1 Circle, Hubli*, (1967) 20 STC 89 (Mys) this Court made the elucidation that the right to receive a refund of the State tax in respect of declared goods created by Section 15 (b) of the Central Act is acquired the moment the goods are sold in the course of inter-State trade, and that the payment of the Central Sales Tax under the Central Act was not a condition precedent to such refund. In *Bhandari Rajmal Kusalraj v. The State of Mysore*, (1967) 11 Law Rep 877 (Mys) this Court made the enunciation that if there was an inter-State sale of declared goods but the State tax had not been paid, it was not permissible for the assessing authority to demand the State Tax with respect to the declared goods and to embark upon the unmeaning formality of making a refund of it either under Section 15 (b) of the Central Act or under the first proviso to Section 5 (4) of the State Act. In *Mallick Hashim & Co. Bijapur v. The Commercial Tax Officer, Bijapur*, 17 Law Rep 298=(AIR 1969 Mys 303), it was explained by this Court that the right to a refund was an absolute right and that that right could not be defeated by the prescription by a rule of a period of limitation for the presentation of an application in a particular form for that purpose.

9. On the basis of these three pronouncements, the argument constructed by Mr. Srinivasan was that in effect the purchaser of declared goods inside the State of Mysore became absolved from the liability to pay sales tax at the purchase point in respect of those declared goods if there was an inter-State sale of those declared goods subsequently. It was maintained by him that in truth the State tax in respect of the purchases in that situation ceases to be exigible and could not be demanded.

10. On the basis of this postulate, we were asked to say that Section 5 (4) subjected persons who did not make inter-State sales of declared goods but who either consumed those goods inside the State or sent those goods for sale on a consignment basis outside the State to hostile discrimination. It was asserted that since those dealers who made inter-State sales of declared goods could receive the refund of the State Tax paid by them and were also not liable to pay any tax under the Central Act, those who did not make any inter-State sales were

liable to pay the State tax although in every relevant respect the two categories of dealers were similarly situate.

11. It is true as Mr. Srinivasan contends that a dealer who purchases declared goods in the State of Mysore but makes an inter-State sale of those goods gets a refund of the State Tax paid by him at the purchase point and is also not liable to pay any Sales Tax under the Central Act. The exoneration from the liability to pay Central tax in that situation is the consequence of the pronouncement of the Supreme Court in the State of Mysore *v. Yeddalam Lakshminarasimhaiah Setty & Sons*, 16 STC 231=(AIR 1965 SC 1510) in which it is explained that since the tax under the Central tax is payable only on sales and the State tax is payable only at the purchase point and that since Central Tax is payable only if State tax would have become payable had the sale taken place inside the State as provided by Sections 8 and 9 of the Central Act, Central tax would not be payable in respect of a sale of that description.

12. But, the argument that under the proviso to Section 5 (4) of the State Act which as we have already observed is a mere reproduction of Section 15 (b) of the Central Act, the State tax has to be refunded when there is an inter-State sale of declared goods, does not support the argument that the State tax was not exigible in respect of the declared goods when they were purchased by the person who made a subsequent inter-State sale of those goods. Such purchase tax is charged by sub-section (4) of Section 5 and so it has to be paid. But, when there is a subsequent inter-State sale, the tax so payable has to be paid back to the dealer if he has paid it, and, the enunciation made by this Court that if it had not been paid when there was a subsequent inter-State sale it could not be demanded so that there need not be the unmeaning formality of a payment and a refund, does not obliterate the charge created by Sec. 5 (4).

The imposition of the tax by that sub-section does not disappear by reason of the proviso which merely gives effect to cl. (b) of Section 15 of the Central Act in order to clothe the dealer who has made an inter-State sale with the right to either seek a refund of the tax if it has been paid or to contend that since there has been a subsequent inter-State sale, he should not be called upon to pay the tax the refund of which could be claimed by him. We should not, therefore, understand the enunciation made by this Court in the three pronouncements to which Mr. Srinivasan asked our attention in manner suggested. Those pronouncements do not say that the charge under Section 5 (4) stands effaced when there is a subsequent inter-State sale.

13. But, it was nevertheless maintained that the dealers who sent their goods to another State from the State of Mysore on a consignment basis so that those goods may

be sold in that State through the agent appointed by them in that State, were subjected to some kind of hostile discrimination. The postulate placed before us was that a dealer who made an inter-State sale and another who made a sale on consignment basis were equals and similarly situate and that, while the dealer who made an inter-State sale could obtain a refund of the State tax and was not liable to pay any tax under the Central Act, one who made a sale on consignment basis became liable not only to pay the purchase tax inside the State but also became liable to pay sales tax in the other State in which the goods were sold if under its provisions tax was payable on the sale.

It was asserted that since in the two kinds of sales there was a movement of goods from one State to another and there was a sale of those goods whatever may be the point of time at which there was such a sale and there was a transmission of the title to those goods by the owner in the State of Mysore to the purchaser in the other State, the mere fact that the sale in the one case was an inter-State sale and the sale in the other was a sale on a consignment basis did not introduce any dissimilarity between the two transactions which, it was argued, were, in truth, similar to one another.

14. We do not agree. An inter-State sale is a transaction which in material respects is distinct from a sale on a consignment basis as it is called. In the case of an inter-State sale what causes the movement of the goods is the inter-State sale whereas in the case of a sale on a consignment basis the goods are moved from one State into another so that after they are taken into the other State there may be a sale of those goods either by the dealer himself or by his agent on his behalf. The point of time at which the title in the goods passes from the seller to the buyer is not the same in the one case as it is in the other, and, although it may be that in the ultimate analysis the goods of the dealer in this State become the goods of the dealer in the other States at some point of time or the other, there is the essential distinction between the two transactions and that distinction is the well recognised distinction between a transaction which takes place in the course of an inter-State trade or commerce and one which takes place in some other way.

15. So, the sale in the course of inter-State trade or commerce to which Section 15 (b) of the Central Act and the first proviso to Section 5 (4) of the State Act refer falls within an entirely different classification between which and a sale which takes place on a consignment basis there is an intelligible differentia which has a rational relationship to the purpose of the relevant statutory provisions whose main object is to promote inter-State trade and commerce.

16. Moreover, Section 15 (b) of the Central Act makes provision for a refund when there is the subsequent inter-State sale and all that the first proviso to Section 5 (4) of the State Act does is to incorporate the provision contained in clause (b) of Section 15 of the Central Act. Mr. Srinivasan intimated us that he does not in the cases before us challenge the validity or constitutionality of Section 15 (b) of the Central Act on the ground that it makes a hostile discrimination against persons who did not make subsequent inter-State sales. And that being so, the challenge to the constitutionality of Section 5 (4) of the State Act becomes difficult for the petitioners.

17. We are also of the opinion that the fact that the proviso authorises a refund only in the case where there is a subsequent sale in the course of an inter-State trade or commerce cannot invalidate the provisions of Section 5 (4) of the State Act which charges tax on all sales or purchases of declared goods inside the State without discrimination between the sellers and the purchasers who fall within the same classification.

18. We must, therefore, negative the argument founded on Article 14 of the Constitution.

19. We should next address ourselves to the argument constructed on Article 301 of the Constitution. We were asked to say that Section 5 (4) of the State Act which when read with the first proviso to it imposes a purchase tax only on dealers who make sales on consignment basis hampers trade, commerce and intercourse which takes place in the form of a sale on consignment basis, and is therefore repugnant to Article 301 of the Constitution.

20. We have already repelled the argument that it is not correct to think that Section 5 (4) of the State Act imposes a tax only on the purchases of goods which are subsequently sold on consignment basis. It charges the tax alike on all purchases of declared goods such as those with which we are concerned in the cases before us.

21. But, it was contended that whereas the movement of goods of which there is a subsequent inter-State sale is free and unrestricted, that of goods which are sold on consignment basis is not so, since when those goods are purchased the petitioners had to pay the purchase tax which however it was unnecessary for them to pay after they made a subsequent inter-State sale also.

22. But, it is now clear from the pronouncement of the Supreme Court in the State of Madras v. N. K. Nataraja Mudaliar, 22 STC 376 = (AIR 1969 SC 147) that the imposition of a tax on a sale or purchase under a law like the State Act does not by itself directly and immediately restrict or hamper the flow of trade and that before an appeal could be made to Article 301 it should be established that such imposi-

tion directly and immediately restricts or hampers the flow of trade.

23. It is obvious that the imposition of the purchase tax by S. 5 (4) with respect to the purchase of declared goods at the rates specified in the fourth schedule to the State Act does not either directly or immediately restrict or hamper the flow of trade in manner suggested to us. That tax has to be paid when the declared goods are purchased inside the State and the fact that it is so payable does not to any extent directly or immediately impede the course of the transaction which takes place in the course of the sale on a consignment basis which the petitioners made or make in the other States. Article 301 cannot, therefore, constitute a proper foundation for the denunciation of Section 5(4) of the State Act.

24. What remains to be considered is whether as contended before us there was a repugnancy between Section 15(a) of the Central Act and Section 5(4) of the State Act. The only argument presented before us in this context was that the provisions of the State Act are such as would make it possible for the purchasers of declared goods inside the State liable to taxation at more than one point in disobedience to Section 15 (a) of the Central Act which provides that the tax payable under any State Law in respect of any sale or purchase of declared goods shall not be levied at more than one stage. It was contended before us that in the case of the purchase of declared goods such as those made by the petitioners before us there was the possibility of the levy of tax under the State Law at more than one stage. That possibility, it was argued arises from the fact that there was no machinery in the provisions of the State Act which would make it possible for a purchaser of declared goods from an unregistered dealer to ascertain whether tax in respect of those goods had been levied at some other antecedent stage when those goods have been purchased by some other registered dealer.

In support of this submission, our attention was asked to the decision of the Supreme Court in *Bhavani Cotton Mills Ltd., v. State of Punjab* 20 STC 290 = (AIR 1967 SC 1616) in which the Section 5 of the Punjab General Sales Tax Act was struck down on the ground that there was a possibility of plurality of the levy of sales tax under its provisions in disobedience to Section 15(a) of the Central Act. In reinforcement of this submission, our attention was asked to the observations of the Supreme Court in one part of the judgment in which the difficulty of a registered dealer purchasing goods from an unregistered dealer in the matter of the ascertainment of the information whether in respect of those goods sales tax had been paid at some other antecedent stage was explained. In that context, the Supreme Court pointed out that having

regard to the machinery of the provisions of Punjab General Sales Tax Act it was "difficult if not impossible" for a registered dealer in that situation to ascertain whether the goods have been subjected to tax at some other antecedent stage and they therefore made it necessary for the purchasing registered dealer to disclose in his return the turnover with respect to every commodity which he had purchased whether or not tax had been levied at some other anterior stage.

25. But, it will be observed that the real basis of the decision of the Supreme Court was that the Punjab General Sales Tax Act did not prescribe the stage at which the sales tax which it imposed could be levied, unlike the Mysore Sales Tax Act under which the impugned assessment in the cases before us were made.

26. That what was the real feature of the Punjab General Sales Tax Act on which rested the pronouncement of the Supreme Court was subsequently explained by the Supreme Court in *Rattan Lal v. Assessing Authority*, W. P. No. 133 of 1968 (SC) in which the Supreme Court said this:

"This court in its majority judgment did not consider that the second proviso to Section 5 (1) by its mere declaration prevented the levy of tax at more than one stage. The difficulty, however, remained that the Act itself did not indicate the stage at which the tax was to be levied and because under Section 15 (1) of the Central Act there could be no liability for payment of tax unless this stage was so stated in the Act or the rules thereunder. It was pointed out that a dealer would have to show in his return all purchases of cotton and pay the tax with his return. There was nothing which would have enabled the dealer to know whether the tax had already been paid by another dealer and to exclude from his return those transactions. The dealer could not take a chance as heavy penalties were provided." When there was an amendment to the Punjab General Sales Tax Act for the removal of the imperfections which were pointed in the case of 20 STC 290 = (AIR 1967 SC 1616), there was again a challenge to the amended Act which failed on the ground that the amended Act did specify the stage at which the sales tax imposed by it could be levied.

27. But, Mr. Srinivisan contended that the real reason why Section 5 of the Punjab General Sales Tax Act was struck down by the Supreme Court was that Section 5 (2) (a) (vi) of that Act made the plurality of the levy possible.

28. We do not think so. Although there was a discussion of the provisions of that part of Section 5 in the judgment of the Supreme Court in 20 STC 290 = (AIR 1967 SC 1616) since that part of that Section states that that part of the turnover relating to goods which had been sold within a

period of six months after the closure of the assessment year could be deducted from the taxable turnover and that therefore the dealer who purchased those goods after the expiry of that period and another who made a purchase of those goods again could both be subjected to the payment of tax for the reason that the Act itself did not prescribe the stage at which the levy had to be made, the real ground on which the challenge to Section 5 vested and succeeded was the omission by the Act to specify the stage of the levy. That was how the judgment of the Supreme Court in 20 STC 290 = (AIR 1967 SC 1616) was also understood by the High Court of Punjab and Haryana in *Niamat Rai Milk Raj Ahuja v. State of Punjab*, (1968) 22 STC 365 (Punj) in which it is observed:

"The next contention of Mr. Srinivasan was that "taxable turnover" is defined by Section 5 (2) of the Punjab Act after giving certain deductions and one of them being under Section 5 (2) (a) (vi). Since Section 5 (2) (a) (vi) has not been amended, taxable turnover cannot be ascertained with the consequence that no purchase tax can be levied. Therefore, it is maintained that the infirmity which was pointed out by the Supreme Court decision in 20 STC 290 = (AIR 1967 SC 1616) still persists. In my opinion, this contention is not sound. The real basis of the Supreme Court decision was that no stage had been fixed for the levy of the tax and therefore, it was not possible to determine who was liable for it under the Act."

29. But, the argument that Section 5 (4) read with the first proviso to it authorises a plurality of the levy in contravention of Section 15 (a) of the Central Act was founded by Mr. Srinivasan on Section 6-A of the State Act which incorporates the rule as to burden of proof. Sub-section (2) of that Section reads:

"(2) Notwithstanding anything contained in this Act or in any other law, a dealer in any of the goods liable to tax in respect of the first sale or first purchase in the State shall be deemed to be the first seller or first purchaser, as the case may be, of such goods and shall be liable to pay tax accordingly on his turnover of sales or purchases, relating to such goods, unless he proves that the sale or purchase, as the case may be, of such goods had already been subjected to tax under this Act."

30. There are two reasons why we should not accept the argument founded on this sub-section. The first is, as Mr. Srinivasan had to admit, there is indeed no plea on behalf of the petitioners that they were not the purchasers who were liable to pay the tax under Section 5 (4) of the State Act read with the fourth schedule of it. If there had been a repudiation of the fact that they were the persons under the State Act who were liable to pay the sales tax for

the reason that they were not either the first purchasers, or the last purchasers in the case of some of the goods, and the assessing authority had depended on the presumption which is enjoined by Section 6-A of the State Act, it would have been possible for Mr. Srinivasan to ask us to examine the validity of the provisions of Section 6-A which throws the onus on the dealer to prove that he is not the person liable to pay the Tax.

31. But, since that was not how the impugned assessments were made in these cases, we will not be right in investigating the validity or the constitutionality of that Section. Moreover, the provisions of Section 5 (4) which as they stand and on their own language do not authorise as such any plurality of levy, do not become invalid by reason of the rule of evidence which Section 6-A of the State Act incorporates. If the rule of evidence which is embedded in Section 6-A (2) is bad is indefensible, what we should do is to strike down that sub-section. The invalidity of that sub-section, if it is invalid, does not contaminate Section 5 (4) which otherwise is a perfectly constitutional piece of legislation.

32. At one stage, Mr. Srinivasan pointed out that there is a distinction between a case where the last purchaser is liable to pay the tax under the State Act and another in which the earliest of the purchasers is fastened with the liability to pay the tax, and, in support of this submission he depended upon the decision of the Supreme Court in *Writ Petition No. 133 of 1968 (SC)*. Our attention was asked to the observations in the judgment in that case that a dealer who is the last purchaser has all the knowledge which is necessary for him to have with respect to the question whether he is the last purchaser or not so as to prepare his turnover accurately and without any difficulty and on the basis of this elucidation Mr. Srinivasan constructed the argument that as a corollary it should follow that in the case of a dealer who purchases goods in respect of which the point of levy is the first sale or the first purchase the difficulty of the dealer who is the last purchaser continues to remain in the same condition in which it was under the Punjab General Sales Tax Act which was struck down by the Supreme Court in *Bhawani Cotton Mills' case* 20 STC 290 = (AIR 1967 SC 1616).

But, in the case of *W. P. No. 133 of 1968 (SC)* the Supreme Court discussed only the question whether the last purchaser who is liable to pay the tax under the relevant statute can plead a difficulty that he is not in a position to prepare his taxable turnover with accuracy and correctness and pointed out that no such difficulty could be pleaded. The fact that the Supreme Court said so does not mean that a registered dealer who is the last purchaser of goods in respect of which the point of levy is the first

purchase is necessarily in a difficulty in respect of the preparation of the return which he has to produce. Even in the case of a registered dealer who purchases goods from an unregistered dealer, we do not think that it can be reasonably contended that it is impossible for him to ascertain whether those goods have been subjected to any tax at some anterior point of time. All that he has to do is to make reasonable enquiries which if he makes can reveal to him all the information that is necessary for him to gather, for the preparation of a proper return.

33. But, it was said that while Rule 26(9) of the Mysore Sales Tax Rules, 1957, does incorporate a machinery for the ascertainment of the question whether tax had been paid in respect of goods taxable at the point of the first sale or first purchase in the State in the form of a declaration in Form 32 to which it refers which the registered dealer who sells the goods to him must make, there is no corresponding machinery with respect to a dealer who purchases those goods from an unregistered dealer. But, Rule 26 (9) (a) which does state that the registered dealer who sold the goods in that way to the dealer who purchases those goods must make the declaration, contains no provision for the enforcement of the duty on the part of the registered dealer which it makes imperative.

34. We dismiss these writ petitions, but, we make no directions in regard to costs.
Petitions dismissed.

AIR 1970 MYSORE 59 (V 57 C 13)

A. R. SOMNATH IYER, J.

Mallappa Gurulingappa Kameeri, Appellant
v. Neelawwa Mallappa Kameeri, Respondent.

Misc. Second Appeal No. 51 of 1967, D/- 21-7-1969 against decree of Dist. J., Belgaum, D/- 17-1-1967.

(A) Hindu Marriage Act (1955), Sections 9 and 10 and 13 (2) — Hindu Adoptions and Maintenance Act (1956), Section 18 (2) (d) — Desertion — What constitutes — Refusal by wife to live with husband who has another wife living — She is not deserter.

The essence of desertion is the abandonment of one spouse by the other for no good cause and so there can be no desertion by a wife who lives separately from her husband if in law she is entitled to do so. The refusal by the wife, therefore, to live with her husband who has another wife living does not constitute a matrimonial offence and does not make her deserter.

(Paras 3, 4)

(B) Mysore Civil Courts Act (21 of 1964), Section 19 (2) — Order by Civil Judge on an application under Sections 9 and 10 of

Hindu Marriage Act — Appeal against, can be preferred only to High Court and not to the District Judge — District Judge in appeal not disturbing order of Civil Judge — Entertaining of appeal though without jurisdiction is of no consequence.

(Paras 7 and 8)

A. Jagannatha Shetty, for B. V. Deshpande, for Appellant; K. S. Srinivasa Iyer, for Respondent.

JUDGMENT: The appellant is the husband who presented a rolled up application for restitution of conjugal rights under Section 9 and for judicial separation under Section 10 of the Hindu Marriage Act, 1955. The respondent who was accused of desertion is his second wife.

2. The Civil Judge dismissed the application on the ground that the appellant who had another wife living could not plead desertion.

3. The essence of desertion is the abandonment of one spouse by the other for no good cause, and so, there can be no desertion by a wife who lives separately from her husband if in law she is entitled to do so.

4. When respondent 2 began to live separately from her husband the appellant's first wife was alive, and, is still living. So, she became entitled to live separately from her husband without impairing her right to claim maintenance from him under Section 18 (2) (d) of the Hindu Adoptions and Maintenance Act, 1956 which reads:

"18. Maintenance of Wife:—

(1)

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,—

(d) if he has any other wife living;

The clear implication of this clause which entitles the wife to refuse to live with her husband who has another wife living is that it is not improper for a wife who is not willing to share her husband with another wife to refuse her company to her husband. By doing so, she does not put herself in the wrong since what is allowed by law cannot constitute a matrimonial offence and does not make her a deserter.

5. Section 18 (2) (d) of the Hindu Adoptions and Maintenance Act, 1956, is a corollary to Section 13 (2) (i) of the Hindu Marriage Act, 1955, which reads:

"13. Divorce.—

(1)

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commence-

ment was alive at the time of the solemnisation of the marriage of the petitioner:”

6. When the respondent was married in the year 1945, her husband's first wife was alive, and so, under this sub-section she could seek a divorce and also became entitled to live away from her husband when the Hindu Adoptions and Maintenance Act subsequently came into force. The exercise of that right is not desertion.

7. But Mr. Shetty contended that the order made in appeal by the District Judge to whom the husband himself preferred an appeal is without jurisdiction since an appeal from the order of the Civil Judge after the new Mysore Civil Courts Act, 1964, came into force, could be preferred only to this Court and not to the District Judge.

8. The fact that it is so can make no difference since the District Judge did not disturb the order of the Civil Judge, and so, even if his order is ignored, no results which can be useful to the appellant can ensue since he will be where he was when his application was dismissed by the Civil Judge.

9. So, I dismiss this appeal with costs.
Appeal dismissed.

AIR 1970 MYSORE 60 (V 57 C 14)

T. K. TUKOL AND B. VENKATA-SWAMI, JJ.

B. B. Mali Patil, Petitioner v. Sreedar Rao Patil and another, Respondents.

Writ Petn. No. 1885 of 1966, D/- 21-3-1969.

(A) Motor Vehicles Act (1939), Sections 64 (b) and (f), 57 (3) and (8) and 48 (3) — Order varying condition as regards route and that as regards timings — Appeal by operator not filing objections as required by Section 57 (3) — Competency. AIR 1961 Ker 53 and AIR 1959 Raj 41, Dissented from.

Section 48 (3) of the Motor Vehicles Act refers to a number of conditions which the Regional Transport Authority while granting a Stage Carriage Permit, may attach to the permit granted thereunder. Clause (xxi) of Section 48 (3) empowers the Regional Transport Authority to vary the conditions of the permit or attach additional conditions of permit after giving notice of not less than one month. Section 57 (8), however, makes it clear that an application for variation of the condition of the permit relating to the route or area is treated differently from an application for variation of any other condition or conditions of the permit. In prescribing the procedure for dealing with an application for variation of the condition of permit as regards the route, sub-section (8) of Section 57 of the Act elevates such ap-

plication to the status of an application for the grant of a new permit and requires it to be dealt with as an application for the grant of a new permit. On account of this mandatory provision, such an application has to be made available for inspection at the office of the Regional Transport Authority as required by Section 57 (3) and has also to be published in the prescribed manner together with notice of the date before which such representations in connection therewith might be submitted.

Further, the fact that an application for variation of the route has to be notified under sub-section (3) of Section 57 and that an obligation under sub-section (4) of Section 57 is imposed on the Regional Transport Authority to the effect that no representation received in connection with the application shall be considered unless the same is made in writing before the appointed date and the copy thereof has been simultaneously furnished to the applicant by the person making such a representation indicate that all the incidents of an application for a new permit are attached to such an application. (Paras 7 and 8)

It is manifest from Clauses (b) and (f) of Section 64 that both of them refer to the word “condition”. While the right conferred by Clause (b) is not subject to any condition, the right conferred by Clause (f) is available to a person (1) providing transport facilities, (2) who has opposed to grant of a permit and is aggrieved either by the grant thereof or by any condition attached thereto. Therefore it can be safely concluded that any person who is aggrieved either by the grant of the permit or by the variation of the condition relating to the route can file an appeal only if he had filed his objections and opposed the grant of variation of route in the manner prescribed by law. The contention that Clause (b) confers unrestricted right of appeal on a person aggrieved by variation of any condition of a permit cannot be accepted for two reasons. Firstly, the contention ignores the distinct position which Section 57 (8) of the Act accords to an application for variation of the route as compared to applications for variation of other conditions. Secondly, it renders Clause (f) otiose and superfluous. He can, however, prefer an appeal as regards the variation of the condition relating to timings inasmuch as an application for the variation of the timings is not conditioned by provisions to those in sub-sec. (8) of Section 57. AIR 1961 Madh Pra 81, Rel. on; AIR 1961 Ker 53 and AIR 1959 Raj 41, Dissent. from.

(Paras 9, 10 and 20)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Clauses contained in section must be so interpreted as not render any clause otiose and in such a way as will harmonise with other relevant provisions in Act. (Para 10)

| Cases Referred: | Chronological | Paras |
|---|---------------|------------|
| (1966) (1966) 2 Mys LJ 176 = (1966) 7 Law Rep 118, M. S. Krishnaswamy v. Mysore Revenue Appellate Tribunal | | 14, 16, 17 |
| (1966) (1966) 2 Mys LJ 199 = 1966-7 Law Rep 752, K. N. Lakshminarasimhaiah v. Secy. Mysore State Revenue Appellate Tribunal | | 14 |
| (1965) AIR 1965 Mys 258 (V 52) = (1964) 2 Mys LJ 394, N. R. Revanna v. T. V. Mallappa | | 11 |
| (1965) AIR 1965 Mys 286 (V 52) = (1965) 1 Mys LJ 206, C. Abdul Azees v. Mysore State Transport Authority | | 11 |
| (1965) W. P. 280 of 1964 and W. P. 487 of 1965 (Mys), H. C. Channaiah v. Regional Transport Authority | | 17 |
| (1964) AIR 1964 Cal 442 (V 51), Sudhir Kumar v. Regional Transport Authority | | 14 |
| (1963) W. P. 440 of 1963, D/- 25-3-1963 (Mys), Rangappa Reddy v. Choodappa | | 12 |
| (1962) AIR 1962 Mys 161 (V 49), Sidalingappa v. Revenue Appellate Tribunal | | 12 |
| (1962) AIR 1962 Mys 215 (V 49), Thimmaiah v. Mysore State Revenue Appellate Tribunal | | 12, 17 |
| (1961) AIR 1961 Ker 53 (V 48) = 1960 Ker LJ 1029, Devraja Iyer v. Regional Transport Authority | | 18 |
| (1961) AIR 1961 Madh Pra 81 (V 48) = 1961 Jab LJ 133, Jasram v. State Transport Authority | | 13 |
| (1961) W. P. No. 1399 of 1961, A. Misquith v. Regional Transport Authority | | 15 |
| (1959) AIR 1959 SC 851 (V 46) = (1959) Supp (2) SCR 692, Ram Gopal v. Anant Prasad | | 16 |
| (1959) AIR 1959 Raj 41 (V 46) = ILR (1958) 8 Raj 1112, Meeralal v. State of Rajasthan | | 19 |
| (1958) W. P. Nos. 229 and 230 of 1958 (Mys), Sri Rama Reddy v. Revenue Appellate Tribunal | | 14 |
| (1957) AIR 1957 Mys 19 (V 44) = ILR (1956) Mys 400, Mohmed Peer v. State of Mysore | | II |
| N. S. Narayana Rao and Rangavittalachar, for Petitioner; M. Rangaswamy, for Respondent No. 1. | | |

TUKOL, J.: This is a writ petition under Articles 226 and 227 of the Constitution praying for the issue of a Writ of Certiorari quashing the order passed by the Mysore State Transport Appellate Tribunal in Appeal No. 554 of 1966.

2. The case of the petitioner is that he was plying a Stage Carriage Service from Koppal to Kawloor via Halligere, Wadegenhal, Handral, Mianalli and Alwandi. He had filed an application on September 30, 1965, before the Regional Transport Authority, Raichur, for variation of the existing

route and timings. The change in the route was that instead of going from Wadegenhal to Mainalli via Handral, it should be via Hiresindogi. The application was duly notified on October 28, 1965 inviting objections before November 30, 1965. The date of hearing was December 15, 1965. No objections were received in time. The 1st Respondent filed his objections on January 10, 1966; but the same were rejected on the ground that they were not submitted within the notified date. The Regional Transport Authority, thereafter considered the merits of the petitioner's prayer and granted the variations in the route as well as in the timings.

The 1st Respondent preferred an appeal, No. 554 of 1966 before the 2nd Respondent. The petitioner contended that the appeal was not tenable. The Tribunal however rejected this contention, allowed the appeal and passed an order setting aside the Resolution passed by the Regional Transport Authority on 1-6-1966. The petitioner challenges the order of the 2nd Respondent on the ground that there is a patent error in holding that the appeal was tenable under Section 64(b) of the Motor Vehicles Act and that the 1st Respondent cannot be considered to be an aggrieved party within the meaning of Section 64 of the Act.

3. In his counter-affidavit, the 1st Respondent admits the factual averments made in the petition. He also admits that he did not prefer a representation to the proposed deviation of the route. He however objects to the change in the schedule of timings for which no specific prayer had been made by the petitioner in his application. According to him, he had a right of appeal under Section 64 (b) of the Act and that the grant of variation in the timings by the Regional Transport Authority had adversely affected him in plying his own Stage Carriage. He has further averred that the deviation of the route does not necessitate any change of timings.

4. The sole question that arises for our determination in this Writ Petition is whether an operator, who has failed to file his written objection within the notified time in response to the notice of application for variation of route published under Section 57 (3) of the Act, can file an appeal to the State Transport Appellate Tribunal under Section 64 (b) against the order varying the condition as regards the route and that as regards the timings.

5. The learned Advocates appearing for the parties have put forward two diametrically opposite contentions. According to the petitioner, the first respondent has no right of appeal under any of the Clauses of Section 64 of the Act and that he could have had a right of appeal under Clause (f) of Section 64 of the Act, had he filed his objections as required by Section 57 (3) of

the Act; he had filed no objections within the time notified and he was therefore debarred from filing an appeal either under Clause (f) or any of the other Clauses of Section 64. Mr. Rangaswami, learned counsel appearing for the Respondent submitted that the 1st Respondent had a right of appeal under Clause (b) of that Section and his right to file an appeal is not dependent on his filing of objections in response to the notification. Both the learned counsel have cited authorities in support of their respective contentions.

6. Since there is no direct decision of this Court bearing on the point at issue, we think it advisable to refer to the relevant provisions of the Act before adverting to a discussion of the authorities cited at the Bar. The Petitioner's application for variation of the route was published in the Mysore Government Gazette on October 28, 1965 in the form of a Notification under Section 57 (3) of the Act, calling upon those who had any representation to make in connection with the application, to file their objections in writing so as to reach the Secretary of the Regional Transport Authority on or before November 30, 1965. The Notification further informed that the application would be taken up for consideration on 15th December 1965. In considering the legal significance of this Notification, we have to refer to sub-section (8) of Section 57 of the Act. That sub-section reads:

"(8) An application to vary the conditions of any permit, other than a temporary permit, by the inclusion of a new route or routes or a new area or, in the case of a stage carriage permit, by increasing the number of services above the specified maximum or in the case of a contract carriage permit or a public carrier's permit, by increasing the number of vehicles covered by the permit, shall be treated as an application for the grant of a new permit:

.....
It is unnecessary to refer to the proviso to this sub-section which lays down that it shall not be necessary so to treat an application made by the holder of a stage carriage permit who provides the only service on any route, etc. The obvious implication of sub-section (8) is, to confine ourselves to the matter at issue, to treat an application to vary the condition relating to the route or areas an application for the grant of new permit. In other words such an application has to be dealt with and disposed of in the same manner as an application for the grant of a new permit.

7. In this context, it is significant to note that an application to vary the condition relating to the route or area is alone required to be treated as an application for the grant of a new permit. Section 48 (3) refers to a number of conditions which the Regional Transport Authority, while granting a Stage Carriage Permit, may attach

to the permit granted thereunder; Cl. (xx) of Section 48 (3) enjoins that the conditions of the permit will not be departed from save with the approval of the Regional Transport Authority. Clause (xxi) has an important bearing on the matter in issue and therefore we read the same here:

"(xxi) that the Regional Transport Authority may, after giving notice of not less than one month—

(a) vary the conditions of the permit;

(b) attach to the permit further conditions."

This Clause empowers the Regional Transport Authority to vary the conditions of the permit or attach additional conditions of permit after giving notice of not less than one month. This Clause does not prescribe in what manner the notice is to be issued or how it should be disposed of.

8. From the aforesaid provisions of the Act, it would be clear that an application for variation of the condition of the permit relating to the route or area is treated differently from an application for variation of any other condition or conditions of the permit. In prescribing the procedure for dealing with an application for variation of the condition of permit as regards the route, sub-section (8) of Section 57 of the Act elevates such application to the status of an application for the grant of a new permit and requires it to be dealt with as an application for the grant of a new permit. On account of this mandatory provision, such an application has to be made available for inspection at the office of the Regional Transport Authority as required by Section 57 (3) and has also to be published in the prescribed manner together with notice of the date before which such representations in connection therewith might be submitted.

The conclusion, therefore, is irresistible that the scheme of the Act makes a distinction between an application for variation of condition of a permit relating to the route or area and an application for variation of other condition or conditions. Further, the fact that an application for variation of the route has to be notified under sub-sec. (3) of Section 57 and that an obligation under sub-section (4) of Section 57 is imposed on the Regional Transport Authority to the effect that no representation received in connection with the application shall be considered unless the same is made in writing before the appointed date and the copy thereof has been simultaneously furnished to the applicant by the person making such a representation indicate that all the incidents of an application for a new permit are attached to such an application.

9. We now proceed to consider the relevant section, Section 64 which provides for appeals, bearing in mind the legal position of applications for variation of conditions

of a permit. Since the learned Advocates for the parties have relied upon Clauses (b) and (f) of Section 64 of the Act, we reproduce those provisions below:

"64. Any person—

(b) aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof, or

(f) being a local authority or police authority or an association which, or a person providing transport facilities who, having opposed the grant of a permit, is aggrieved by the grant thereof, or by any condition attached thereto, or

may, within the prescribed time and in the prescribed manner, appeal to the prescribed authority who should give such person and the original authority an opportunity of being heard."

It is manifest from these two clauses that both of them refer to the word "condition". While the right conferred by Clause (b) is not subject to any condition, the right conferred by clause (f) is available to a person (1) providing transport facilities, (2) who has opposed to grant of a permit and is aggrieved either by the grant thereof or by any condition attached thereto. It would not be consistent therefor to treat the attachment or the variation of any and every condition on the same footing since, as already indicated, the law treats the conditions relating to variation of the route on the same footing as an application for the grant of a permit. Reading the provisions relevant to the issue together, it can be safely concluded that any person who is aggrieved either by the grant of the permit or by the variation of the condition relating to the route can file an appeal only if he had filed his objections and opposed the grant of variation of route in the manner prescribed by law. The words "conditions attached" occurring in clause (f) should be interpreted as including a condition relating to variation in the route or area, in view of the fact that Section 57 (8) places an application for variation of a route or area on the same footing as an application for grant of a new permit.

10. Mr. Rangaswamy's contention that Clause (b) confers unrestricted right of appeal on a person aggrieved by variation of any condition of a permit cannot be accepted for two reasons. Firstly, the contention ignores the distinct position which Sec. 57 (8) of the Act accords to an application for variation of the route as compared to applications for variation of other conditions. Secondly, it renders Clause (f) otiose and superfluous. It is a cardinal principle of construction that clauses contained in a Section must be so interpreted as not to render any Clause otiose and to construe them harmoniously with other relevant provisions

contained in the Act. For all these reasons, we are of the opinion that the 1st Respondent who did not file any objections as required by sub-section (3) of Section 57 would not have a right of appeal under Clause (f) of Section 64 to challenge the condition of the permit relating to the variation of the route. He can, however, prefer an appeal as regards the variation of the condition relating to timings inasmuch as an application for the variation of the timings is not conditioned by provisions to those in sub-section (8) of Section 57.

11. Now we proceed to consider the authorities cited by the learned counsel for the parties. The effort of Mr. N. S. Narayana Rao, learned counsel appearing for the Petitioner was to persuade us to the view that the first Respondent could not have preferred an appeal unless the facts of the case fully attracted the provisions contained in Clause (f) of Section 64 of the Act. The first decision cited is of the former High Court of Mysore in *Mohmed Peer v. State of Mysore*, AIR 1957 Mys 19 decided on 26-7-1956, in which the sole question that arose for decision was whether the State Government had jurisdiction to entertain an appeal against the order of the State Transport Authority declining to grant variation in the timings. In holding that the State Government had no jurisdiction, the Court held that Section 64 (f) of the Motor Vehicles Act which was the only provision that could apply to the case enabled a person providing transport facilities to prefer an appeal against the grant of permit or attach any condition thereto only if he had opposed the grant of permit and was aggrieved either by the grant thereof or any condition thereto. There is no discussion of the scope of Clause (f) or of other Clauses of the section. While deciding that point, the Court observed:

"...Even assuming that the timings assigned for running of a Stage Carriage Service are to be regarded as a condition attached to the permit, it will be of no avail if a person who wishes to prefer an appeal in regard to such condition has not opposed the grant of a permit itself."

This decision cannot however, be an authority in a case where a dispute relates to the competency of an appeal by a person aggrieved by the variation of a route and the timings made in a proceeding to consider an application for the variation of both.

The decisions in *N. R. Revanna v. T. V. Mallappa*, 1964-2 Mys LJ 394 = (AIR 1965 Mys 258) and in *C. Abdul Azeez v. Mysore State Transport Authority*, 1965-1 Mys LJ 206 = (AIR 1965 Mys 286) relate to the competency of an appeal against the order granting an ordinary permit. It was laid down in *Revanna's case*, (1964) 2 Mys LJ 394 = (AIR 1965 Mys 258) that only persons who have made representations strictly

in accordance with sub-section (4) of Section 57 are entitled to a hearing before the Regional Transport Authority and that any other person not complying with those mandatory provisions cannot be considered as one who has opposed the grant of permit and that he is therefore not entitled to file an appeal under Section 64 (f) of the Act. It was explained that the words "person having opposed the grant" occurring in Section 64 (f) should be given a restricted meaning in view of the scheme of the Act and should be confined to those who have made written representations in accordance with Section 57 (4) of the Act.

In Abdul Azeez's case, (1965) 1 Mys LJ 206 = (AIR 1965 Mys 286) it was laid down consistently with the earlier decision that a Stage Carriage operator who has filed his representation after the notified time is not entitled to file an appeal under Section 64 (f) of the Act. These decisions, therefore, have no direct bearing on any of the points raised for decision in this case.

12. The other decisions cited for the Petitioner relate to appeals against the orders relating to the change of timings. In Thimmaiah v. Mysore State Revenue Appellate Tribunal, AIR 1962 Mys 215 the question raised was whether another operator who is adversely affected by the change of timings granted to another permit holder on the same route can prefer an appeal under Section 64 of the Act. It was held that if as a result of revision of timings, assigned to a permit holder, another permit holder who is deprived of the priority of timings would clearly to be a person aggrieved by the variation of the condition of the permit and would therefore be entitled to prefer an appeal under Section 64 (f) of the Act.

The same view finds expression in Siddalingappa v. Revenue Appellate Tribunal, AIR 1962 Mys 161. Therein it has been laid down that the timings assigned to a Stage Carriage permit holder by the Regional Transport Authority at the time of the grant of permit constitute a condition of his permit and that if the Regional Transport Authority subsequently varies those timings, such variation amounts to variation of condition of the permit within the meaning of Section 64 (b) of the Act and that an appeal lies against such variation under aforesaid provision. An unreported decision of another Bench in Rangappa Reddy v. Choodappa, W. P. 440 of 1963, D/- 25-3-1963 (Mys) affirms the view taken in Thimmaiah's case, AIR 1962 Mys 215.

13. The last decision cited for the petitioner is of the Madhya Pradesh High Court in Jasram v. State Transport Authority, AIR 1961 Madh Pra 81. In that case the Writ Petitioner had filed an application for variation of a route and the Regional Transport Authority had granted the application vary-

ing the route as prayed for. In the Revision Petition filed before the State Transport Authority by the aggrieved party who had filed his representation beyond time, that authority set aside the order on the ground that the route was wholly outside the territorial jurisdiction of the Regional Transport Authority, Gwalior.

It was contended in the Writ Petition that the Revision Petitioner was incompetent to challenge the order of the Regional Transport Authority as he had preferred his objections beyond time. It was contended for the respondent that any person providing transport facilities aggrieved by the variation of the conditions of a permit by inclusion of a new route is entitled to file an appeal under Clause (b). Rejecting the latter argument, their Lordships held that the right of appeal by persons providing transport facilities and aggrieved by the variation of the route, had been specifically provided for in the Clause (f) of Section 64 and that in the case before their Lordships, Respondent 3 who did not make the representation within the prescribed time and could not be regarded as having opposed the variation was disentitled to appeal under clause (f) of Section 64 which was the only clause applicable to such a case. This decision supports the petitioner and for the reasons already stated, we are in respectful agreement with this view.

14. The other decision cited for the Petitioner has bearing on different aspects of the legal position involved in the question for decision. In the case of Sri Rama Reddy v. Mysore Revenue Appellate Tribunal, Writ Petns. Nos. 229 and 230 of 1958 (Mys), this Court discussed the implications of S. 57 (8) of the Act and stated:

"...Section 57 (8) requires the Regional Transport Authority to treat the application for the variation of the conditions of a permit, such as those referred to in that sub-section, as an application for 'the grant of a new permit. What that sub-section, in our opinion, provides is that although the application is for the variation of such conditions of a permit, it has to be statutorily regarded as an application for the grant of a new permit. In other words, although the prayer made in the application is only for the variation of a condition of the permit, that prayer is statutorily made equivalent to a prayer for the grant of a new permit, with the result that that application acquires the status of an application for the grant of a new permit...."

It is for these reasons that their Lordships came to the conclusion that the dismissal of an application for the variation of a route can be challenged by the person aggrieved by the order of dismissal in Appeal under Section 64 (a) of the Act. Their Lordships observed that whatever might have been the position before the amendment of the Act, by Central Act 100 of 1956, the

position after the amendment was that the refusal of an application for the variation of the conditions of a permit would be clearly appealable under Section 64 (1) (a) of the Act. As the question of appeal related to the competency of the petitioner, there is naturally no discussion of Clause (f) of Section 64 (1).

The decision of the Calcutta High Court in *Sudhir Kumar v. Regional Transport Authority*, AIR 1964 Cal 442 does not deal with the question of appeal but lays down that an application for extension of the permit by inclusion of a new route has to be treated as an application for a new permit requiring compliance with sub-sections (2) and (3) of Section 57 in view of what is contained in sub-section (8) of Section 57. It is unnecessary to refer to the facts of this case as the point decided therein is what is explicitly laid down in sub-section (8) of Section 57.

The learned Advocate for the petitioner referred to the decision of this Court in *M. S. Krishnaswamy v. Mysore Revenue Appellate Tribunal*, 1966-2 Mys LJ 176 in which the judgment was delivered by one of us (Tukol, J.) holding that where the original permit has expired by efflux of time according to law, it is not open to any of the authorities to vary the terms of such permit. The only question relevant to the point at issue is as regards the effect of Section 57 (8) which we have already discussed above.

Another decision in *K. N. Lakshminarasimaiah v. Secretary, Mysore State Revenue Appellate Tribunal*, 1966-2 Mys LJ 199 which has also been relied upon by the petitioner explains the meaning of the expression "person aggrieved" in Section 64 (1) (f) of the Act. It lays down that that expression means the person who is injured or affected in a legal sense. There is no need to refer to the facts of this case as in the case before us, it is not contended by the petitioner that the first Respondent is not the person aggrieved within the meaning of that expression used in that Clause.

15. The last decision read to us on behalf of the Petitioner is an unreported decision in *A. Misquith v. Regional Transport Authority*, Writ Petn. No. 1899 of 1961 (Mys) which needs no detailed discussion as the only point in issue there was about the legality of the proceedings for the change of route and timings. That was a case where the Regional Transport Authority had committed irregularities under Section 57 of the Act.

16. Now we proceed to discuss the decisions cited by Mr. Rangaswami, appearing for the 1st Respondent. He drew our pointed attention to paragraph 5 of the decision in *M. S. Krishnaswamy's case*, (1966) 2 Mys LJ 176 already cited. That paragraph discusses the meaning of the word "treated" occurring in sub-section (8) of Section 57.

After full discussion of that sub-section, it was concluded that all that the law meant was that an application for the variation of permit should be dealt with and disposed of in the same manner as an application for the grant of a permit is dealt with and disposed of under the Act. The court also affirmed that the grant of a permit with the changed route "would not result in the grant of new permit". According to Mr. Rangaswami, if what the Court does in granting the variation of the route by altering the condition relating thereto in the concerned permit, does not amount to grant of a new permit, then it would not be logical to hold that the aggrieved party could appeal only under Section 64 (f).

We have already discussed the implication of Clause (f) and have indicated that that clause not only covers the case of a person aggrieved by the grant of a new permit but also the case of a person who is aggrieved by the attachment of the condition relating to the variation of the route. We are not prepared to narrow down the scope of Clause (f) by saying that it is applicable only to the grant of a new permit and to the conditions attached to it at the time of its initial grant as advocated by Mr. Rangaswami.

In support of the argument that Clause (f) Section 64 if extended so as to include an appeal by a person aggrieved by the condition relating to the variation of the route so as to render Clause (b) of Section 64 otiose and such an interpretation should not be accepted, he cited the decision of the Supreme Court in *Ram Gopal v. Anant Prasad*, AIR 1959 SC 851 where their Lordships had to consider the situation arising from the grant of renewal of a permit by one of the applicants without passing any express order on the application for a fresh permit. Their Lordships held that the grant of renewal amounts in fact to a refusal to grant a permit and the person making the first application for a new permit would be a person aggrieved under Clause (a) of Section 64 of the Act prior to the amendment. In dealing with the Clause of that Section their Lordships observed:

".... The different clauses in the section deal with different situations. Each is independent of the others. Clause (f) deals with a case where an objection had been filed against the fresh grant or the renewal of a permit but the permit has nonetheless been granted or renewed It does not say that a permit granted or renewed cannot be questioned except at the instance of the persons mentioned in Cl. (f); it does not affect the right of appeal under the other clauses."

The interpretation that the learned Advocate for the 1st Respondent is asking us to adopt would in fact go counter to this decision of the Supreme Court. As we have already

pointed out, if a person aggrieved by the grant of an application for variation of the route mentioned in the permit is to be allowed to appeal against such grant under Cl. (b) not only such a view would nullify the effect of Section 57 (8) but would also narrow down Clause (f) of that Section. Such a construction is not permitted by law and we have no hesitation in declining to accept it.

17. We were referred to the decision of this Court in AIR 1962 Mys 215. We have already discussed the ratio of this decision and pointed out that it was not referred to the point at issue. Our attention was drawn to the decision of this Court in (1966) 2 Mys LJ 176 to which we have already referred to. The learned Advocate read the concluding sentence of paragraph 5 of the judgment in which the Court came to the conclusion that 'to treat an order granting a variation in any of the conditions of any permit as a grant of a new permit would be wholly misconceived and untenable'. To the same effect are the unreported decisions of this court in H. C. Channaiah v. Regional Transport Authority, W. P. No. 280 of 1964 and W. P. No. 487 of 1965 (Mys). In fact the latter decision has affirmed the view taken in M. S. Krishnaswamy's case, (1966) 2 Mys LJ 176. We are in respectful agreement with the view that the variation of the route in an existing permit does not amount to a grant of new permit.

18. An attempt was made to support the plea by referring to the decision of the Kerala High Court in Devaraja Iyer v. Regional Transport Authority, AIR 1961 Ker 53 in which it has been held that after the amendment of the Act in 1956 any variation in respect of routes made in a permit by the Regional Transport Authority amounts to a variation in its conditions within the meaning of Section 64 (b) and is therefore open to appeal to the Appellate Tribunal. We have already pointed out that Clause (f) of Section 64 covers the case of an appeal against the order granting variation of a condition in respect of the route and we are therefore, with respect, unable to agree with the view that an appeal against an order varying the route can be filed under cl. (b) of the said Section.

19. Considerable emphasis was laid on the decision of the Rajasthan High Court in Heeralal v. State of Rajasthan, AIR 1959 Raj 41 which has been relied upon by the Appellate Tribunal and which supports the view pressed upon us by Mr. Rangaswamy. The view taken therein is to be found in paragraph 6 of the judgment which reads as follows:

"In this view of the matter, we are of opinion that in cases involving the variation of a permit such as by the inclusion of a new route or area, the correct position even under the Act as it stands after the amend-

ments of 1956 is that a person adversely affected and aggrieved by such variation has a right of appeal under Clause (b) of Section 64 though for some reason or another for which he has not been able to raise an objection before the Regional Transport Authority, and such a right will be available to him under Clause (b) of Section 64; and where he has raised the objection, he will have a right of appeal also under Clause (f) of the said Section."

This view virtually places all cases of variations of conditions of permit on the same footing and in fact ignores the special provision contained in Section 57 (8) of the Act which requires an application for variation of route or area in a permit to be treated as an application for a new permit.

If due regard is paid to the provision of Section 57 (8) of the Act, it has to be held that an appeal under Clause (f) can be filed only by a person who has filed objections in time in response to the notification issued under Section 57 (3) of the Act. To hold that a person who has failed to file his objections within time can prefer an appeal under Clause (b) of Section 64 would result in eroding the effect of Section 57 (8) and of Clause (f) of Section 64 of the Act. Such a view would bring about another anomaly. A person who fails to file his written objections in time cannot be heard by the Regional Transport Authority on the proposal for grant of variation of the route or area. In that event, it would be illogical to allow such a person to prefer an appeal before the State Transport Appellate Authority and urge all grounds which the law debars him from urging before the original authority. We do not think that the legislature contemplated to permit such an anomalous position, we are not prepared to agree that such a person can prefer an appeal under Clause (b) of Section 64. He has such right of appeal only under Clause (f) of that Section.

20. After a careful consideration of the provisions of the Act and the decisions cited before us by the Advocates for the parties, we are of the opinion that a person who has not filed his objections in time to an application for the variation of a route and has thus failed to oppose the grant of variation of the condition in a permit in respect of the route will not be entitled to prefer any appeal under Clause (b) of Section 64; only a person who has opposed such a grant according to provisions of Section 57 of the Act can prefer an appeal under Clause (f) of Sec. 64. Clause (b) of that Section applies to cases relating to variations of conditions other than the condition relating to the route for which special provisions are made in the Act.

21. In the view we take, we allow this writ petition and set aside the order passed by the State Appellate Tribunal. We confirm the order varying the route but remand the application to the Regional Transport Authority to decide upon the timings after

hearing the persons who have opposed or are affected by the variation in the timings. Till such variation in timings is made, the Petitioner shall be entitled to continue to run his vehicle as per the existing timings. In the circumstances of the case, we make no order as to costs.

Petition allowed.

AIR 1970 MYSORE 67 (V 57 C 15)

G. K. GOVINDA BHAT AND
M. SADANANDASWAMY, JJ.

M. Ayyappan and another, Petitioners v. Moktar Singh and another, Respondents.

Civil Revn. Petn. No. 1074 of 1967, D/- 25-7-1969, against order of Dist. J., Chitradurga, D/- 18-3-1967.

(A) Motor Vehicles Act (1939), Ss. 110, 110-F — Claim for damages by parents of deceased child — Claims Tribunal has exclusive jurisdiction to decide such claim.

The word "Compensation" is a more comprehensive term and the claim for compensation includes a claim for damages. Hence a claim for damages made in a suit by parents of a child, who died in an accident, is covered by Section 110 and can be made to Claims Tribunal, which has exclusive jurisdiction to decide the claim, the jurisdiction of the Civil Court being excluded by Section 110-F. AIR 1923 Cal 507, Rel. on.

(Para 7)

(B) Motor Vehicles Act (1939), Ss. 110-A, 110-F — Term "Legal representative" in Section 110-A — Includes persons referred to as "representative of deceased" in Section 1 of Fatal Accidents Act — Claim for damages by parents of deceased child — Civil Court's jurisdiction is barred.

The jurisdiction of the Civil Court to entertain a suit for damages filed by parents of a child who died in an accident, is barred under Section 110-F and the Motor Accidents Claims Tribunal has exclusive jurisdiction to adjudicate upon such claim. The term "legal representative" in S. 110-A includes the persons referred to as "representatives" in Section 1-A of the Fatal Accidents Act, namely, the wife, husband, parent or child of the deceased.

(Para 10)

(C) Motor Vehicles Act (1939), Ss. 111-A & 110-A — Mysore Motor Vehicles Rules (1963), Rule 342 (2) — Right to claim Compensation under Section 110-A taken away — Rule is invalid as being beyond rule-making power of State.

Rule 342 (2) is beyond the rule-making power of the State Government and is invalid. The right that can be exercised under Section 110-A of the Act cannot be confined to persons who come within the term "Legal representative" as defined under Section 2 (11) of the Civil Procedure Code only. The

right of representatives of the deceased who do not come under the definition of the term "legal representatives" as defined in the Code of Civil Procedure to put forward a claim under Section 110-A of the Act cannot be taken away by means of a rule framed under the Rule-making power conferred by Section 111-A of the Act. The power to make rules under Sec. 111-A is given to the State Government only for the purpose of carrying into effect the provisions of Section 110-A of the Act, and while acting for that purpose, the State Government cannot restrict the right given under Section 110-A of the Act to only some of the persons contemplated under that Section. (Para 11)

Cases Referred: Chronological Paras

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| (1967) AIR 1967 Mad 123 (V 54)= | |
| 1966-2 Mad LJ 378, Mohd. Habibullah v. Seethammal | 9 |
| (1967) AIR 1967 Mys 11 (V 54)= | |
| (1966) 1 Mys LJ 576, Seethamma v. Benedict D'Sa | 9 |
| (1966) 1966 Acc CJ 19. (Mad), Palani Ammal v. Safe Service Ltd. | 9 |
| (1947) AIR 1947 Cal 195 (V 34)= | |
| 51 Cal WN 419, Jeet Kumari v. Chittagong E. & E. Supply Co. | 9 |
| (1935) AIR 1935 Bom 333 (V 22)= | |
| 37 Bom LR 410, Goolabi v. Pestonji | 9 |
| (1934) AIR 1934 Cal 665 (V 21)= | |
| ILR 61 Cal 480, Mrs. E. V. Penheiro v. Mineey | 9 |
| (1923) AIR 1923 Cal 507 (V 10)=27 | |
| Cal WN 210, Md. Mozahar Ahmad v. Md. Azimoddin | 7 |
| (1905) ILR 28 Mad 479, Johnson v. Madras Railway Co. | 8, 9 |
| (1854) 23 LJ Ch 625 = 61 ER 707, | |
| In re, Crawford's Trust | 9 |
| K. Jagannatha Shetty, for Petitioners; B. K. Ramchandra Rao, for Respondents. | |

ORDER: This is a revision petition referred to us for disposal under sub-section (1) of Section 8 of the Mysore High Court Act, 1961 by A. Narayana Pai J. It is necessary to state the relevant facts leading to the reference. The petitioners Ayyappan and Katayani Amma are the parents of a child which died as a result of an accident caused by a motor vehicle at Davangere on 24-7-1963. They filed the suit O. S. 9/65 in the Court of the Civil Judge, Chitradurga, on 24-4-1965 against the owner of the vehicle, first defendant, and the Insurance Company which had insured the motor vehicle, defendant-2, for recovery of Rs. 10,000/- being the loss of future pecuniary benefit and Rs. 5,000/- towards the expectation of life, mental agony and loss of society.

2. The State Government, in exercise of the powers conferred by Section 110 of the Motor Vehicles Act, under a Notification No. H. D. 228 MVA 57 dated 28th June, 1963 and published in the Mysore Gazette on the same day, constituted the District Judges of various districts mentioned therein as Motor Accidents Claims Tribunals for the

areas within their jurisdiction with effect from 1st July 1963. Since there was no separate District Judge for Chitradurga District, the District Judge of Shimoga was constituted as the Tribunal for Chitradurga District in which Davangere is situated.

3. Since on the date of the accident a Tribunal under Section 110 of the Motor Vehicles Act, hereinafter referred to as the Act, had been constituted for the area in question, the Civil Judge held that the jurisdiction of his Court as a Civil Court has been ousted by Section 110-F of the Act. He therefore ordered return of the plaint for presentation to proper Court. Against the said order the petitioners appealed to the District Judge of Chitradurga in 1966 by which time a separate District Judge had been appointed for Chitradurga District. The District Judge of Chitradurga was also the Claims Tribunal under Section 110 of the Act by the time he came to hear the appeal, under the Notification No. HD 565 TMA 65 dated 28th October, 1965. The District Judge confirmed the order of the trial Court and dismissed the appeal. Against that order the petitioners filed the present Civil Revision Petition.

4. If the claim for compensation made in the suit was a claim which is covered by Section 110 of the Act, and can be made to the Claims Tribunal which had exclusive jurisdiction to decide the claim, the jurisdiction of the Civil Court is excluded by Section 110-F of the Act.

5. The petitioners contend that at any rate, so far as the first petitioner, the father of the child is concerned, his right to compensation conferred by the Fatal Accidents Act (Central Act 13 of 1855) is not a right, the adjudication of which has been taken away from the jurisdiction of the Civil Court and placed within the exclusive jurisdiction of the Claims Tribunal. The argument in support of this contention is that whereas Sec. 110-A of the Act enables only the legal representative of the deceased to make an application for compensation to the Claims Tribunal the right conferred by S. 1-A of the Fatal Accidents Act is capable of being sued upon by a person who may not be the legal representative but nevertheless comes within the description of "representative of the person deceased" contained in the 2nd paragraph of Section 1-A of the Fatal Accidents Act. It is further contended that the word "representative" has a different meaning from the expression "legal representative" mentioned in Section 110-A of the Act.

6. The first contention urged on behalf of the petitioners is that the suit filed by the petitioners is one for recovery of damages and not for compensation and therefore the suit claim is not barred under Section 110-F. The argument of the petitioner's learned counsel was that under Section 110(1) of the

Motor Vehicles Act, the jurisdiction of the Motor Accidents Claims Tribunal for the area is restricted to claims for compensation in respect of accidents involving death or bodily injury arising out of the use of motor vehicles and that under Sec. 110-F, the jurisdiction of the Civil Court is barred in respect of any claim for compensation which may be adjudicated upon by the Claims Tribunal for the area. The first question, therefore, is whether a claim for compensation includes a claim for damages.

7. In *Md. Mozaharal Ahmad v. Md. Azimuddin*, AIR 1923 Cal 507 it was observed that the term "compensation" as stated in the Oxford Dictionary, signifies that which is given in recompense, an equivalent rendered, and that damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money, of something lost or withheld. The term "compensation" etymologically suggests the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent. Thus, it is clear that the word "compensation" is a more comprehensive term and the claim for compensation includes a claim for damages and hence, the petitioners could have put forward their suit claim before the Motor Accidents Claims Tribunal.

8. Under Section 110-A (1) (b) of the Act, an application for compensation arising out of an accident involving the death of a person arising out of the use of motor vehicles may be made by the legal representatives of the deceased. Under Clause (2) of Rule 342 of the Mysore Motor Vehicles Rules, 1963, it is provided that the term "legal representative" shall have the meaning assigned to it under Clause (11) of Section 2 of the Code of Civil Procedure, 1908. In Section 2 Cl. (11) of the Code of Civil Procedure the term "legal representative" as a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. Hence it is urged on behalf of the petitioners that so far as the claim put forward by the father is concerned, it could not be adjudicated upon by the Claims Tribunal constituted under the Act, and that therefore, the jurisdiction of the Civil Court to entertain the claim is not barred.

Under Section 1-A of the Indian Fatal Accidents Act (Central Act 13 of 1855) an action or a suit for damages in respect of the death of a person caused by wrongful act, neglect or default, of another person shall be for the benefit of the wife, husband, parent and child if any, of the person whose

death shall have been so caused, and "shall be brought by and in the name of the executor, administrator or representative of the person deceased". It is further provided that the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. Section 2 of the same Act provides that not more than one suit or action shall be brought for and in respect of the same subject matter of complaint, and the proviso to that section provides that in every such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

The Legal Representatives' Suits Act, 1855 (Act 12 of 1855) provides that an action may be maintained by the executors, administrators, or representatives of any person deceased, for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person. Both Act 12 of 1855 and Act 13 of 1855 were passed on the same day. The precise nature of the right conferred by Act 13 of 1855 was considered in *Johnson v. The Madras Railway Company*, (1905) ILR 28 Cal 479. It was held that as the preamble of the Act 13 of 1855 itself indicated the relations of another were not, prior to its enactment, entitled to claim compensation on account of the death, and that the right to claim compensation in respect of such a death was created by the said Act. It was contended in that case that in the case of Europeans and Eurasians, the only 'representative' of a deceased man is his executor or administrator, and that in the said Act the word "representative" has no application to Europeans and Eurasians, but is used only with respect to Hindus and Mohammedans. It was held that the word 'representative' is not equivalent to 'heirs' since by Act 12 of 1855 passed on the same day, the right is given to bring a suit against "heirs or representatives" of the deceased wrong-doer. It was held that the word 'representative' means and includes all or any one of the persons for whose benefit a suit under the Act can be maintained, and that these persons are the representatives of the deceased, in the sense, that they are the persons taking the place of the deceased in obtaining reparation for the wrong done. It was further held that where there is no executor or administrator or where there is one, and he fails or is unwilling to sue, then the suit may be instituted by, and in the name of, the representative of the person deceased, but one suit only is allowed to enforce the claims of all the persons beneficially

entitled, — it being provided that the rights of each and every one of them shall be adjudged and adjusted by the Court in such suit. The right of each beneficiary is only to receive compensation in proportion to the loss occasioned to him by the death of his deceased relative. The beneficiaries entitled to compensation under Act 13 of 1855 are not persons entitled to claim compensation jointly, but are parties entitled to relief severally, in respect of the same cause of action which is enforceable at the suit of all or any of them suing for himself and the rest.

8-A. The Indian Fatal Accidents Act 13 of 1855 was enacted on the same lines as the English Fatal Accidents Act, 1846. Under Section 2 of the English Act, it is provided that the action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been caused and shall be brought by and in the name of the executor or administrator of the person deceased. Thus, it is only the executor or administrator of the deceased who could bring an action under the English Act. The English Act was amended by Fatal Accidents Act, 1864, which provided that in case there is no executor or administrator of the deceased or where there is an executor or administrator, no action is brought by him within the time prescribed, then such an action may be brought by and in the name or names of any of the persons for whose benefit such action could have been brought by the executor or administrator, and that every action so brought shall be for the benefit of the said person or persons. Thus, it enables an action to be brought by the persons beneficially interested under the Act.

9. It has been observed in *Palani Ammal v. The Safe Service Ltd.*, 1966 Acc CJ 19 (Mad), a decision of the High Court of Madras, that Section 110 of the Motor Vehicles Act provides a speedier remedy, obviously conceived as a better one from the point of view of the injured person or his unfortunate dependants. No new right or even a new remedy has been created by that provision; the forum alone is changed. The right to claim damages by the legal representatives of a deceased in respect of an accident, where the latter met with his death, was actionable under the pre-existing law, in Civil Court. The effect of the new provision is to create a new forum thus taking away the jurisdiction of the ordinary Civil Court. The aggrieved person has, as before, a remedy for damages in respect of the injury. The forum alone is changed. The period of limitation has also been curtailed but these two are matters of procedure.

In *Mrs. E. V. Penheiro v. M. Mineey*, AIR 1934 Cal 685 it was held that the word 'representative' has a special meaning of its own. It has not the same meaning as 'legal representative' in the Civil Procedure Code. The intention was that in the absence of an

executor or administrator any one or more of the persons for whose benefit the right of action is given shall be deemed to be a "representative" of the deceased for the purpose of maintaining a suit under the Act. It could not have been intended that in such a case where there is no executor or administrator, the persons for whose benefit the right of action was given should be without a remedy. Consequently, a widow of a deceased European or Eurasian was held entitled to maintain a suit under the Fatal Accidents Act. The decisions in (1905) ILR 28 Mad 479 and AIR 1934 Cal 665 were followed in Goolabi v. Pestonji, AIR 1935 Bom 333 wherein it was held that the suit brought by the widow, sons and daughters of a deceased Parsee under the Fatal Accidents Act was maintainable.

In Jeet Kumari v. Chittagong E. & E. Supply Co., AIR 1947 Cal 195, it was held, following the view of the Madras and Calcutta High Courts, that the word "representative" in the Fatal Accidents Act means not the legal representative of the deceased but the wife, husband, parent and children of the deceased, and that any one of them can also bring the suit for the benefit of the others. In Mohd. Habibullah v. Seethammal, AIR 1967 Mad 123 it was held that the claim preferred by the married sister of the deceased who died a bachelor, is maintainable under Section 110 (1) of the Act on the ground that Section 110-F provided for the foundation of a claim by any legal representative of the victim of the accident. The contention that such a claim be preferred only by the wife, child or parents who are the persons mentioned in the Fatal Accidents Act, was negatived. It has been held in Seethamma v. Benedict D'Sa, (1966) 1 Mys LJ 576 = (AIR 1967 Mys 11) that a claim for compensation can be made under Section 110-A of the Act not only against the owner of the motor vehicle and the Insurer, but also against the driver whose negligence produces the claim for compensation. In Re: Crawford's Trust, (1854) 23 LJ Ch 625 it has been held that the word "legal" when added to "representative" only means the representatives reorganised by law and does not designate different persons from those who would be intended by the single word "representatives", any more than the term "legal heirs" describes different persons from those who would be designated by the single word "heirs".

10. After the Motor Vehicles Act was amended by incorporating Sections 110 to 110-F, it is only the forum which has been changed in order to provide for a speedier remedy. In our judgment, the term "legal representative" in Section 110-A includes the persons referred to as "representatives" in Section 1-A of the Fatal Accidents Act, namely, the wife, husband, parent or child of the deceased. Since both the petitioners come within the meaning of "parent" they

could have made their claim before the Claims Tribunal. In that view, the Civil Court's jurisdiction to entertain the suit is clearly barred. The Courts below were right in returning the plaint for presentation before the proper forum.

11. Since we have held that the term "legal representative" used in Section 110-A of the Act cannot have the same meaning as that attributed to it under Section 2 (11) of the Code of Civil Procedure the right that could be exercised under Section 110-A of the Act cannot be confined to persons who come within the term "legal representative" as defined under Section 2 (11) of the Civil Procedure Code only. The right of representatives of the deceased who do not come under the definition of the term "legal representatives" as defined in the Code of Civil Procedure to put forward a claim under Section 110-A of the Act cannot be taken away by means of a rule framed under the Rule-making power conferred by Sec. 111-A of the Act. The power to make rules under Section 111-A is given to the State Government only for the purpose of carrying into effect the provisions of Section 110-A of the Act, and while acting for that purpose, the State Government cannot restrict the right given under Section 110-A of the Act to only some of the persons contemplated under that Section. Hence, Clause (2) of Rule 342 is beyond the Rule-making power of the State Government and is therefore invalid.

12. The revision petition is therefore, dismissed. But in the circumstances of the case there will be no order as to costs.

Petition dismissed.

AIR 1970 MYSORE 70 (V 57 C 16)

K. R. GOPIVALLABHA IYENGAR AND
B. VENKATASWAMI, JJ.

Appasaheb Annappa Sirguppi, Petitioner
v. Town Municipal Council, Ramdurg, Respondent.

Writ Petn. No. 3278 of 1968, D/- 21-11-1968.

Municipalities — Mysore Municipalities Act (22 of 1964), Ss. 306 (1) and 306 (2) — Scope — Dy. Commissioner's order under Sec. 306 (1) suspending execution of impugned resolution — Order must be given effect to immediately — Possibility of its being set aside by Government under Sec. 306 (2) cannot render order of Dy. Commissioner ineffective or inchoate. AIR 1965 SC 1275, Foll.; AIR 1959 Punj 75 & AIR 1955 Assam 238 & AIR 1963 Andh Pra 54, Disting.

(Paras 4, 5)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1275 (V 52) =
1965-1 SCR 350, Subhash Chandra
v. Municipal Corporation, Delhi 4

CM/IM/B167/69/VGW/D

(1963) AIR 1963 Andh Pra 54 (V 50)=
1962-1 Andh LT 152, Seetha Ramiah
v. State of A. P. 5
(1959) AIR 1959 Punj 75 (V 46)=
ILR (1958) Punj 2061, K. K. Co-op.
Trans. Society v. Punjab State 5
(1955) AIR 1955 Assam 238 (V 42),
U. W. Lyngdoh v. B. M. Roy 5
V. Tarakaram, for Petitioner; S. G. Bhat,
for Respondent.

ORDER: The petitioner was appointed as Secretary of the respondent-Municipality on 10-6-1959 and he had been acting as such till 31-10-1967, when the respondent-Municipality passed a resolution dismissing the petitioner as such Secretary, giving him a month's notice. The petitioner preferred a petition under Section 305 (1) of the Mysore Municipalities Act, 1964 (hereinafter referred to as the Act) before the Deputy Commissioner, Belgaum, praying that the execution of the resolution passed by the Municipality may be suspended. The Deputy Commissioner passed orders on 21-2-1968, a copy of which is marked C, allowing the petitioner's application, in exercise of the powers vested in him under Section 306 of the Act and ordering that the execution of the impugned resolution No. 130 of 31-10-67 be suspended. He also directed further action being taken in accordance with the provisions of Section 306(2) of the Act. The petitioner received accordingly an endorsement from the Office of the Deputy Commissioner, which is dated 11-3-1968 and marked Exhibit D. It may be mentioned that during the pendency of his petition before the Deputy Commissioner, he made an application for stay of implementation of the resolution passed by the Municipality, pending disposal of his petition before the Deputy Commissioner. The Deputy Commissioner made an order on 8-11-1967 staying the resolution and directing that the status quo should be maintained. Thereafter the petitioner appears to have reported for duty on 19-12-1967 but the respondent declined to allow him to work. After the final disposal of the matter on 21-2-1968, the petitioner reported to duty to the President of the respondent's council, asking him to take him on duty in accordance with the order of the Deputy Commissioner. The respondent refused to take him on duty as can be seen from the communication marked Exhibit F. The petitioner then sent a letter and a telegram to the respondent complaining that the refusal to take him on duty is illegal and in breach of the order passed by the Deputy Commissioner under Section 306 of the Act. The respondent issued a further endorsement on 26th March, 1968, refusing to take him on duty. It was further mentioned in that endorsement that the petitioner was not a Secretary-cum-Chief Officer as he claimed to be. Further it was mentioned that the point at issue i. e., the question of his dismissal was under final consideration before

the Government as per Section 306 (2) of the Act. This has obviously a reference to the action taken by the Deputy Commissioner under the provisions of Section 306, forwarding to Government a copy of the order made by him with a statement of the reasons for making it. In these circumstances the petitioner being aggrieved by the act of the respondent to take him on duty even though the Deputy Commissioner has suspended the execution of the respondent's resolution, has filed this Writ petition. He prays that a direction in the nature of mandamus be issued as against the respondent directing it to take the petitioner back to service as Chief Officer of the respondent-Municipality and further directing respondent to pay the petitioner the arrears of salary and other emoluments and benefits as Chief Officer from 19-4-1967 and to treat him as in continuous service without any break since that date.

3. Sri V. Tarakaram, the learned Counsel for the petitioner says that the petitioner was acting as Secretary of the respondent-Municipality and also as Chief Officer of the Municipality since 1-4-1965. This fact is disputed by the respondent. What is admitted by the respondent is that the petitioner was the Secretary of the Municipal Council. It should, however, be noted that the resolution passed by the Municipal Council on 31-10-1967 is to dismiss the petitioner, who was the Secretary of the Municipal Council. Sri Tarakaram makes it clear that the question as to whether he was acting as Chief Officer is a matter that need not be considered for the present, but his claim to be allowed to rejoin service as Secretary of the Municipal Council requires to be considered. Under Exhibit C the order passed by the Deputy Commissioner, Belgaum, the execution of the resolution passed by the Municipal Council on 31-10-67 was suspended. The contention of Sri Tarakaram is that if the execution of the resolution dismissing the petitioner is suspended by the Deputy Commissioner, it implies that he is entitled to report himself to duty and to work as Secretary of the Municipal Council.

4. It is contended by Sri S. G. Bhat, the learned Counsel appearing for the respondent, that the order made by the Deputy Commissioner is not a final order and therefore the prayer of the petitioner cannot be granted. He submits that the report made by the Deputy Commissioner under the provisions of Section 306 (2) of the Act is now pending before the Government and under the provisions of Section 306 (2) the Government has the power to rescind the order of the Deputy Commissioner or to direct that it shall continue in force with or without modification, permanently or for such period as it thinks fit. To consider the respective contentions of the parties it is necessary to set out the provisions of Section 306 of the Act:—

"306. Deputy Commissioner's power of suspending execution of orders, etc., of municipal councils.—

(1) If, in the opinion of the Deputy Commissioner, the execution of any order or resolution of a town municipal council, or the doing of anything which is about to be done or is being done by or on behalf of a town municipal council is unlawful or is causing or is likely to cause injury or annoyance to the public, or to lead to a breach of the peace, he may, by order in writing under his signature, suspend the execution or prohibit the doing thereof.

(2) When a Deputy Commissioner makes any order under this section, he shall forthwith forward to Government and to the Commissioner and to the Municipal Council affected thereby a copy of the order, with a statement of the reasons for asking it; and it shall be in the discretion of the Government to rescind the order, or to direct that it shall continue in force with or without modification, permanently or for such period as it thinks fit:

Provided that no order of the Deputy Commissioner passed under this section shall be confirmed, revised or modified by the Government without giving the municipal council, a reasonable opportunity of showing cause against the said order."

Sri V. Tarakaram invites our attention to a decision of the Supreme Court reported in AIR 1965 SC 1275, Subhash Chandra v. Municipal Corporation, Delhi, where the Supreme Court considered the provisions of Sections 232 and 235 of the Punjab Municipal Act (3 of 1911). The provisions of Sections 232 and 235 considered in the said decision read as follows:—

"232. Power to suspend action of committee. — The Commissioner or Deputy Commissioner may by order in writing suspend, within the division or district respectively, the execution of any resolution or order of a committee or joint committee, or prohibit the doing of any act within the said limits which is about to be done, or is being done, in pursuance of or under cover of this Act, or in pursuance of any sanction or permission granted by the committee in the exercise of its powers under the Act, if, in his opinion, the resolution, order or act is in excess of the powers conferred by law, or the execution of the resolution order or the doing of the act, is likely to lead to a breach of the peace, or to cause injury or annoyance to the public or to say class or body of persons."

"235. Action of Deputy Commissioner or Commissioner to be immediately reported. — When the Deputy Commissioner makes any order under S. 232, S. 233 or S. 234, he shall forthwith forward to the Commissioner, and, when, the Commissioner makes any order under Section 232, or Section 234, he shall forthwith forward to the Local Government,

a copy thereof, with a statement of the reasons for making it, and with such explanation, if any, as the committee may wish to offer; and the Commissioner or the Local Government, as the case may be, may thereupon confirm, modify or rescind the order." The provisions of Section 306 of the Act are substantially similar to those of Sections 232 and 235 of the Punjab Municipal Act. While considering the effect of an order passed under Section 232 of the Punjab Municipal Act, which corresponds to the order passed by the Deputy Commissioner, Belgaum, in exercise of his powers under Section 306 (1) of the Act, the Supreme Court observes as follows:—

"It has to be borne in mind that an order under Section 232 takes effect immediately and its operation is not made dependent upon the action contemplated under Section 235. Where an order is made thereunder by an authority, other than the State Government that authority has to report to the State Government. But, though such authority is bound to make a report its order [is not inoperative or inchoate. It has to be given effect to by the Committee.] It is true that till the procedure set out in Section 235 is complied with it cannot be regarded as final. But want of finality does not vitiate the order under Section 232. The order is, unless modified or annulled by the State Government, [legally effective and binding on the Committee.]"

(Square bracketing is ours).

In view of this decision the contention of Sri V. Tarakaram, the learned Counsel for the petitioner that the respondent must give effect to the order passed by the Deputy Commissioner, Belgaum, is well founded. It is no doubt true, that under Section 306 (2), as contended by Sri S. G. Bhat, the order can be set aside by the State Government and in this case, the order can be set aside only after notifying the Municipal Council as provided by the proviso to Section 306 (2) of the Act. The contention of Sri Bhat is that the Supreme Court has observed that even the procedure set out in Section 232 is complied with the order cannot be regarded as final. His further contention is that the provisions of Section 306 (1) and (2) should be read together and if that is done, the result would be that there could be only one effective final order which could be given effect to, and that we cannot bifurcate the order made by the Deputy Commissioner under Section 306 (1) and the order to be made by the Government under Section 306 (2). We are unable to accept this contention as it is opposed to the observations of the Supreme Court extracted above. Therefore the respondent's counsel is bound to give effect to the order passed by the Deputy Commissioner on 21-2-1968.

5. Sri S. G. Bhat further contends that if eventually the Government should set aside the order of the Deputy Commissioner,

the result would be that the petitioner would have no legal right to ask for the implementation of the order passed by the Deputy Commissioner. It may happen that if the Government should set aside the order of the Deputy Commissioner, the petitioner's position then will be that he is bound by the resolution passed by the Municipal Council. This factor cannot render the order of the Deputy Commissioner passed under the provisions of Section 306 (1) ineffective or inchoate. Whether the order of the Deputy Commissioner will be modified is a contingent factor which cannot affect the present right of the petitioner. Sri Bhat contended that the petitioner had no specific or clear right to be taken into service as required by him. He submitted that in view of the provisions of Section 306 (2), the right of the petitioner to seek relief is of a doubtful character. As mentioned already, the doubt arises only on account of the contingency of an order adverse to him being passed by the Government under the provisions of Section 306 (2). This cannot affect, as mentioned already, the present right of the petitioner. Sri S. G. Bhat, in this connection, invited our attention to the decision in AIR 1959 Punj 75, K. K. Co-op. Trans. Society v. Punjab State. In view of what we have stated above, the said decision cannot apply to the facts of this case. The decision in AIR 1955 Assam 238, U. W. Lyngdoh v. B. M. Roy also does not apply to this case, in view of the fact that the order which came for consideration in the said case was not an executable order and in particular the resolution passed by the Executive Committee of the District Council in that case was specifically made subject to a final order to be passed by the District Council — the Assam High Court took the view that the petition before them was premature. But, the facts in this case are quite different. The decision in AIR 1963 Andh Pra 54, Seetha Ramiah v. State of Andhra Pradesh, is not of any use to the respondent in view of the fact that the petitioner has at present a right, though it is subject to the final decision which the Government may take under the provisions of Section 306 (2). As circumstances stand at present, we are of the view that the petitioner is entitled to require the respondent to take him back to service as a consequence of the order passed by the Deputy Commissioner on 21-2-1968 under Exhibit C, suspending the execution of the resolution of the Municipal Council, dated 31-10-1967.

6. Therefore, we allow this writ petition and issue a direction to the respondent by a writ of Mandamus to treat the petitioner as in service.

7. The next claim of the petitioner is that we should direct the respondent to pay him the arrears of salary and other emoluments and benefits as Chief Officer from 19-4-1967. In view of the fact that we have

given him relief directing the respondent to treat him in service as Secretary of the Municipal Council, he is entitled to the pay and emoluments as such Secretary. In paragraph 4 of the affidavit filed by the petitioner in support of his writ petition he has averred that it is only on 19-12-1967 that he reported himself to duty on the expiry of his sick leave and the respondent declined to take him to service as he was not appointed as Chief Officer. From the affidavits filed and the correspondence in this case, it is clear that the respondent refused to take him into service even as Secretary which the respondent was bound to do. In view of the fact that the petitioner did not report himself to duty till 19-12-1967 according to his own admission, we cannot direct the respondent to pay him the emoluments as Secretary of the respondent-Municipal Council from 19-4-1967 as claimed by him. We direct the respondent to pay him the pay and emoluments as Secretary of the Municipal Council from 19-12-1967.

8. We have already mentioned that the order passed by the Deputy Commissioner, Belgaum is subject to any order that the Government may pass under the provisions of Section 306 (2) of the Act. If any order adverse to the petitioner should come to be passed by the Government it is bound to be implemented in accordance with law.

9. In the result, the petition is allowed. Each party shall bear his own costs.

Petition allowed.

AIR 1970 MYSORE 73 (V 57 C 17)

A. NARAYANA PAI AND M.

SANTHOSH, JJ.

Nagappa Gulappa Amminabhavi, Petitioner v. Fakirappa Bhimappa Hanchinal and others, Respondents.

Writ Petn. No. 4 of 1969, D/- 11-2-1969.

Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), S. 13 — Application under Sec. 13 is not appeal against or petition to revise declared result of election — Such declaration is not order or judgment for purpose of Sec. 12 (2) Limitation Act — Time-barred election petition under Sec. 13 must be dismissed under S. 3 Limitation Act even if plea of limitation is not raised in defence — Such time-barred petition allowed ex parte on narrow difference showed after recount — Writ petition against that decision filed more than two months later — In dealing with elections, statutory provisions must be strictly interpreted and applied — High Court must necessarily interfere in such a case — (Limitation Act (1963), Ss. 3 and 12 (2) — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Strict construction) — (Constitution of India, Art. 226 — Grounds of Certiorari).

EM/IM/CS97/69/JRM/D

An application under Sec. 13 of the Mysore Village Panchayats and Local Boards Act is not an appeal against or a petition to revise the declared result of an election. Such a declaration is also not an order or judgment for the purpose of Sec. 12 (2), Limitation Act. Therefore, a time-barred petition under Section 13 must be dismissed under Sec. 3 Limitation Act even if the plea of limitation is not raised in defence. When such a time-barred petition is allowed ex parte on a narrow difference shown after recount and a writ petition against that decision is filed more than two months later, since in dealing with election statutory provisions must be strictly construed and applied, the High Court must necessarily interfere in such a case. (Paras 9, 11, 13 and 14)

A mere expression of opinion by a person is not an order. An expression of opinion by an adjudicator as to the validity or otherwise, or acceptance or non-acceptance of the contentions of the two parties before him may and should be regarded as an order. (Para 7)

The declaration of the result of an election by the Returning Officer is beyond doubt not the result of any adjudication by him of a dispute but a mere formal declaration of the counting of the votes. The judgment in the matter, if any, is that of the voters. Such a declaration is also not one which embodies the decision of the Returning Officer about the validity of any ballot paper. (Para 8)

Further, an application under Section 13 is prima facie, an original proceeding. It is not an application to examine the correctness or otherwise of the declaration of the results by the Returning Officer, but is an application questioning the validity of the election itself. After hearing the parties and taking necessary evidence the Munsiff to whom the application is made is given the power either to confirm or amend the declared result or to set aside the election itself. What he is to examine is the validity of the election itself. Therefore, an application under Sec. 13 cannot in any sense be regarded as an appeal against or an application to revise the declared result, nor can such a declaration be regarded as an order or judgment for the purpose of Section 12 (2) Limitation Act, or for any other purpose. (Paras 6 and 9)

As such, the Munsiff is bound under S. 3 of the Limitation Act to dismiss a time-barred application under Section 13 even if the plea of limitation is not set up in defence. (Para 11)

The electoral right is a statutory one and the principle is that in dealing with an election statutory provisions must be strictly interpreted and applied. Section 13 expressly lays down the time limit for filing a petition under it and hence it is not possible to extend that time except in accordance with law. Since there is no way of extending the time by the application of Section 12 (2),

Limitation Act and the Munsiff is bound to dismiss a time-barred petition under Sec. 13, under Sec. 3 Limitation Act, when such a petition is allowed, the Munsiff fails to exercise that jurisdiction. It is therefore necessary that the High Court should correct that error of jurisdiction which goes to the root of the matter. (Para 13)

Further, the principle, as far as possible, is not to disturb the verdict of the electorate unless clear grounds justifying the same are made out. When the Munsiff allows such time-barred petition ex parte on a narrow difference shown after recount, since the verdict in such a case has been in favour of the writ-petitioner, public interest will not be served by dismissing the writ petition in such a case. Thus the High Court must interfere. AIR 1964 SC 1099, Expl.; AIR 1962 Assam 30, Foll. (Paras 12 and 14)

Cases Referred: Chronological Paras (1964) AIR 1964 SC 1099 (V 51)=

1964-6 SCR 129, Vidyacharan v.

Khubchand

(1962) AIR 1962 Assam 30 (V 49),

Dhatu Ram Das v. State of Assam 10

R. M. Patil and V. H. Ron, for Petitioner; C. M. Desai, for Respondent 1.

ORDER: The petitioner Nagappa Gulappa Amminabhavi was elected to the Village Panchayat of Javoor at the election held early in 1968. The results of the election were declared on 12th March, 1968. Respondent 1 Fakirappa Bhimappa Hanchinal, a candidate defeated at the election, filed an election petition before the Munsiff of Navalgund on 1st April, 1968 under Section 13 of the Mysore Village Panchayats and Local Boards Act, 1959.

2. The petitioner remained ex parte. By an order dated 28th October, 1968, the Munsiff, after making a recount of the votes, set aside the election of the petitioner and declared the first respondent as elected.

3. The petitioner has now approached this Court with this writ petition asking for the quashing of the Munsiff's order. As he was ex parte, no questions on merits are raised by the petitioner. His sole contention is that the petition before the Munsiff was clearly barred by limitation prescribed therefor and that therefore, under Section 3 of the Limitation Act, the Munsiff was bound to dismiss the same. The limitation is that prescribed by Section 13 itself of the Village Panchayats Act. Sub-section (1) thereof, to the extent relevant, reads —

"At any time within fifteen days after the declaration of the result of an election any candidate who stood for election, or any person qualified to vote at the election, may apply, together with a deposit of fifty rupees as security for costs, to the Munsiff within whose territorial jurisdiction the village concerned is situate for the determination of the validity of the election."

4. In this case, the petition by the first respondent before the Munsiff was filed more

than 15 days after the declaration of the result. The contention on behalf of the first respondent is that he had applied for a copy of the notification containing the declaration of the result on 15th March, 1968, obtained the same on 22nd March, 1968 and that, if the period required for taking out that copy is deducted, as he is entitled to under sub-section (2) of Section 12 of the Limitation Act, the petition would be well within time.

5. The only question for consideration, therefore is, whether sub-section (2) of Section 12 of the Limitation Act applies to this case and may be availed of by the 1st respondent. The said provision of the Limitation Act reads as follows:—

“12 (2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.”

6. Prima facie, an election petition under Section 13 of the Panchayat Act is an original proceeding. The argument strongly passed on behalf of the 1st respondent by his learned counsel, Mr. Desai, is that in effect, or in the eye of law, an election petition must be regarded as either an appeal against or a petition to revise the result as declared by the Returning Officer and that such a declaration by the Returning Officer can be regarded as an order or judgment. Reliance is placed by Mr. Desai on the observations of the Supreme Court contained in the case reported in AIR 1964 SC 1099, *Vidyacharan v. Khubchand* to the effect that a judgment or order, for the purpose of sub-section (2) of Section 12 of the Limitation Act need not necessarily be a judgment as defined in the Code of Civil Procedure.

7. It appears to us that the observation of the Supreme Court is of no assistance to the argument because, whether an order or judgment in question is or is not one which comes strictly within the definition contained in the Code of Civil Procedure in the sense that the same is not an order or judgment made or passed by the Civil Court functioning under the Code of Civil Procedure, it will be doing considerable violence to the language to call anything an order or judgment which is not an expression of a conclusion arrived at by any authority or person after adjudication of a dispute or difference between the parties contending before it or him. A mere expression of opinion by a person is not an order. An expression of opinion by an adjudicator as to the validity or invalidity, or acceptance or non-acceptance of the contentions of the two parties contending before him may be and should be regarded as an order.

8. So far as the declaration of the results of an election by the Returning Officer is

concerned, there can be no doubt that the declaration that he makes is not the result of any adjudication by him of a dispute, but a mere formal declaration of the counting of the votes. The judgment in the matter, if any, is that of the voters. It has been contended that at any rate there will be adjudication by the Returning Officer in the event of any validity of a ballot paper being called in question. But the declaration of the result of an election is not one which embodies the decision of the Returning Officer about the validity of any ballot paper. What is declared is the ultimate result of the election namely, the result of the counting of valid votes.

9. Secondly, an application under Section 13 of the Panchayat Act to the Munsiff is not an application to examine the correctness or otherwise of the declaration of the results by the Returning Officer, but an application which questions the validity of the election itself. After hearing the parties and taking necessary evidence, the Munsiff is given the power either to confirm or amend the declared results of the election or to set aside the election itself.

The various reasons on which the Munsiff can make an order in relation to the validity of the election set out in the subsequent portions of Section 13 also leave no room for doubt that what the Munsiff is called to examine is the validity of the election itself. Hence, we have no doubt in our mind that an application under Section 13 questioning the validity of an election cannot, in any sense, be regarded as an appeal against or an application to revise the declaration of the result made by the Returning Officer, nor can such a declaration be regarded as an order or a judgment for the purpose of sub-section (2) of Section 12 of the Limitation Act, or for any other purpose.

10. The view expressed above was also taken by the Assam High Court in the case of *Dhatu Ram Das v. State of Assam*, reported in AIR 1962 Assam 30.

11. There can be no doubt therefore that the Munsiff was bound under Section 3 of the Limitation Act, to dismiss the petition although the plea of limitation had not been set up as a defence by the petitioner (in this writ petition) or any other respondent before him in the election petition.

12. Mr. Desai has next contended that in any event, we should not interfere in this case, because, the petitioner has been guilty of laches not only in remaining ex parte before the Munsiff but also by taking more than two months after the Munsiff's order to approach this Court. He also states that interference by this Court will cause great dislocation.

13. We are not impressed by this argument for two reasons. The electoral right is a statutory right and the principle is that

fixed to a conspicuous part of the premises.

(Para 5)
(B) Mysore General Clauses Act (3 of 1899), Section 27 — Service by post — Presumption under section, when arises — Presumption rebuttable — Contrary that has to be proved for rebuttal of presumption has no reference to actual service.

The service by post should be deemed to be effected if the four conditions are fulfilled namely, sending the letter by registered post, it being properly addressed, prepaid and the letter contains the document; the contrary that is required to be proved to take away the presumption is with reference to the four requirements, referred to above.

(Para 6)
It is only to meet the contingency of a person who is to be served with the notice trying to evade it, that the service shall be deemed to have been effected if the four conditions are fulfilled. If the contrary to be proved has reference to the actual service, then provision of Section 27 could be rendered useless by the addressee avoiding to receive the letter or even refusing the registered letter.

(Para 6)
(C) Evidence Act (1872), Section 114 — Notice of termination of tenancy — Notice sent under Certificate of posting — Presumption arises that the notice has been duly delivered to addressee — (Transfer of Property Act (1882), Section 106) — (Mysore General Clauses Act (3 of 1899), Section 27) — AIR 1968 Cal 49, Rel. on.

(Para 11)
(D) Transfer of Property Act (1882), Section 106 — Affixture of notice to conspicuous part of premises — Procedure of — If the tender or delivery to the party is shown as impracticable, it is open to the landlord to adopt the procedure — It is not necessary that attempt must be made to serve personally on all classes of persons referred to in the section i. e., the party or to one of his family members or his servants of his residence, before landlord can take advantage of the procedure of affixture.

(Para 9)
Cases Referred: Chronological Paras
(1968) AIR 1968 Cal 49 (V 55), Sukumar Guha v. Naresh Chandra Ghosh

7
E. V. Mathew, for Petitioner; N. K. Gopala Iyengar, for Respondent.

ORDER: The petitioner made an application for eviction of the respondent-tenant before the learned Munsiff, Civil Station, Bangalore, on the ground that she required the premises for her own occupation. After terminating the tenancy by issuing notice, she filed the application for eviction as the respondent-tenant refused to comply with the demand. The respondent contended that the petitioner's claim was neither reasonable nor bona fide and greater hardship would be caused to him by passing a decree for eviction than by refusing to pass it. He

also contended that there was no valid notice terminating his tenancy and therefore the petitioner has no right to seek his eviction from the premises.

2. The trial court found in favour of the petitioner on all issues including the question of notice which is the only one on which the arguments have been addressed in this court. The trial court held that the registered notice issued by the petitioner to the respondent has been returned undelivered. The learned Munsiff found that a copy of the notice was affixed on a conspicuous part of the premises. He also found that one of the notices was sent by certificate of posting and therefore a presumption of service of the notice arises under Section 114 of the Evidence Act. The learned Munsiff found that the petitioner had issued a valid notice to the respondent to quit. In the result, he allowed the petition for eviction.

3. On appeal in H. R. C. A. 11 of 1968 the learned First Additional District Judge, Bangalore concurred with the finding of the trial court that the petitioner required the premises reasonably and bona fide for her own use. On the question of hardship, the learned District Judge found against the tenant. He took the view that in the circumstances of the case, there was no valid termination of the tenancy in accordance with law; thus the petitioner had no right to seek eviction of the respondent-tenant and therefore he allowed the appeal and dismissed the petitioner's application for eviction. She has now filed this revision petition.

4. The most important question that arises for consideration in this case relates to the validity of the notice terminating the tenancy of the respondent. In paragraph 6 of the petition for eviction, the petitioner says that "the respondent's tenancy has been terminated by a registered notice dated 8-12-1966 terminating his tenancy on the expiry of the month ending with 31st December 1966. The said notice has been sent by registered post to the respondent's house address and to his official address. Both the notices have come back unserved. Even on prior occasions "the respondent has been successfully evading service of notice by deliberately returning them. As a matter of fact the notice of attornment was similarly sent back though the respondent has attorned to the petitioner with effect from 1st September 1966. Realising this the petitioner got a similar notice issued terminating the tenancy of the respondent on the expiry of 31st December 1966 which was duly affixed on the schedule premises in the presence of two witnesses. The affixture was made on 10-12-1966." The petitioner also produced a certificate of posting for having posted the notice by ordinary post on 22-11-1966. She also has produced the returned registered letter and also the unsigned acknowledgment. It is contended that the

notice of termination referred to in the petition was with reference to the notice dated 8-12-1966 and not the earlier notices. It is not correct in view of the fact that the notices which were sent to the respondent to his official as well as residential address on 22-11-66 have been returned unserved. These letters and the postal acknowledgments have been produced along with the petition. Therefore, it is but correct to take all these notices into consideration while coming to a decision whether in this case there was a valid notice, terminating the tenancy of the respondent. It is not the contention of the respondent that the notice is invalid. It is his contention that he has not been served with the notice of termination of the tenancy.

5. I may here refer to a few facts that can be gathered from the pleadings and evidence produced by the parties. The petitioner is also a tenant paying a rent of Rs. 120 per mensem for the premises she occupies. The respondent pays a rent of Rs. 75 per mensem for the premises in question. It is in the evidence that the respondent has a house of his own and he gets a rent of Rs. 120 per mensem. The petitioner purchased the premises with a view to occupy the same herself. After purchasing the same she appears to have notified the tenant by a registered letter marked as Ex. P-4 (a) dated 29-8-66 wherein she has stated that she has purchased the house on 26-8-66 and that the tenant should attorn to her. There is material in the evidence of the respondent to show that he had an intention of purchasing this property himself. In any event, it is clear from Ex. P-4 envelope containing Ex. P-4 (a) that the letter was returned with an endorsement that he was not found at the leased premises. Therefore, the petitioner issued the second notice on 10th September 1966 again asking him to attorn to her. This letter came back with an endorsement that he was not found at the delivery time. Again, the petitioner sent a letter Ex. P-6(a) addressed to the tenant through his official superior. Even this letter came back with an endorsement "not found". It is useful to refer to the fact that in Ex. P-6 (a) the petitioner's counsel through whom notices were issued, has stated that it is the third notice that is being issued to him in connection with the attornment since he has evaded receiving the first two notices. It may also be mentioned that Exbts. P-4(a) and P-5(a) are also letters sent through the petitioner's counsel. There is no dispute in this case that the respondent attorned to the petitioner and has been paying rents to her. On 22nd November 1966, the petitioner's counsel issued a notice terminating the tenancy with the month ending 31st December, 1966. This is marked as Ex. P-7 (a) and is enclosed in the envelope marked

Ex. P-7, addressed to his office. In the said notice there is a post script stating "since our clients' experience in sending notices to you has been that of continuous evasion by you, we are sending this notice one to your residence and the other through office, both registered post, the third one to your house address "under certificate of posting". The registered letters came back with the endorsement "not found during delivery time" same as before. Exhibit P-8 is the certificate of posting bearing the postal seal addressed to the residential address of the tenant. Exhibit P-9 (a) is the notice enclosed in Exbt. P-9 sent to the residential address of the respondent. Exhibits P-7(a), P-9(a) and P-11 are in the same terms and Exhibit P-1 is dated 8-12-1966. They purport to terminate the tenancy of the respondent by the end of December 1966. The fact that Ex. P-1 was affixed to a conspicuous part of the tenement, is held in favour of the petitioner by the trial court. The lower appellate court does not agree with that finding on account of some discrepancies in the evidence of P. Ws. 1 and 2. In my view, the learned Judge has attached undue importance to these discrepancies. The discrepancies are in regard to the nomenclature of the place where the notices were affixed. This does not, in the absence of any material to show that these witnesses are interested in the petitioner, mean that such notice was not affixed to a conspicuous part of the premises. It must be held in this case that the notice was affixed as required under Section 106 of the Transfer of Property Act. In the view I propose to take this question of affixture of the notice on a conspicuous part of the premises will not be of much consequence. It is contended by Sri E. V. Mathew, the learned counsel for the petitioner that from the series of notices that have been issued to the tenant terminating his tenancy it must be presumed that there has been due service of the notice of termination of the tenancy and therefore the petitioner is entitled to succeed. He also invites my attention to the provisions in Para 2 of Section 106 of the Transfer of Property Act which prescribes that the notice of termination referred to in Para 1 must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his resident, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property. It is pointed out that the notice has been sent by post to the party, i. e. lessee in this case who is intended to be bound by it. Further it is contended that since the registered notices sent to the respondent-tenant have come back to the petitioner without being delivered personally to him, the petitioner affixed the notice to a con-

spicuous part of the property as delivery personally to the tenant was not practicable.

6. There is no dispute that the petitioner has sent several notices by registered post. Firstly, what is the consequence of the notice sent by registered post being returned with postal endorsement "not found during my delivery time". In this connection the learned counsel for the petitioner invites my attention to Section 27 of the Mysore General Clauses Act, 1899, which is in the following terms:—

"27. Meaning of service by post. — Where (any Mysore Act) (substituted by Act 12 of 1953) made after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Service of notice by registered post, shall be deemed to be effected on the addressee if the letter is properly addressed, pre-paid and contains the document in this case the notice of termination of tenancy. It is contended by the respondent's counsel that in this case the very fact that the registered letter has come back with the endorsement as mentioned above, shown that the contrary has been proved, namely that there has been no due service effected on the tenant; on the other hand, it is submitted that the service should be deemed to be effected if the four conditions are fulfilled namely, sending the letter by registered post, it being properly addressed, pre-paid and the letter contains the document; the contrary that is required to be proved to take away the presumption is with reference to the four requirements referred to above. It appears to me that this contention is not without force. It is only to meet the contingency of a person who is to be served with the notice trying to evade it, that the service shall be deemed to have been effected if the four conditions are fulfilled. If the contrary to be proved has reference to the actual service, then provision of Section 27 could be rendered useless by the addressee avoiding to receive the letter or even refusing the registered letter. Therefore, it appears to me that in this case the notice having been sent by registered post complying with the four requirements referred to earlier, in law, it must be deemed that there is due service of the notice of termination of the tenancy.

7. The next submission is that para 2 of Section 106 of T. P. Act does not prescribe that the notice of termination should be sent by registered post; it could also be sent by ordinary post. In this case, there is un-

impeachable evidence that the petitioner's counsel sent the notice of termination under "certificate of posting". The certificate of posting bearing the postal seal is marked Exbt. P-8. Therefore, a presumption arises under Section 114 of the Evidence Act that there has been due service. In support of this contention the learned counsel for the petitioner drew my attention to a decision reported in Sukumar Guha v. Naresh Chandra Ghosh, AIR 1968 Cal 49, wherein at paragraph 13 it has been observed as follows:—

"In view of the history of legislation that added the relevant phrase in Section 106, T. P. Act and the language of the phrase that says only "sent by post" in the relevant part, I unhesitatingly reject that argument of Mr. Mukherjee and hold that though presumption under Section 27, General Clauses Act can only arise when the notice is sent by Registered post, there may arise a presumption under Section 114, Evidence Act when notice is sent by ordinary post or under certificate of posting."

8. It was contended by Mr. Gopala Iyengar, the learned counsel for the respondent-tenant that this presumption is rebutted by the evidence of the respondent that he did not receive these letters having been sent by "certificate of posting". I am unable to accept this evidence of the respondent. In the circumstances of this case, I feel no doubt that the presumption under Section 114 does arise and the tenant should be held to have received notices of termination of tenancy.

9. The last question relates to the validity of the affixtures of a copy of the notice dated 8-12-1966 to a conspicuous part of the property. As a fact I have found that such notice was affixed to a conspicuous part of the property. Shri Gopala Iyengar's contention is that in this case the stage at which the affixture of the notice to a conspicuous part of the property under Section 106 of the Transfer of Property Act has not arisen inasmuch as the notice has not been tendered or delivered personally to the tenant or to one of his family members or servants at his residence and that such tender or delivery has not become impracticable. Therefore, he contends that before the affixture of the notice could arise, an attempt must be made to tender or deliver the notice personally to the party or to one of his family members or his servants at his residence. It is only after attempt is made to serve on all the said classes of persons that the landlord can take advantage of the affixture of the notice on a conspicuous part of the property. Shri E. V. Mathew, on the other hand contends that if it is proved that it is not practicable to tender or deliver personally the notice to the party that would be enough to justify the affixture of the notice. This appears to be sound.

is no longer in dispute and therefore would stand.

4. According to the plaintiff the suit-properties were sold by the original owner to one Markanda Misra by a registered sale-deed, Ex. 1 dated 9-3-18. The vendee in his turn sold the same to the plaintiff's father by another registered sale-deed, Ext. 2, dated 27-6-27. His father thereupon possessed the land. It is in evidence and is no longer in dispute that the plaintiff's father died in the year 1940-41 when the plaintiff was a minor. In view of the admission that his age was 20 years on the 2nd January, 1959, he would obviously be aged two years' old in the year 1941, when his father died. Then the joint family comprised of himself and his mother. Before transfer of the suit-property by the original owner in favour of the vendor of the plaintiff's father in the year 1918, under Ext. 1, he had mortgaged the same with possession under Ext. C dated 25-9-1909 to one Baishnab Padhan. The mortgagor subsequently transferred the equity of redemption in favour of the defendant on 10-8-28.

On the basis of equitable redemption so acquired the defendant filed T. M. S. No. 158/50 in the court of Munsif of Aska, for redemption in respect of the four items of property, viz., 1, 6, 7 and 8 and other lands. The suit was ultimately decreed and the defendant started execution of the same in E. P. No. 381/52. In due course, as already stated, the defendant got possession of the four items of property, viz., 1, 6, 7 and 8 and other lands on 9-12-58. The plaintiff's mother was impleaded in this redemption suit as defendant no. 10, in her own name without indicating whether she was there in her personal capacity or as a member of the joint family comprising herself and her minor son.

On this redemption suit being decreed, an appeal was carried to the first appellate court by some of the defendants of whom defendant 10, the mother of the plaintiff, was one. The appeal failed and thereafter the matter was carried in second appeal to the High Court. Here also the decree of the trial court was upheld. This second appeal was disposed of on 31-7-58. In the execution proceedings in E. P. No. 381/52, the plaintiff's mother was also a party and she died during the pendency of this execution proceeding whereupon the plaintiff was impleaded as her heir. The execution proceedings terminated and the defendant was given possession on 9-12-58. Therefore, the plaintiff filed the present suit (T. S. No. 2/59) on 19-1-59 for the reliefs above stated.

5. The defendant's case, in short, is that the plaintiff's mother represented

the estate of the joint family comprising herself and her minor son. In the mortgage-suit (T. M. S. No. 158/50) even though she was impleaded *eo nomine*, there cannot be any question that she represented the entire estate. She was also impleaded in the execution proceedings and upon her death the present plaintiff was substituted. The plaintiff upon substitution, does not appear to have raised any objection to the execution proceedings as raised here that the decree in the mortgage-suit does not bind him, he being not a party to it.

6. At one time in course of this litigation the plaintiff raised an issue that the suit-land does not form the subject-matter of the mortgage. That contention appears to have been given up in the lower appellate court. From para 5 of the judgment of the lower appellate Court, it appears that this issue was not further agitated. It is accepted that the suit-properties viz., the four items of property claimed by the defendant did form the subject-matter of the mortgage and also of the mortgage-suit. For the purposes of the present appeal, it is now accepted by both parties that these four items claimed by the defendant were conveyed in the manner alleged by the plaintiff to his father and upon the latter's death, were inherited by him and his mother jointly.

It was also conceded that the mother would get moiety interest by way of inheritance as a legal heir under the Hindu Women's Rights to Property Act as amended by Orissa Act. In view of this legal position that the plaintiff's mother is entitled to a moiety interest in the suit-property, her interest would be bound by the decree passed in the mortgage-suit. Therefore, if the plaintiff succeeds in this appeal, it would be only to the extent of his moiety interest in the suit-property.

7. The defendant in para 4 of his written statement specifically avers that the plaintiff's mother represented the estate as the manager of the joint family comprising herself and her son and she contested the redemption suit representing the entire family. The defendant as D. W. 1 in the suit categorically states that he did not implead the plaintiff in the mortgage-suit as he did not know of his existence at the time. He came to know of him during the execution proceedings. So when the plaintiff's mother died, he substituted the plaintiff in that proceeding. By this evidence, the defendant intends to show that he impleaded the plaintiff's mother alone in the redemption suit *bona fide* believing that she was the only member available to represent her husband's estate, and that there was

no collusion or fraud on his part in omitting to implead the plaintiff.

It is conceded by learned counsel for the plaintiff that his mother is the natural guardian in law. She was not a stranger to the property, nor had any interest adverse to that of her son. There is no gainsaying the fact that she was the joint owner of the property with her son and her interest apparently was not adverse to the latter.

8. The judgments of the trial court and the first appellate court in the redemption suit have been exhibited here as Exts. A and B. It appears therefrom that the plaintiff's mother filed a written statement adopting that of defendant 11 in which all defences available to her then were taken and the issues were joined thereon. When the redemption suit succeeded she was one of the appellants and contested the redemption suit in appeal. It is argued by learned counsel for the appellant that the plaintiff's mother did not claim any title in the redemption suit, nor did she produce any title-deeds nor the cist receipts in proof of her title all of which indicate that she did not fairly and honestly contest the suit.

But on going through Exts. A and B, I find that these contentions have got no substance, in so far as her claim of title is concerned. The defence of defendant 10 the mother of the plaintiff in the redemption suit was the same as that of her co-defendants 2 and 11, and evidence was adduced by those two defendants and when they fought the same issues as interested her and adduced evidence in regard thereto, there was no point in duplicating the same. Having regard to the present stand of the plaintiff that the defendant had in fact purchased the equity of redemption in the four items of property claimed by him, the criticism that the plaintiff's mother did not produce the title-deeds or the cist receipts in the redemption suit is not of much significance. In view of the aforesaid facts, either admitted or proved, the plaintiff's contention that the mother did not put up a fight in the redemption suit and that there was therefore no fair trial so far as his interest and his mother's interest are concerned, cannot be sustained.

9. It is now appropriate to refer to the law relating to the principles of representation of an estate according to which the decree passed in an action binds all persons having some interest in the estate, but not parties to the action, in certain circumstances. In the light of those principles, if it is concluded that the plaintiff's estate had been sufficiently represented in the redemption suit, the present suit must fail. If, on the other hand, it is found that the estate compris-

ing his interest was not represented fully and substantially, then he being not a party to that suit, could not be bound by that decree and that his right to recover his interest in the property in the present suit must succeed. This principle has been discussed in a decision of the Supreme Court reported in AIR 1966 SC 792, Mohammed Sulaiman v. Mohammed Ismail wherein the previous decisions of that Court as well as of other High Courts have been noticed. The relevant passage on the point is quoted herein below:

"Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognised exceptions. Where by the personal law governing the absent heir, the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. . . ."

The defendant in the redemption suit impleaded the plaintiff's mother bona fide believing that she was the only heir to her husband. He says that he was not aware of the plaintiff's existence. There is nothing to discredit that statement of the defendant. The plaintiff was admittedly a minor in the year 1950 when the redemption suit was instituted. Even if the minor was impleaded he should have been impleaded under the guardianship of his mother. If any fight was to be put up on his behalf, it should have been by the mother. It is not the plaintiff's case nor is there any evidence that there was a partition by metes and bounds between the plaintiff and his mother in the year

1950 when the redemption suit was filed the estate being joint, the mother was obviously in possession of the estate both in respect of her interest as well as of her son. There is no evidence, nor any suggestion that the mother's interest at the time was on any ground adverse to that of the plaintiff or she in any manner acted adversely to his interest in course of that litigation. The plaintiff does not urge that the decree in the redemption suit was obtained by fraud, collusion or in any other means intended to overreach the court and that the court was invited to decide those questions of sharp practice.

I have already indicated that the mother really put up a contest in the redemption suit. Being a lady she joined hands with some male defendants in that suit and advanced all manner of defences possible. She did not lag behind to appeal against the trial court's decision. Nothing has been shown in this case that the plaintiff's mother omitted to advance any special defence which was open to the plaintiff at the time of redemption suit, but was not actually put forth. In other words, no circumstances have been proved in this case by way of indicating that there has not been a fair or real trial or that the plaintiff had any special defence which she had not or could not put forward in course of the redemption suit.

10. The plaintiff has tried to make out a case at the trial stage that during his minority upon the death of his father, though his mother was his natural guardian, his uncle-in-law who is P. W. 3 was factually looking after the properties. This case does not find a place in his pleadings. In view of the law as regards representation of the estate this is normally to be regarded as a very important fact to be stated in the pleadings. Omission of such a fact in the pleadings discredits any evidence to the contrary adduced at the trial. That apart, such a case is difficult to believe because the properties which were being looked after by the so-called uncle-in-law of the plaintiff comprises half of the interest of the mother and it is most unlikely that she would willingly concede to her interest in the property being dealt with by a stranger. There is nothing in evidence to indicate that she was incapable of dealing with the property. On the contrary, she has demonstrated her capabilities by contesting the suit effectively at the appellate stage by filing an appeal. Therefore, this case of uncle-in-law being the de facto guardian of the plaintiff during his minority cannot be accepted. I am, thus, in agreement with the lower appellate Court that the plaintiff's mother was the natural guardian of her minor son in

de facto management of the minor's property till her death. In view of these facts and the circumstances the principles of representation as laid down by the decision of the Supreme Court in AIR 1966 SC 792 are fully applicable. The Lower Appellate Court is therefore justified in holding that the plaintiff is bound by the decree in the redemption suit. In reaching that conclusion the lower appellate court has also proceeded on theory that the plaintiff's mother being the Karta of the joint family comprising herself and the plaintiff was competent to manage and represent the estate for all legal purposes. It is true as argued by learned counsel for the appellant that the lower appellate Court was in error in accepting the theory of female Kartaship of a joint Hindu undivided family and the decision of the Nagpur High Court reported in AIR 1947 Nag 178 on which reliance is placed in its support is no longer good law. It is now well settled that a widow cannot be a Karta of a joint family. The decision of the Supreme Court in AIR 1966 SC 24, *Commr. of Income Tax, Madhya Pradesh v. Seth Govindram, Sugar Mills* on the point runs as follows:

"Under the Hindu Law coparcenership is a necessary qualification for the managership of a joint Hindu family. A widow is not a coparcener, she has no legal qualification to become the manager of a joint Hindu family. A widow of a coparcener cannot, therefore, be a Karta of the joint Hindu family consisting of three widows and two minors."

While so holding the Supreme Court has overruled the decision in AIR 1947 Nag. 178. Despite this error he is correct in his ultimate conclusion that the plaintiff's mother in her capacity as natural guardian of her minor son was managing the joint family properties comprising the minor's interest as well as her own, and as such, she was in a position to represent the entire estate both of herself and of her minor son and in fact did so in the redemption suit, until possession was wrested from her by the defendant in the execution proceeding.

11. In these circumstances and in view of the legal position it must be held that the plaintiff is bound by the decree in the redemption suit his mother having represented the estate fully and sufficiently.

In the result, therefore, there is no merit in this appeal and it must be dismissed. The appellant shall pay the costs of this appeal to the respondent.

Appeal dismissed.

AIR 1970 ORISSA 36 (V 57 C 15)

B. K. PATRA AND S. ACHARYA JJ.

Ramavtar and others, Appellants v. Pop Sing Mahadeb Prasad, Respondent.

A. H. O. No. 5 of 1963, D/- 30-7-1969, against decision of G. K. Misra, J. D/- 11-9-1963, in M. A. No. 71 of 1961.

Civil P. C. (1908), Ss. 40 and 42 — Transfer of decree for execution in another State — Powers of transferee court — It cannot regulate substantive rights and liabilities of parties — Money decree passed by Calcutta High Court in Original side — Decree transferred to court in Orissa for execution — Judgment-debtor praying for instalments under S. 13 of Orissa Money Lenders Act — Orissa Court held could not grant instalments — For the application of the Orissa Act money lending must have been transacted in State of Orissa — (Debt Laws — Orissa Money Lenders Act (3 of 1939), S. 13).

Under S. 40, C. P. C. the transferee court has to execute the decree by following the procedure prescribed by rules in its own State and the powers referred to in S. 42 purport only to mean the powers of the executing court in relation to the procedure to be followed and not in relation to the substantive law applicable in execution of the decree. Those sections are purely procedural, laying down only the adjective law for the execution of the decree. They do not regulate the substantive rights and liabilities of the parties which were settled and determined in the transferor Court in accordance with the substantive law in force in that State. Such rights and liabilities cannot again be subjected to and/or regulated by the law of the State to which the decree is sent only for execution. AIR 1948 Pat 245 & AIR 1953 Mys 37 Rel. on.

(Para 3)

Thus where a money decree was passed by Calcutta High Court in Original Side and when that decree, on transfer, was pending in the court in Orissa, the judgment-debtor prayed for instalments under Section 13 of the Orissa Money Lenders Act, the Orissa Court could not grant instalments, because the provisions of Orissa Money Lenders Act would not be applicable for granting relief to any debtor in the State of Orissa, unless such person becomes debtor by the money lending transacted in the State of Orissa.

(Paras 3, 4)

Cases Referred: Chronological. Paras (1953) AIR 1953 Mys 37 (V 40)=

ILR (1952) Mys 312, Basheer

Ahamed v. G. Padmanabha Kamathi 3

(1948) AIR 1948 Pat 245 (V 35)=

ILR 26 Pat 307, Inderchand Kajriwal v. Bansropan Sahu 3

(1942) AIR 1942 Pat 128 (V 29)=

23 Pat LT 87, N. V. Ranganan-

dham v. M. Ponnacharamma 3

(1913) ILR 36 Mad 108=21 Mad LJ

777, Sreekrishna Doss v. Alumbi

Ammal 3

(1890) ILR 17 Cal 491, Tincourie

Dawn v. Debendra Nath 3

A. K. Rao, for Appellants; B. K. Mohanty, for Respondent.

ACHARYA, J.: This is an appeal by leave from the judgment of Hon'ble Mr. Justice G. K. Misra (as he then was) in Miscellaneous Appeal No. 71 of 1961.

2. The facts of the case, in short, are as follows:

A decree was passed by the Calcutta High Court in the Original Side for Rs. 16,765-69 nP. inclusive of interest at 6 per cent. When the said decree on transfer was pending in execution in the court of the Subordinate Judge of Balasore, the judgment-debtor prayed for instalments under Section 13 of the Orissa Money-Lenders Act (hereinafter referred to as the Orissa Act) on which Misc. Case No. 72 of 1960 was started. The said Misc. case having been dismissed on 8-7-1961 the judgment-debtor preferred Misc. Appeal No. 71 of 1961 in this court which was heard and dismissed by a Single Bench of this court and hence this appeal.

3. The only question for consideration is whether a transferee court in Orissa in executing such a decree passed in a court in Bengal would have to follow the provisions of the Bengal Money-Lenders Act or that of the Orissa Act. Mr. A. K. Rao submits that as the decree is pending execution in a court in Orissa the provisions of the Orissa Act would apply and can be followed by the transferee court in this case. Mr. Rao contends that on the provisions of Sections 40 and 42 of the Civil Procedure Code the transferee court in Orissa has to follow the law for such transactions in force in this State and as such could grant instalments under the Orissa Act.

Section 40, C. P. C. lays down that a decree which is sent for execution to a court in another State shall be executed in such manner as is prescribed by rules in force in that State. It therefore states that the transferee court has to execute the decree in following the procedure prescribed by rules in its own State. Section 42 lays down the powers of a court in executing a decree transferred to it.

Now it is well settled that the 'powers' referred to in Section 42, C. P. C. purport only to mean the powers of the executing court in relation to the procedure to be followed and not in relation to the substantive law applicable in execution of the said decree. So therefore, the provisions of Sections 40 and 42, C. P. C. are purely procedural, laying down only

the adjective law for the execution of the decree and cannot therefore regulate the substantive rights and liabilities of the concerned parties which were settled and determined in the court which transferred the decree in accordance with the substantive law in force in that State, and as such cannot again be subjected to and/or regulated by the law of the State to which the decree is sent only for execution.

In *Inderchand Kajriwal v. Bansropan Sahu*, AIR 1948 Pat 245 a Division Bench of the Patna High Court in consonance with the court's decision in *N. V. Ranganandham v. M. Ponnacharamma*, AIR 1942 Pat 128 and the decision of the Calcutta High Court in *Tincourie Dawn v. Debendra Nath* (1890) ILR 17 Cal 491 and that of the Madras High Court in *Sree Krishna Doss v. Alumbi Ammal* (1913) ILR 36 Mad 108 held as follows:

"Hence it may be said that the preponderance of judicial authority appears to be in favour of view that the transferee Court in executing the decree transferred to it for execution has to do so in accordance with the law of procedure obtaining in that Court, but has to determine the rights and liabilities of the parties in accordance with the substantive law obtaining in the Court which passed the decree, that is to say, the transferor Court."

The Patna decision has been followed with approval in *Basheer Ahamed v. G. Padmanabha Kamath*, AIR 1953 Mys 37.

4. Mr. Rao further contended that it is evident from the Preamble of the Orissa Act that the provisions of the said Act would be applicable for the purpose of granting relief to any debtor in the State of Orissa. We cannot also accept this contention of Mr. Rao. The Preamble is worded as follows:

"Whereas it is expedient to regulate money-lending transactions and to grant relief to debtors in the State of Orissa; it is hereby enacted as follows: "

From the above it is evident that the purpose of enacting the said Act is to regulate money-lending transactions in the State of Orissa and to grant relief to debtors in this State. Therefore, the primary purpose of the Act is to regulate money-lending transactions in the State of Orissa and in doing so to grant relief to debtors in the State of Orissa. As it is an Act regulating money-lending transactions in the State of Orissa, its provisions would not affect the money-lending transactions which were transacted outside the State of Orissa. Naturally therefore the 'debtors' referred to in the Preamble, in the context in which the word appears therein, would mean only such persons who become debtors by the money lending transactions in the State of

Orissa. Thus the above contention of Mr. Rao is fallacious.

Mr. Rao did not have any other point to urge in this appeal.

5. On the discussions and considerations made above, we do not find any merit in this appeal which is hereby dismissed with costs.

6. PATRA, J.: I agree.

Appeal dismissed.

AIR 1970 ORISSA 37 (V 57 C 16)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

Controller of Estate Duty, Bihar and Orissa, Applicant v. K. Lingamurti and another, Respondents.

Special Jurisdiction Case No. 103 of 1964, D/- 23-7-1969.

Wealth Tax Act (1957), S. 50A—Relief in respect of gift tax paid — Assessee is entitled to relief in respect of the amount paid as tax under S. 18 (1), Gift Tax Act, 1958 (as it stood before amendment) and the ten per cent credit given to him under that section cannot be deducted therefrom — Assessee cannot be penalised in respect of the ten per cent credit given to him for making a voluntary payment of tax and which can in no circumstance constitute gift tax — Gift Tax Act (1958) (before amendment), S. 18 (1).

(Paras 4, 5)

D. Mohanty, for Applicant; S. C. Roy and P. V. B. Rao, for Respondents.

G. K. MISRA, C. J.: The question referred by the Tribunal for the opinion of this Court runs thus:

"Whether in the facts and circumstances of the case, the amount to be deducted under Sec. 50A of the Estate Duty Act, had been correctly determined by the Tribunal at Rs. 3200/-?"

2. The relevant facts appearing from the order of reference may be stated in brief. The deceased K. Buchiraju, who died on 5-8-61 had made two gifts of Rs. 40,000/- each to his two grandsons separately on 21-10-57. The deceased deposited Rs. 6400/- as advance gift tax under section 18 of the Gift Tax Act. The gift tax payable was determined at Rs. 3200/-. At the time of assessment he was given credit to the tune of Rupees 640/- which represents 10 per cent of the amount deposited. The total amount available for gift tax was Rs. 7040. The assessee took a refund of Rs. 3840/-.

Section 50A of the Estate Duty Act makes a provision that where tax has already been paid under the Gift Tax Act in respect of gift of any property which is also included in the estate of the

donor as property passing under the Estate Duty Act, the estate duty payable shall be reduced by an amount equal to the amount of gift tax paid in respect of such property under the Gift Tax Act. The subject-matter of the aforesaid two gifts was taken into consideration for assessment of estate duty. The question for consideration was as to the amount of gift tax to be allowed as a deduction from the estate duty.

The Assistant Controller and the Appellate Controller held that the sum deductible was Rs. 2560/- and not Rupees 3200/-. The Tribunal took the contrary view. It was of opinion that the assessable gift tax was Rs. 3200/- and that amount should be deducted.

3. The question for consideration is whether Rs. 2560/- or Rs. 3200/- is to be deducted towards gift tax. This necessitates an examination of Section 18 (1) of the Gift Tax Act and Section 50-A of the Estate Duty Act.

4. Section 18 (1) of the Gift Tax Act (as it stood at the relevant time before amendment), so far as material, runs thus:

"18 (1). If a person making a taxable gift of the value of not less than Rs. 10,000/- pays into the treasury in the case of a taxable gift made before 16th day of July, 1958, before the 1st day of August 1958, and in the case of any other taxable gift, within 15 days of his making the gift, an amount calculated in the manner specified in sub-section (2), he shall at the time of assessment under section 15, be credited, in addition to the amount so paid, for an amount equal to 10 per cent of the amount so paid."

Clearly, the gift tax payable by the assessee was Rs. 3200/-. For his voluntary payment within 15 days of his making the gift he was given a credit and he is not to be penalised. The ten per cent of the amount credited to him would in no circumstances constitute a gift tax.

To take the contrary view would lead to fantastic results. Acceptance of such a view would mean that voluntary payment within 15 days would entail punishment. That is not the provision of the law. Credit is given to the tune of 10 per cent for the good conduct evinced by the assessee.

5. If this construction of section 18 is accepted, then the question becomes simple and what is to be deducted under section 50A of the Estate Duty Act is clear. Only the gift tax would be deducted and not the 10 per cent given by way of credit. Section 50A of the Estate Duty Act, already quoted reads as follows:

"50-A. — Relief from estate duty where gift tax has been paid: Where tax has been paid under the Gift Tax Act, 1958,

in respect of gift of any property and the property is also included in the estate of the donor as property passing under this Act, then, notwithstanding anything contained in this Act, the estate duty payable under this Act shall be reduced by an amount equal to the amount of gift tax paid in respect of any such property under that Act."

The assessee paid a gift tax of Rs. 3200/-, and accordingly from the estate duty payable by him only Rs. 3200/- is to be deducted.

6. In our opinion, the Tribunal took the correct view. We would accordingly answer the question in the affirmative. There will be no order as to costs.

7. R. N. MISRA, J.: I agree.

Answered in affirmative.

AIR 1970 ORISSA 38 (V 57 C 17)

G. K. MISRA, C. J.,
AND R. N. MISRA, J.

Bhajuram Ganapatram, Applicant v. Commissioner of Income Tax, Bihar & Orissa, Respondent.

Special Jurisdiction Case No. 37 of 1964, D/- 23-7-1969.

Income-tax Act (1922), S. 28—Imposition of penalty for concealment of income — No evidence recorded in penalty proceedings — Order based on decision in assessment proceedings — Penalty is not validly imposed. (1961) 42 ITR 129 (Pat) and (1963) 48 ITR 324 (All) Dissented from—(Evidence Act (1872), Ss. 3 and 101-104).

An order imposing penalty on the assessee for concealment of income without any evidence in the penalty proceedings to show that there was such concealment and based on the final decision in the assessment proceeding itself is not a valid order. (Para 10)

It is clear from sub-ss. (1) (c), (3) and (4) that penalties are placed on analogous footing with offences, that the penalty proceeding is altogether a different proceeding and starts after the assessment proceeding is closed and that in the penalty proceeding itself the assessee should be given a reasonable opportunity of being heard, at the stage of imposition of penalty. It follows therefore, as a logical corollary, that the conclusion reached in the assessment proceeding, though it could be taken into consideration, would not, by itself, be enough to hold that the assessee concealed his income or deliberately furnished inaccurate particulars of such income under S. 28 (1) (c). Other evidence de hors the conclusion made in the assessment proceeding would be relevant and admissible, and

on the basis of such evidence it is open to the authorities during the penalty proceeding to say that there was concealment. (Paras 4, 5)

Penalty proceedings are in the nature of quasi criminal proceedings and the onus is on the department to establish the necessary ingredients under S. 28 (1) (c). In section 3 of the Evidence Act, there are three expressions "prove", "disprove" and "not proved". In the assessment proceedings the assessee might have failed to prove his case that the questioned income is not his, but that will not prove the contrary, namely that it has been established by the department that such income is concealed income. Different conclusions emerge when the onus is placed either on the assessee or on the department to establish that the income had been concealed. Failure on the part of the assessee to prove his own case does not mean that the department succeeds in establishing its case that there was concealment of income or furnishing inaccurate particulars of such income. AIR 1959 Bom 96 and (1967) 64 ITR 388 (A. P.) and (1963) 47 ITR 434 (Ker) and AIR 1968 Cal 345 and (1965) 56 ITR 126 (Guj) and (1969) 73 ITR 26 (Mad) and AIR 1969 Madh Pra 72 and AIR 1960 Pat 252 Rel on; (1961) 42 ITR 129 (Pat) and (1963) 48 ITR 324 (All) Dissent.

(Paras 4, 5)

Cases Referred: Chronological Paras

- (1969) AIR 1969 Madh Pra 72 (V 56) = 1969 MPLJ 41, Commr. of Income Tax, M. P. v. Champalal 6
- (1969) 1969-73 ITR 26 = (1969) 2 ITJ 1 (Mad), P. S. S. Bommanna Chettiar v. Commr. of Income Tax, Madras 6
- (1968) AIR 1968 Cal 345 (V 55) = 1967-65 ITR 95, Commr. of Income Tax (Central), Calcutta v. Anwar Ali 6
- (1967) 1967-64 ITR 388 = (1967) 1 Andh LT 364, Commr. of Income Tax, E. P. T. A. P. v. Ramaswamy Chetty 5
- (1965) 1965-56 ITR 126 = 1964-2 ITJ 526 (Guj), Commr. of Income Tax Gujarat v. L. H. Vora 6
- (1963) 1963-48 ITR 324 (All), Lal Chand Gopal Das v. Commr. of Income Tax, U. P. & V. P. 7, 8
- (1963) 1963-47 ITR 434 (Ker), Kerala Maney and Co. v. Commr. of I. T. Kerala 6
- (1961) AIR 1961 SC 609 (V 48) = (1961) 41 ITR 425, C. A. Abraham v. Income Tax, Officer Kottayam 8
- (1961) 1961-42 ITR 129 = ILR 40 Pat 571, Murlidhar Tejpal v. Commr. of Income Tax 7
- (1960) AIR 1960 Pat 252 (V 47) = (1960) 38 ITR 523, Khemraj

Chaggan Lal v. Commr. of Income Tax B. & O.

(1959) AIR 1959 Bom 96 (V 46) = ILR (1958) Bom 1162, Commr. of Income Tax, Ahmedabad v. Gokul-das 5

D. Bhuyan, for Applicant; D. Mohanty, for Respondent.

G. K. MISRA, C. J.: The question referred to this Court by the Tribunal, under section 256 (1) of the Income Tax Act, 1961, runs as follows:

"Whether in the facts and circumstances, penalty under section 28 (1) (c) of the Income Tax, Act, 1922, has been validly imposed".

2. The facts out of which this question of law arises may be stated in brief. The assessment year is 1953-54. The assessee was a Hindu Undivided Family of which one Ganapatram was the Karta. During the accounting year, on 20-7-52, the following credit appeared in the cash book of the assessee:

| | |
|------------------------|--------------------|
| Jankibai, mother of | |
| Ganapatram | Rs. 10,000/- |
| Lakshmi Bai, wife of | |
| Ganapatram | Rs. 4,000/- |
| Rukmini Bai, widowed | |
| daughter-in-law of | |
| Ganapatram | Rs. 4,000/- |
| Ginni Bai, wife of | |
| grandson of Ganapatram | Rs. 2,000/- |
| | <hr/> Rs. 20,000/- |

The assessee asserted that this sum of Rs. 20,000/- belonged to the four ladies. This contention was rejected all through. A tipka book was produced at a certain stage. It was held to be not genuine. The sum of Rs. 20,000/- was accordingly added to the income of the assessee. Thereafter, the Income-Tax Officer started a proceeding under Section 28 (3) of the Income Tax Act, 1922 and imposed a penalty of Rs. 4000/- under section 28 (1) (c). The appeals filed by the assessee before the Appellate Assistant Commissioner and the Tribunal failed on merits. The Tribunal, however, reduced the quantum of penalty to Rs. 2000/-.

3. As appears clearly from the order of the Tribunal there was no other evidence before the authorities in the penalty proceedings showing that the assessee concealed this sum of Rs. 20,000/- as being his own income. The entire conclusion is based on the final decision made in the assessment proceeding itself. The point of law that arises is whether penalty can be imposed without further evidence to establish that there was concealment of the income or that the assessee deliberately furnished inaccurate particulars of such income.

4. Section 28 (1) (c) of the Income Tax Act, 1922, runs thus:

"If the Income Tax Officer, the Appellate Assistant Commissioner, or the Appellate Tribunal in the course of any proceedings under this Act is satisfied that any person

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, he or it may direct that such person shall pay by way of penalty. . . ."

The rest of the provision need not be quoted. Sub-section (3) of Section 28 lays down that

"no order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard".

It would clearly appear from the aforesaid two provisions that the penalty proceeding is altogether a different proceeding and starts after the assessment proceeding is closed. In the penalty proceeding itself the assessee is given a reasonable opportunity of being heard.

Sub-section (4) of section 28 enacts that "no prosecution for an offence under this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section."

This sub-section gives a clear indication that penalties are placed on analogous footing with offences.

5. There is a conflict of authorities as to the nature of these penalty proceedings and as to the party on whom the onus lies, to establish the requirements of section 28 (1) (c) of the Act. The view, of which AIR 1959 Bom 96, I. T. Commissioner, Ahmedabad v. Gokuldas, is the best exponent, is that these penalty proceedings are in the nature of quasi-criminal proceedings and the onus is on the department to establish the necessary ingredients under section 28 (1) (c). This view *prima facie* seems to be rational. As has already been observed, a penalty proceeding is different from an assessment proceeding and is not a mere formality. It starts after the assessment proceeding is over and furthermore, reasonable opportunity of being heard is given to the assessee again at the stage of imposition of penalty.

It follows, as a logical corollary, that the conclusion reached in the assessment proceeding would not by itself be enough to hold that the assessee concealed his income or deliberately furnished inaccurate particulars of such income under section 28 (1) (c). Doubtless the decision in the assessment proceeding can be taken into consideration in the penalty proceeding; but by itself it would not be enough to establish the necessary ingredients. Other evidence *de hors* the con-

clusion made in the assessment proceeding would be relevant and admissible, and on the basis of such evidence it is open to the authorities during the penalty proceeding to say that there was concealment. This appears apparent from the provision made in sub-section (3) that the assessee will be given a reasonable opportunity of being heard.

In this connection, it should be remembered that in section 3 of the Evidence Act, there are three expressions "prove", "disprove" and "not proved". In the assessment proceedings the assessee might have failed to prove his case that the questioned income is not his, but that will not prove the contrary, namely that it has been established by the department that such income is concealed income. Different conclusions emerge when the onus is placed either on the assessee or on the department to establish that the income had been concealed. Failure on the part of the assessee to prove his own case does not mean that the department succeeds in establishing its case that there was concealment of income or furnishing inaccurate particulars of such income. This is the analysis, on the basis of which it was held in the aforesaid Bombay case that the penalty proceeding must be treated as a quasi criminal proceeding and the department must establish the necessary ingredients under section 28 (1) (c).

6. The Bombay decision has been followed in subsequent cases:

(1967) 64 ITR 388 (AP), Commissioner of Income Tax, E. P. T. A. P. v. Ramaswamy Chetty; (1963) 47 ITR 434 (Ker), Kerala Maney and Co. v. Commissioner of I. T. Kerala; (1967) 65 I. T. R. 95 = (AIR 1968 Cal 345), Commissioner of Income Tax (Central) Calcutta v. Anwar Ali; (1965) 56 I. T. R. 126 (Guj), Commissioner of Income Tax, Gujarat v. L. H. Vora; (1969) 73 I. T. R. 26 (Mad), P. S. S. Bommanna Chettiar v. Commissioner of Income Tax, Madras; AIR 1969 Madh Pra 72, Commissioner of Income Tax, M. F. v. Champalal and AIR 1960 Pat 252, Khemraj Chagga Lal v. I. T. Commissioner, Bihar & Orissa.

7. The contrary view is reflected in (1961) 42 I. T. R. 129 (Pat), Murlidhar Tejpal v. Commissioner of Income Tax, Patna and (1963) 48 I. T. R. 324 (All), Lal Chand Gopal Das v. Commissioner of Income Tax U. P. & V. P. The Allahabad High Court has more or less consistently adhered to this view. It goes by the plain wording of the section.

8. After giving our anxious consideration to the two views, we have no doubts in our mind that the view expressed by the Bombay High Court and consistently followed thereafter by most of the High Courts represents the correct law. In

(1963) 48 I. T. R. 324 (All) reference was made to AIR 1961 SC 609, C. A. Abraham v. Income Tax Officer, Kottayam, and it was deduced that the Supreme Court decision supported the theory that penalty proceedings are in the nature of assessment proceedings and are not of a criminal nature. With respect we must say that we are unable to see anything in the Supreme Court decision to support such a conclusion. In the Calcutta and Madras decisions cited above, the aforesaid Supreme Court decision has been distinguished and it was rightly observed that it throws no light on the question at issue.

9. Examined in the light of the aforesaid dictum the Tribunal's view that the assessee knew his income cannot be supported. In support of this conclusion reliance was placed merely on the decision in the assessment proceeding. The department made no endeavour to prove that there was any concealment. It is one thing to discard the explanation of the assessee in the assessment proceeding; it is altogether a different thing to say that concealment has been established. The Tribunal therefore wrongly held that the assessee was liable to pay penalty.

10. On the aforesaid analysis, we would answer the question by saying that in the facts and circumstances of this case, penalty under Section 28 (1) (c) of the Income Tax Act 1922, has not been validly imposed. The reference is answered accordingly. In the circumstances there will be no order as to costs.

11. R. N. MISRA, J.: I agree.
Reference answered.

AIR 1970 ORISSA 41 (V 57 C 18)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

Balasore Municipality, Petitioner v. State of Orissa and others, Opposite Parties.

Original Jurisdiction Case No. 154 of 1965, D/- 5-8-1969.

Constitution of India, Art. 226 — Principles of natural justice — Violation of, by Chairman of a Municipality — Order set aside by Government in appeal without hearing Chairman — High Court when will not interfere with appellate order, stated.

The Chairman of a Municipality held enquiry against the municipal employee on charges, amongst others, of abusing the Chairman and showing insubordination to him. It that enquiry, the Chairman relied upon his own evidence, and held the delinquent guilty and dismissed him. On appeal by the delinquent, the

State Government reinstated him. The Chairman, thereupon, applied under Article 226 contending that the appeal was heard by Government without any notice to him and as such there was a violation of the principle of natural justice.

Held that the Chairman was not entitled to any hearing at the appellate stage. Even if he were entitled to a hearing, the High Court would not interfere with the order of Government when the Chairman himself did not act in accordance with the principles of natural justice and no failure of justice had been caused by the appellate order directing a fresh enquiry by a person other than the Chairman. (Para 12)

The rules of natural justice vary with the varying constitution of statutory bodies and the rules of natural justice alleged to have been contravened should be decided not under any pre-conceived notions but in the light of the statutory rules and provisions. Though a personal hearing is essential at the primary stage of enquiry, at later stages, like appeals or revisions, personal hearing cannot be given if the rules do not so permit. AIR 1957 SC 648 and AIR 1958 SC 398 and AIR 1967 Cal 321 Ref. (Para 6)

The Chairman in the instant case had a bias in the enquiry. He was the complainant as well as a witness in the case and was also the Judge in that very case. His order dismissing the delinquent was rightly vacated and the High Court would not, in exercise of its discretionary power under Art. 226 or 227 interfere with the appellate order. AIR 1957 SC 227 and AIR 1960 SC 407 Ref.

(Paras 10, 11)

Cases Referred: Chronological Paras

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|---|----|
| (1967) AIR 1967 Cal 321 (V 54)= | |
| 1967 Cri LJ 738, Prafulla Kumar v. Inspector General of Police, W. B. | 6 |
| (1960) AIR 1960 SC 407 (V 47)= | |
| 1959-2 Lab LJ 837, Balwantrai v. M. N. Nagrashna | 11 |
| (1959) AIR 1959 SC 308 (V 46)= | |
| 1959 SCJ 967, G. Nageshwara Rao v. A. P. S. R. T. Corpn. | 9 |
| (1959) AIR 1959 SC 1376 (V 46)= | |
| 1960-1 SCR 580, Nageshwara Rao v. State of A. P. | 9 |
| (1958) AIR 1958 SC 398 (V 45)= | |
| 1958 SCR 1240, Nagendranath v. Commr. of Hills Division | 6 |
| (1957) AIR 1957 SC 227 (V 44) = | |
| 1957 SCR 359, A. M. Allison v. B. L. Sen | 11 |
| (1957) AIR 1957 SC 648 (V 44) = | |
| 1957 Cri LJ 1026, F. N. Roy v. Collector of Customs Calcutta | 6 |
| D. Mohanty and P. V. Ramdas, for Petitioner; Standing Counsel, B. K. Pal, B. J. Pal, A. Mohanty, R. K. Mohapatra, for Opposite Parties. | |

G. K. MISRA, C. J.: Opposite party no. 4 is the Head-clerk-cum-Accountant in Balasore Municipality. On 12-6-64 there was a quarrel between himself and a Municipal Sweeper. He requisitioned the services of the Police for protection. On 6-7-64 the Chairman of Balasore Municipality (petitioner) framed 8 charges against him in a disciplinary proceeding. Charge no. 3 was to the effect that opposite party no. 4 abused the Chairman by using insulting words. Charges 4 and 5 were that he showed insubordination to the Chairman. All the charges arise out of the incident of 12-6-64.

On 15-7-64 the delinquent showed cause and pleaded not guilty. He clearly asserted that the Chairman was personally interested in the case and denied the charges of insulting the Chairman and insubordination and wanted that the enquiry should be made by some person other than the Chairman. He also filed an appeal before the State Government that the Chairman cannot be the Enquiry Officer. Initially, the Chairman granted an order of stay but later on he vacated it and did not forward the memorandum of appeal. The Chairman made the enquiry himself and found the delinquent guilty of all the charges. Ultimately the punishment of dismissal was inflicted. The dismissal order was passed on 5-10-64 and was to take effect retrospectively from 29-9-64.

2. With regard to charge no. 3, the Chairman relied upon his own evidence that he was insulted by the delinquent and believed his own statement. Against the order of punishment opposite party no. 4 filed an appeal to the State Government. On 22-4-65, Government passed the following order.

"I am directed to say that after careful consideration of the appeal petition dated 24-10-64 of Sri S. C. Sen, ex-Head Clerk-cum-accountant of Balasore Municipality, Government have been pleased to decide that the disciplinary action taken by the Chairman against the Head-clerk-cum-Accountant is irregular as the Chairman, who is the appointing authority as well as the disciplinary authority of the appellant, has acted illegally by becoming the enquiry officer, and that his order dated 5-10-64 cannot have retrospective effect from 29-9-64. Government have, therefore, been pleased to order that the appellant be reinstated forthwith and the period of his suspension and dismissal from duty be treated as the period spent on duty.

The matter of fresh independent enquiry into the incident or conduct of the appellant will be taken up later." Thus, by the Government order the peti-

tioner was reinstated in service, but there was a direction that an enquiry would be held by a person other than the Chairman later. In fact, on 3-5-65, the Chairman addressed a letter asking the District Magistrate to intimate to him the person who would enquire into the charges framed against opposite party no. 4. Aggrieved by the order passed by the State Government setting aside the order of dismissal passed by the Chairman, the present application under Article 226 of the Constitution has been filed.

3. Mr. Mohanty for the petitioner does not dispute that an appeal lies to Government against the order of dismissal passed by the Chairman. The only contention raised by him is that the appeal was heard by Government without any notice being given to the petitioner, who got no opportunity to justify the order of dismissal and as such there was a violation of the principle of natural justice and the order of Government must be vacated.

4. Mr. Pal, on the other hand, contends that the Chairman violated the principles of natural justice, and being an administrative functionary the Chairman was not entitled to any hearing in appeal; and even if he was entitled to a hearing, the High Court should not interfere when there has been no failure of justice.

5. These contentions require careful examination.

6. The first question for consideration is whether the Chairman was entitled to any hearing in appeal. Mr. Mohanty was unable to place any statutory rule whereunder a public functionary like the Chairman is entitled to a hearing when the appeal was heard. Law is well settled that the rules of natural justice vary with the varying constitution of statutory bodies and the rules of natural justice alleged to have been contravened should be decided not under any preconceived notions but in the light of the statutory rules and provisions. Where no such rule, which could be said to have been contravened, is brought to the notice of the Court, it is no ground for interference either under Article 226 or 227 simply because a Tribunal viewed the matter in a light which is not acceptable to the Court.

At the first stage of an enquiry a delinquent must be given every opportunity to defend himself and must be heard but once the proceedings have terminated, the subsequent stages like appeals or revisions are, in most cases, governed by rules and regulations which are framed or according to practice. Though a personal hearing is essential at the primary stage of enquiry, at later stages personal hear-

ing cannot be given if the rules do not so permit. Rules of natural justice do not necessarily require that there should be repeated hearings at all later stages. [See AIR 1957 SC 648, *F. N. Roy v. Collector of Customs Calcutta*; AIR 1958 SC 398, *Nagendra Nath v. Commissioner of Hills Division*; and AIR 1967 Cal 321, *Prafulla Kumar v. Inspector General of Police, West Bengal*.

7. In this case even if the delinquent had been the appellant, he was not entitled to a personal hearing at the appellate stage on the aforesaid principles. The question of having any hearing of a Judge or a public functionary does not arise at all. The order with the record of any judge or public functionary acting judicially or quasi-judicially is the subject-matter of the appeal. That should speak for itself and be its own defence. Such authorities are not entitled to any hearing either at the appellate or revisional stage. Mr. Mohanty's contention has no substance and is accordingly rejected.

8. Even otherwise, the Chairman himself violated the principles of natural justice in making the enquiry when charge no. 3 directly concerned himself. The charge was that he was insulted by the delinquent. The only evidence in support of that charge was the statement of the Chairman himself. The enquiry officer thus held the delinquent guilty on his own evidence. This is abhorrent to any notion of judicial determination. It is one of the fundamental principles of judicial procedure that the person entrusted with hearing of a case judicially or quasi-judicially, should not have personal bias. The principles governing the doctrine of bias vis-a-vis a judicial tribunal are: (i) no man shall be judge in his own cause and (ii) justice should not only be done but manifestly and undoubtedly seem to be done.

9. The same principles equally apply to authorities who have to act even quasi-judicially to decide rights: See AIR 1959 SC 308 *G. Nageswara Rao v. A. P. S. R. T. Corporation*; and AIR 1959 SC 1376 *Nageswara Rao v. State of Andhra Pradesh*.

10. The Chairman had thus a bias in the enquiry. He was the complainant as well as a witness in the case and was also the Judge in that very case. His order dismissing the delinquent was rightly vacated.

11. Once we are of opinion that the Chairman acted with bias and his order was rightly vacated, we would not, in exercise of our power under Article 226 or 227 of the Constitution, interfere with the appellate order passed by the Government as there has been no failure of jus-

tice. The power of the High Court under those Articles is discretionary. See AIR 1957 SC 227 *A. M. Allison v. B. L. Sen* and AIR 1960 SC 407 *Balwantrao v. M. N. Nagrashna*.

12. To sum up: The petitioner was not entitled to any hearing at the appellate stage by Government. Even if he were entitled to a hearing, we would not interfere with the order of Government when the Chairman himself did not act in accordance with the principles of natural justice and no failure of justice had been caused by the appellate order directing a fresh enquiry by a person other than the Chairman.

13. In the result, the application fails and is dismissed with costs. Hearing fee Rs. 100/- (Rupees one hundred only).

14. **R. N. MISRA, J.:** I agree.
Application dismissed.

AIR 1970 ORISSA 43 (V 57 C 19)

B. K. PATRA

AND S. ACHARYA, JJ.

Lakhman Kumar Kar, Appellant v. Mst. Basanta Kumari and another, Respondents.

A. H. O. No. 1 of 1965, D/- 18-7-1969, from decision of R. K. Das, J. in S. A. No. 407 of 1963, D/- 13-1-1965.

Administration of Orissa States Order (1948), Pr. 4 — Ex-State area of Gangpur—Hindu Law of Inheritance (Amendment) Act (1929)—Hindu Women's Rights to Property Act (1937) — Not applicable in Gangpur State before merger—"Hindu Law" in force in that area before merger meant uncodified Hindu law and did not include amendments made to it from time to time in British India — (Constitution of India, Art. 245 — Parliament—Territorial extent of legislative power)—(Words & Phrases — "Hindu law—Means uncodified Hindu law and not amendments made to it) — (Civil P. C. (1908), Pre.—Interpretation of Statutes—Retrospective operation — Retrospective effect given to — Amending Act — Operation anterior to date of coming into force of main Act not contemplated.)

One U resident of ex-State of Gangpur (now forming part of Orissa) and who was separate from his brothers, died in 1938 leaving behind S, the widow of his pre-deceased son K, the two daughters of K (who were plaintiffs in this case), B, who was K's only son, and the disputed properties. B died on 11-2-1945 and S died in 1953. Thereafter, litigation started in respect of the disputed properties between the plaintiffs who claimed the entire property for themselves, and the defen-

HM/IM/D600/69/NNH/P.

dant who was the grandson of one of the separate brothers of U.

Held that on the death of U his entire properties devolved on his grandson B as the Hindu Women's Rights to Property Act, 1937 (which undoubtedly was in force in British India at the time of U's death in 1938) was not in force in Gangpur State; that after B's death in 1945 leaving behind him his two sisters, the plaintiffs, and his mother S, those properties devolved on the mother who held the same as a limited owner and that on the latter's death in 1953 by which time the merger had taken place and the provisions of the Hindu Law of Inheritance (Amendment) Act, 1929 and the Hindu Women's Rights to Property Act, 1937, had been brought into force from 1-1-1948 in the ex-State area of Gangpur, the property devolved on the heirs of the last full owner, namely, B, and that the plaintiffs being the sisters of B became entitled under the 1929 Act to succeed to the entire properties.

(Para 1)

The list of laws in force in Gangpur State (appended to the Administration Report of the State for 1946-47) showed that 'Hindu Law' was in force in the State before merger. But 'Hindu Law' referred to was the uncodified Hindu Law and did not include all amendments effected to Hindu Law from time to time in the adjoining British Indian territory, such as the 1929 or 1937 Act. (Para 4)

The Indian Parliament, which passed the 1937 Act, was competent to legislate only in respect of territories over which it had legislative control and Gangpur State was not one of such territories. Where a British Indian Law altered the existing uncodified Hindu Law of inheritance, the same did not automatically extend to any area which was not a part of British India. (Para 4)

The two enactments (the 1929 Act and the 1937 Act) came into force in the Gangpur ex-State area after merger only on 1-1-1948 and not before, as a result of para 4 of the Administrative of Orissa States Order, 1948. (Para 4)

Merely because retrospective operation is given to the expression "property" in S. 2 of the Hindu Women's Rights to Property (Extension to Agricultural Land in Orissa) Act, 5 of 1944, it does not follow that, notwithstanding the extension of the 1937 Act and Orissa Act V of 1944 to the ex-State area of Gangpur with effect from 1-1-1948, these two Acts must be deemed to be in force in the ex-State area of Gangpur since 1937, for the simple reason that retrospective operation contemplated by Section 2 of the Act V of 1944 cannot take one back to the period anterior to the coming into force of the main Act itself. (Para 5)

The provisions of the 1937 Act as amended by Orissa Act 5 of 1944 came into force in the Gangpur ex-State area with effect from 1-1-1948. The provisions of the 1937 Act were not applicable to a widow whose husband died prior to the coming into force of the Act. Hence, those provisions were not applicable to the widow S, who was alive when the Act came into force, as her husband had died before that date. AIR 1955 Orissa 73 (SB), Rel. on. (Para 6)

Cases Referred: Chronological Paras (1955) AIR 1955 Ori 73 (V. 42) =

ILR (1955) Cut 113 (SB), Moni

Dei v. Hadibandhu Patra

6

B. K. Ray and B. H. Mohanty, for Appellant; R. C. Misra and Mrs. A. K. Padhi, for Respondents.

PATRA, J.: This is an appeal by the defendant against a decision of a learned Judge of this Court in Second Appeal No. 407 of 1963. The parties in this litigation are residents of the ex-State area of Gangpur now comprised in the district of Sundergarh. One Udhaba Kar, who was separate from his brothers, died in the year 1938 leaving behind Sunakhadika, the widow of his pre-deceased son, Krupa, the two daughters of Krupa who are the plaintiffs, Bikram who was Krupa's only son and the disputed properties. Bikram died on 11-2-1945 and Sunakhadia died in the year 1953. Thereafter litigation started in respect of the disputed properties between the plaintiffs who claimed the entire property for themselves and the defendant who is the grandson of one of the separate brothers of Udhab. The claim of the plaintiffs is that on the death of Udhab his entire properties devolved on his grandson Bikram as the Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as the 1937 Act), which undoubtedly was in force in British India at the time of Udhab's death in 1938 was not in force in Gangpur State; that after Bikram's death in 1945 leaving behind him his two sisters, the plaintiffs, and his mother Sunakhadika, these properties devolved on the mother who held the same as a limited owner and that on the latter's death in 1953 by which time the merger had taken place and the provisions of the Hindu Law of Inheritance (Amendment) Act, 1929 (hereinafter referred to as the 1929 Act) and the Hindu Women's Rights to Property Act 1937 had been brought into force in the ex-State area of Gangpur, the property devolved on the heirs of the last full owner, namely, Bikram; and that the plaintiffs being the sisters of Bikram became entitled under the 1929 Act to succeed to the entire properties. As the defendant had been given possession of the disputed properties by vir-

tue of an order passed under Section 145 Cr. P. C., the plaintiffs asked for recovery of possession.

2. The substantial defence put forward on the defendant's side and which found favour with the learned trial Court is that by virtue of the provisions of the 1937 Act which, according to the learned Munsif, must be deemed to have been in force in the ex-State area of Gangpur by 1938 when Uddhab died, half of the interest in the suit property devolved on Sunakhadika (widow of a predeceased son) as a limited owner and the other half devolved on Bikram, the grandson. In 1945, when Bikram died, Sunakhadika succeeded as mother heir to Bikram's interest, and held it as a limited owner. When in 1953 Sunakhadika died, half of the interest in the property which Sunakhadika had inherited from Bikram devolved on Bikram's heirs who by then were his two sisters the plaintiffs, and the other half to which Sunakhadika had succeeded as limited heir of her deceased father-in-law Uddhab, devolved on the heir of Uddhab who by then, it is not disputed, was the defendant. In this view of the case, the learned Munsif passed a decree in favour of the plaintiffs only in respect of half of the suit property.

3. On appeal by the plaintiffs, the first appellate court gave the finding that the 1937 Act was not in force in the ex-State area of Gangpur at any time before 1st January, 1948 and consequently, the claim as put forward by the plaintiffs must succeed in toto. He, therefore, allowed the appeal. His view was confirmed in Second Appeal in the High Court.

4. Mr. B. K. Ray, appearing for the appellant strenuously contested the finding that the 1937 Act was not in force in the ex-State area of Gangpur since 1937, his contention being that our learned brother Das, J. failed to draw the proper inference from the list of laws in force in Gangpur State appended to the Administration Report of the State for the year 1946-47. Entry 10 of the list shows that "Hindu Law" was in force in the State. The contention of Mr. Ray is that "Hindu Law" as mentioned in the list must be construed to include all amendments effected to Hindu Law from time to time in the adjoining British Indian territory, and that so construed, it must be held that the provisions of the 1937 Act operated in the ex-State area of Gangpur right up from 1937 when it was made applicable to the British Indian territory. There cannot be any doubt that Hindu Law referred to in the Administration Report is the uncodified Hindu Law. The Indian Parliament which pass-

ed the 1937 Act was competent to legislate only in respect of territories over which it had legislative control and Gangpur State was not one of such territories. Where a British Indian Law altered the existing uncodified Hindu Law of inheritance, the same did not automatically extend to any area which was not a part of British India. The then Ruler of the State in exercise of his legislative power could extend the operation of the Act to his territory but, it is conceded on the defendant's side, that this had not been done by the then Ruler of Gangpur. After the merger of Gangpur State with British India with effect from 1-1-1948, the Government of Orissa, as the delegated authority of the Central Government, in exercise of its powers under the Extra Provincial Jurisdiction Act 1947 made an order known as the Administration of Orissa States Order, 1948, for the purpose of governing the merged areas including the Gangpur State. By paragraph 4 of that Order, several enactments then in force in British India as specified in the Second Schedule to that Order were applied throughout the merged area and it was further provided that the enactments so applied would prevail in the merged territories notwithstanding anything to the contrary in the laws that were in force in those territories prior to the coming into force of that order. These laws so extended of which a list is given in the Second Schedule to the Order include the 1929 Act and the 1937 Act. It is, therefore, clear that these two enactments came into force in the Gangpur ex-State area only on 1-1-1948 and not before.

5. Another ingenious argument put forward by Mr. Ray is this: He referred to Section 2 of the Hindu Women's Rights to Property (Extension to Agricultural Land in Orissa) Act 1944 (Orissa Act V of 1944) which may be quoted.

"2. The expression "property" in the Hindu Women's Rights to Property Act, 1937, as amended by the Hindu Women's Rights to Property (Amendment) Act, 1938, in its application to the State of Orissa shall include and shall be deemed always to have included agricultural land and the provisions of the said Act shall apply and shall be deemed always to have been applied to agricultural land in the said State accordingly."

This Act V of 1944 is one of the Acts mentioned in Schedule 2 referred to above. Mr. Ray, therefore, argues that in view of the retrospective operation given to the expression "property" as mentioned in section 2 above, it must follow that notwithstanding the extension of the 1937 Act and Orissa Act V of 1944 to the ex-State area of Gangpur with effect from 1-1-1948, these two Acts must be deemed

to be in force in the ex-State area of Gangpur since 1937:

This argument appears to us to be so fantastic that it can be rejected outright for the simple reason that retrospective operation contemplated by section 2 of the Act V of 1944 cannot take one back to the period anterior to the coming into force of the main Act itself.

6. The last argument advanced by Mr. Ray which is equally untenable is that even if the 1937 Act as amended by Act V of 1944 be held to have come into force in the Gangpur ex-State area with effect from 1-1-1948, still, in view of the fact, that Sunakhadika was then alive and was in possession of the properties which at one time belonged to her father-in-law Uddhab, she must by virtue of the provisions of Section 3 of the 1937 Act be deemed to have succeeded as a limited heir to the properties of her father-in-law and that on her death in 1953, the properties would devolve on the heir of her father-in-law Uddhab. In making the submissions, Mr. Ray has completely overlooked that the last full owner in respect of these properties was not Uddhab but Bikram, and that Section 4 of the 1937 Act makes it quite clear that nothing in the Act shall apply to the property of any Hindu dying intestate before the commencement of the Act. There are large number of authorities in support of the proposition that the provisions of the 1937 Act are not applicable to a widow whose husband died prior to the coming into force of the Act. It is sufficient to refer in this connection to a Special Bench decision of this Court reported in AIR 1955 Orissa 73, *Moni Dei v. Hadibandhu Patra*.

7. All the contentions raised on behalf of the appellant fail. We would accordingly dismiss the appeal with costs.

8. ACHARYA, J.: I agree.

Appeal dismissed.

AIR 1970 ORISSA 46 (V 57 C 20)

G. K. MISRA, C. J.

AND R. N. MISRA, J.

Niranjan Sahu, Petitioner v. Narasu Satpathy and others, Opposite Parties.

O. J. C. No. 1561 of 1968, D/- 17-7-1969.

(A) Constitution of India, Article 226 — Other remedy available — Election petition under Orissa Gram Panchayat Act — Interlocutory Order — Section 38 of Panchayat Act provides appeal only against final orders passed under sub-secs. (1) and (2) — No appeal lies against interlocutory order — Hence only remedy is by application under Article 226—(Orissa Gram Panchayat Act, 1964 (1 of 1965), S. 38).

(Para 2)

(B) Panchayats — Orissa Gram Panchayat Act, 1964 (1 of 1965), Ss. 35, 37 — Civil P. C. (1908), O. 18, R. 17 — O. 18, R. 17 applies to trial of election cases—Procedure applicable, under Civil P. C., to trial of suit applies to trial of election petitions by virtue of S. 35 (1) of Panchayat Act — Sub-secs. (2) to (9) of Section 35 do not exclude applicability of O. 18, R. 17 — O. 18, R. 17 is a procedure applicable to trial of suits—Examining witnesses on oath comes under O. 18, R. 17 and also within purview of S. 37 (d). (Para 4)

N. V. Ramdas and N. B. K. Murty, for Petitioner; Advocate General, B. K. Pal and B. Pal, for Opposite Parties.

G. K. MISRA, C. J.: The petitioner and opposite party no. 1 were candidates for election of Sarpanch in the Golantha Gram Panchayat. The election was held on 3-6-67 and the results were published on 9-6-67. Opposite party no. 1 was declared elected. The petitioner filed an election petition under Section 31 of the Orissa Gram Panchayat Act, 1964 (hereinafter to be called as the Act) for setting aside the election of opposite party no. 1 on the ground, amongst others, that he was disqualified under section 25 (1), clause (1) of the Act as he was a debtor to the Aska Multipurpose Co-operative Society. The election petition was registered as Misc. Case No. 109 of 1967. It was taken up for trial. After the close of the entire evidence the petitioner filed an application for further cross-examination of opposite party no. 1 himself with reference to a document which was called for earlier but produced subsequent to his examination on oath. The application was filed under Order 18, Rule 17 C. P. C. The learned Munsif was of opinion that Order 18, Rule 17 was not applicable to trial of election cases, and as such he had no power to grant the prayer. The petitioner filed an appeal before the District Judge under Section 38 (4) of the Act. Petitioner's assertion is that no appeal lies, but that the appeal had been filed by way of abundant caution. The writ application has been filed under Articles 226 and 227 of the Constitution for quashing the order of the learned Munsif dated 22-7-68.

2. Mr. Pal raises a preliminary objection that an appeal lies against an interlocutory order in an election case before the Munsif. To appreciate this contention, Section 38 of the Act needs close examination. The section runs thus:

"38 (1) If the Munsif after making such enquiry, as he deems necessary, finds in respect of any person, whose election is called in question by a petition that his election was valid, he shall dismiss the petition as against such person and may award costs at his discretion.

(2) If the Munsif finds that the election of any person was invalid, he shall either—

(a) declare a casual vacancy to have been created; or

(b) declare another candidate to have been duly elected;

whichever course appears, in the circumstances of the case to be more appropriate and in either case, may award costs at his discretion.

(3) All orders of the Munsif shall, subject to the provisions of sub-section (4), be final and conclusive;

Provided that the Munsif may, on application presented within one month from the date of any of the orders made under this section by any person aggrieved, review such order on any ground and may, pending the decision in review, direct stay of operation of such order; Provided further that no application for review under the preceding proviso shall lie, if an appeal is preferred in accordance with the provisions of sub-section (4).

(4) Any person aggrieved by an order of the Munsif may within thirty days from the date of the order, prefer an appeal in such manner as may be prescribed before the District Judge having jurisdiction who shall after giving the parties an opportunity of being heard, confirm, reverse, alter or modify the order of the Munsif and pending disposal of such appeal may direct stay of operation of the said order."

On a perusal of the various sub-sections, it is clear that an appeal lies only against final orders passed under sub-sections (1) and (2), and no appeal lies against an interlocutory order. Those very sub-sections make provision for awarding of costs at the discretion of the Munsif. The first proviso to sub-section (3) makes the position further clear that the appeal is to lie against any order made under Section 38. This section makes no provision for passing of interlocutory orders. It merely conceives of final orders either of dismissal or of allowing the election petition. We are therefore satisfied that there is no substance in the preliminary objection. No appeal lies to the District Judge, and the only remedy is by an application under Article 226 of the Constitution.

3. The next question for consideration is whether the view of the learned Munsif that Order 18, Rule 17, C. P. C. has no application to trial of election cases is correct. Section 35 (1) of the Act enacts that subject to the provisions of the Act and the rules made thereunder every election petition shall be tried by the Munsif as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits. Sub-sections (2) to (9) of Sec-

tion 35 do not exclude the applicability of Order 18, Rule 17 C. P. C. Section 37 of the Act enumerates the powers that the Munsif shall have when trying election cases. He would have powers in respect of the following matters:

(a) discovery and inspection;

(b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;

(c) compelling the production of documents;

(d) examining witnesses on oath;

(e) granting adjournments;

(f) reception of evidence taken on affidavit.

4. Order 18 C. P. C. is styled as "Hearing of the Suit and Examination of Witnesses". Order 18 Rule 17 C. P. C. is clearly a procedure applicable to the trial of suits. The powers conferred upon the Munsif in section 37 to try election cases come under Orders 11, 16, 13, 18, 17 and 19. Examining witnesses on oath clearly comes under Order 18. Order 18, R. 17 in terms says that the Court may at any stage of a suit recall any witness who has been examined and may, subject to the law of evidence for the time being in force, put such questions to him as the Court thinks fit. This also comes within the purview of section 37, clause (d), namely, examining the witnesses on oath. We are therefore, clearly, of opinion that the learned Munsif wrongly refused to exercise his jurisdiction which was vested in him. He had powers to follow Order 18, Rule 17 C. P. C., and under a misconception of law he was of the view that he could not exercise such powers. We will accordingly quash his order.

5. Order 18, Rule 17 C. P. C. itself says that the power is discretionary with the Court. The case must accordingly go back to the Munsif to examine, in the facts and circumstances of this case, whether he would exercise his discretion to allow the prayer of the petitioner to resubmit opposite party no. 1 for further cross-examination.

6. In the result, the application is allowed with costs against opposite party no. 1. Hearing fee of Rs. 100/- (one hundred). There will be no order as to costs against the State.

7. R. N. MISRA, J.: I agree.

Application allowed.

AIR 1970 ORISSA 47 (V 57 C 21)

A. MISRA, J.

Bala Bariha and others, Petitioners v. Kathu Bariha, Opposite Party.

Criminal Revn. No. 80 of 1967, D/- 14-7-1969, against order of Sub-Divisional Magistrate, D/- 27-9-1966.

HM/HM/D585/69/HGP/B

Penal Code (1860), Ss. 441, 447 — Intent to annoy etc., must be the aim of entry — Natural consequence of entry and knowledge of such consequence not sufficient — Dominant intention to assert possession — Assertion resulting in annoyance to complainant — Entry could not be said to be criminal trespass.

In order to establish that the entry of the accused on the complainant's property was with intent to annoy, intimidate or insult within the meaning of Ss. 441 and 447, Penal Code, it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry. It is not sufficient to show merely that the natural consequence of the entry was likely to be annoyance, etc. and that this likely consequence was known to the persons entering. In deciding whether the aim of the entry was the causing of such annoyance, etc. the Court has to consider all the relevant circumstances, including the presence of knowledge that its natural consequences would be such annoyance, and including also the probability of something else than the causing of such intimidation being the dominant intention which prompted the entry. AIR 1964 SC 986, Rel. on.

(Para 5)

Accused was serving as gomasta-jhankar under the complainant for 7 or 8 years and claimed to have been given the piece of land in question towards his remuneration; while the complainant said that he was giving five pudugs of paddy every year as remuneration. There was no clear finding whether the remuneration consisted of paddy, as alleged by the complainant, or the land had been given as asserted by the accused. In the circumstances, when all that the accused did was to plough the land and spread manure asserting that he had been in possession of that land in lieu of his wages, it will not be reasonable to conclude that the dominant intention of making the entry was to annoy the complainant. On the other hand, the dominant intention in all probability was to assert possession over the land. Merely because by such assertion annoyance resulted to the complainant, it could not be said that the trespass amounted to criminal trespass punishable u/s 447 I.P.C.

(Para 5)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 986 (V 51) =

1964 (2) Cri LJ 57, Smt. Mathri
v. State of Punjab

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P. V. B. Rao, for Petitioners; B. Naik,
for Opposite Party.

ORDER: Each of the petitioners has been convicted u/s 447 I. P. C. and sentenced to a fine of Rs. 20/-; in default, to undergo S. I. for one week.

2. The complainant's case, in brief, is that as ex-jhankar of village Srigida, he was all along in possession of the jhankar service lands situate in the village. For some time, he engaged petitioner no. 1 to work as gomasta-jhankar under him on payment of five pudugs of paddy per year as his wages. Subsequently, when petitioner no. 1 stopped working as gomasta, he stopped payment of his remuneration. On the date of occurrence, it is alleged that petitioner no. 1 along with his relations the other petitioners, trespassed into the disputed land which is a part of the jhankar lands in possession of the complainant, ploughed it and spread manure. Thereby they committed criminal trespass. The defence is that complainant had given the disputed land to petitioner no. 1, while he was working as gomasta-jhankar and he has been in possession of the same. Being in possession, he ploughed the land and spread manure and has been falsely implicated. The other petitioners are his relations whose assistance he took in performing the ploughing operations.

3. There is no dispute that the land in question is a part of the jhankar lands and that complainant is ex-jhankar. There is also no dispute that petitioner no. 1 for 7 or 8 years worked on gomasta-jhankar being engaged by the complainant. According to the complainant, for the service of petitioner no. 1, he had offered some land, but when the latter pleaded inability to cultivate, he gave him wages in the shape of five pudugs of paddy annually, while according to the defence, the land in question had been given to him and he was in possession of it as gomasta-jhankar. The learned Magistrate, on a consideration of the evidence, accepted the version of the complainant and convicted the petitioners.

4. Learned counsel for petitioners assails the conviction only on one ground. He contends that to sustain a conviction u/s 447 I. P. C., it is incumbent on the prosecution to prove, and for the court to give a finding that the accused committed trespass with one of the intents specified in section 441 I. P. C., i.e. intent to insult, annoy, intimidate or commit an offence.

In this case, all that has been proved by the complainant is that on the date of occurrence, petitioners ploughed the land and spread manure. Accepting the complainant's version that he was in possession of the disputed land, the learned Magistrate has observed that the action of petitioners in the circumstances has definitely caused annoyance to the complainant who was in possession of the jhankar lands. This being the finding of the learned Magistrate, it is argued by Mr. Rao, learned counsel for petitioners

It is thus apparent that "the last purchase by a dealer liable to pay tax under this Act" will be the purchase by the dealer who himself consumes it or sells it to a consumer or to a dealer in the course of inter-State trade or commerce so that as long as the goods remain with him in the condition he purchased them, he does not become liable to pay the tax. Every dealer will thus be able to know whether he is liable to pay the tax under the Act or not and the stage having been prescribed, no machinery is required to be prescribed to ascertain that stage."

5. Learned Counsel, therefore, submitted that this is the only way by which a single point levy can be validly imposed by a purchase tax or a sales tax on a declared goods. He also contended that Rule 8C which was introduced on 6-4-68 in the midst of the hearing of the case in order to cure the infirmities of Section 5A which is headed as "Determination of stage of levy of tax on purchases of declared goods" indicating the stage of purchase which will bear the levy, that is, the first purchase, has singularly failed to achieve the object inasmuch as Section 5A of the Bihar Act gives the nomenclature of 'seller' only i. e., non-registered and not that of the 'purchaser'. Therefore, he contended that the first purchase might be by a non-registered to non-registered and so on and registered dealer may intervene at the fifth stage. Thus the stage of first purchase set out in Rule 8C becomes redundant. If, according to Rule 8C, first purchase alone is to be taxed, then there may be a case in which the first purchaser is a non-registered dealer and if tax is levied on him, the said tax will be ultra vires. Further, he argued that it is well settled that under Entry 54 of list II of the second schedule to the Constitution, a State cannot levy Sales Tax on the goods which are sold to purchasers outside the State or on transactions of sales and purchases within the State which are in course of inter-State trade and commerce. He has referred to the following decisions on this point:

Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661 at 668; Ben Gorm Nilgiri Plantations Co-conoor (Nilgiris) etc. v. Sales Tax Officer, AIR 1964 SC 1752; Shankarjee Raut Gopaljee Raut v. State of Bihar, 1968 Pat LJR 241 = (AIR 1968 Pat 329); State of Madras v. A. Habibur Rahman & Sons, AIR 1968 SC 339; Shree Bajrang Jute Mills Ltd. v. State of Andhra Pradesh, AIR 1966 SC 376.

He submitted that the principle to be deduced from the above decisions is that where goods are sold by a Bihar seller to a purchaser outside Bihar who delivers

his goods outside Bihar, it is not a case of inter-State trade at all, but a case of outside sale altogether, and the State of Bihar will be incompetent to levy any tax on it. Where a seller enters into a contract with a purchaser to deliver goods outside Bihar, such as jute mills in West Bengal, and pursuant to that contract the purchaser purchases goods in Bihar and sends the goods to West Bengal, the sale and purchase in Bihar is occasioned by the prior contract of the purchaser to sell and deliver the goods in West Bengal and the transaction becomes a transaction in course of inter-State trade and commerce. He urged that if a contract of sale or purchase entered in Bihar occasions the transport of goods from Bihar to any place outside Bihar for delivery there, that will be a sale or purchase in course of inter-State trade and commerce.

He further submitted that if there is a completed sale or purchase in the State of Bihar and then the purchaser enters into a contract with outside purchasers for sale and delivery thereof, such a transaction will not become a sale or purchase in course of inter-State trade or commerce, and the first purchase will be liable either to sales tax or purchase tax, as the case may be.

Learned counsel has drawn our attention to Annexure H series to the supplementary affidavit dated 18-4-68, sworn by Komal Singh, Karpardaz, on behalf of the petitioners in C. W. J. C. 6 of 1968, and has contended that those clearly indicate contract entered into with the Jute mills in the West Bengal for supply of raw jute from Bihar to the jute mills in West Bengal and in pursuance of such contract the petitioners buy in Bihar raw jute and send the same to the jute mills in West Bengal. There is no counter-affidavit filed on behalf of the State regarding those contracts. All that is stated on behalf of the State is that the petitioners can get refund of any tax which may be levied on such inter-State transactions. According to learned Counsel, this is not enough. The question is not one of refund of wrong levy but of competence of the authorities concerned to demand or levy tax on inter-State sales or outside sales. Cases of outside sales are clearly given in C. W. J. C. 520 in which the petitioners have clearly stated that the goods were brought in Bihar and transported to Kishanganj for being despatched to West Bengal, Kishanganj being the only rail head of the jute growing areas both in West Bengal and in Bihar. In this connection he has referred to a decision of the Supreme Court in Tata Iron & Steel Co. Ltd. Bombay v. S. R. Sarkar, AIR 1961 SC 65 wherein their Lordships have observed that a citizen is entitled to chal-

lenge the demand for levy of sales tax on inter-State sales made by the State, and he cannot be asked to wait for the wrong levy and then go on exhausting his remedies under the Act to challenge the levy etc. He has also referred to a later decision in *Tata Engineering and Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Taxes*, AIR 1967 SC 1401 where their Lordships have held that where the assessee to a sales tax proceeding claimed exemption in respect of sales effected from their stock-yards in the various States, asserting that the goods in the stock-yards were still those of the assessee and that neither the property in them had passed to any one, nor had they been appropriated to contract of sale and the Assistant Commissioner of Sales Tax without giving an opportunity to the Assessee did not allow any exemption thereon and the Assessee having filed a writ petition in the High Court, which summarily dismissed the application, their Lordships observed that the High Court ought to have exercised jurisdiction in that case.

6. Learned counsel drew our attention to the application in C. W. J. C. 520 and submitted that the original order of the Sales Tax authorities given to the Railway authorities mentioned in Annexure D not to book any goods from Kishanganj to outside Bihar without the consignor's producing a sales tax registration certificate under the Bihar Act, will clearly amount to forcing the consignor to register himself as a registered dealer under the Act. In other words, the Sales Tax authorities were making it (registration) a condition precedent for allowing any citizen to consign goods from Bihar State to any place outside the State. According to him, this is clearly bad and has no authority under the law. No State can require a consignor whether he was sending goods in the course of inter-State sales or in fulfilment of outside sales, to register himself as a dealer. A dealer can be registered only in respect of sales in Bihar coming upto a required turnover, even for sales in Bihar, a man whose turnover does not come up to the statutory level, i. e. Rs. 15,000, cannot be required to register himself as a dealer. He further added that there cannot be a blanket order that every man who wants to send goods outside Bihar must register himself as a dealer under the Bihar Act to enable him to consign the goods. He laid emphasis that neither the Bihar Act provides for it, nor could it provide for it, as it will be clearly beyond the jurisdiction of the Bihar State Legislature to require all consignors, irrespective of their sales being inter-State or outside the State, to be registered as a dealer under the Bihar Act.

7. Further, he contended that the notification clearly impedes the movement of goods from Bihar to outside Bihar and unless it is authorised by a law as provided under Article 302 or Article 304 of the Constitution of India and passed in the public interest, such a restriction would be illegal.

8. He invited our attention to the fact that at the time when the applications were filed there was only the order on the Railway authorities not to book consignments of jute from Bihar to outside Bihar without the consignor being registered as a dealer under the Bihar Act. After the application in C. W. J. C. 520 was admitted, the State of Bihar by notification dated 26-12-67 introduced Rule 31B in the Bihar Rules under Section 46 of the Bihar Act. He urged that Rule 31B is clearly in conflict with Section 42 of the Act. Section 42 of the Act runs:—

"42. Restriction on movement — (1) No person shall transport from any railway station, steamer station, airport, post office or any other place, whether of similar nature or otherwise, notified in this behalf by State Government, any consignment of such goods, exceeding such quantity, as may be specified in the notification, except in accordance with such conditions as may be prescribed and such conditions shall be made with a view to ensuring that there is no evasion of tax payable under this Act.

(2) Any authority or officer who may be authorised by the State Government in this behalf, may, for the purpose of verifying whether any goods are being transported in contravention of the provision of sub-section (1) and subject to such restrictions as may be prescribed intercept, detain and search any road vehicle or river craft or any load carried by persons."

He has submitted that the provisions contained in the above section clearly indicate that it prohibits only a person transporting from any railway station, steamer station, airport, post office or any other place notified in this behalf by the State Government any consignment of such goods exceeding such quantity as may be prescribed in the notification itself, whereas rule 31B, according to him, purports to prohibit a person from tendering at any railway station, steamer station, airport, post office etc. unless the consignor has obtained a despatch permit as mentioned in the said Rule. He emphasised that prohibition against a person from transporting from a railway station etc. is quite different from prohibition against a person tendering the goods at the railway station etc. for despatch outside the State. He argued that Section 42 read with Rule 31 which is specifically

covered by Section 42, clearly shows that Section 42 was meant only against a person transporting goods etc. which have come to a railway station etc. from that railway station by the person who has received the goods himself, either by a vehicle or by a river craft or physically by persons. He further submits that the scope of Section 42 is also clear from clause (2) of the section, which authorises the authorities to verify whether the goods are being transported in contravention of Section 42 by intercepting detaining and searching any road vehicle or aircraft or any load carried by persons. The prohibition being against transport from the station by vehicles etc. the power of enforcement relates to the interception, detention and search of the vehicle etc. According to him, Section 42 does not give the power to search railways or to prevent the booking on the railways. Therefore, he submitted that Rule 31B is clearly outside Section 42, and has gone beyond the scope of the said section and is in conflict with it. Thus, the said rule is ultra vires of the Act itself. He has referred to relevant portion of Section 46 of the Act which gives power to make rules, which reads as follows:—

"46. Power to make rules — (1) The State Government may, subject to the condition of previous publication, make rules for —

(i) all matters expressly required or allowed by the Act to be prescribed and generally for carrying out the purpose of this Act and regulating the procedure to be followed, forms to be adopted and fees to be paid in connection with proceedings under this Act and all other matters ancillary or incidental thereto;

(ii) any other matter for which there is no provision or no sufficient provision is in the opinion of the State Government necessary for giving effect to the purposes of this Act."

He contended that the above provision of Section 46 only gives the power to make rules for matters specifically required or allowed by the Act to be prescribed and generally for carrying out the purpose of the Act. The restrictions provided by Rule 31B are not specifically provided by the Act, the specific prescriptions being under Section 42, only for the verification of the goods and the places. The general purposes of the Act cannot also provide for a ban on consignment of goods or prevent the booking on railways, for the Act nowhere discloses such a purpose, the Act being only to tax sales inside the State of Bihar. In fact Rule 31B cannot stand on Section 46 alone and, therefore, it takes the aid of Section 42 for the purpose of relating it to the goods and the station notified under Section 42.

9. He also drew our attention to an order made on 23rd of October, 1967 (vide No. STGL-AR-1017/67-1124-F.T.) mentioning the article 'Jute' and the quantity as 800 kgs., being the subject of restriction under Section 42 of the Act, which shows clearly that jute of the quantity of 800 kgs. required permit for transfer from notified stations by vehicles or by persons, but it did not prescribe permits to be required for despatching goods from notified stations. That is why Rule 31B takes the aid of this notification and tries to create a new restriction, not authorised by the Act, for putting a general ban on all consignments of jute of the required quantity from notified stations to any other place. This, according to him, is clearly contrary to the Act itself.

10. Learned counsel has advanced some more points for consideration in addition to his contentions which have been set out in paragraph 3 ante. He has urged that section 46(1)(ii) of the Act is ultra vires of the Legislature in abdicating its function. According to him, by giving wider power to the rule-making authorities by providing therein that the State Government may make rules for any other matter for which there is no provision or no sufficient provision which in the opinion of the State Government is necessary for giving effect to the purpose of this Act, amounts to abdicating the legislative function. He submitted that such powers cannot be enlarged by the Executive authorities. Powers have to be specifically mentioned by the Legislature, otherwise, it will be subject to attack on the ground of excessive delegation. In order to support his contention he has relied on a decision of the Supreme Court in *Devi Das Gopal Krishnan v. State of Punjab*, AIR 1967 SC 1895 where their Lordships while dealing with the subject on the delegated legislation have quoted with approval the observations made in *Vasanlal Maganbhai Sanjanwala v. State of Bombay*, AIR 1961 SC 4 at pp. 11-12 which read as follows:—

"The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its function in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An over-burdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy.

at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature."

He has further relied on another decision of the Supreme Court in *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 where their Lordships were dealing with Section 3(d) of the Drugs and Magic Remedies (Objectionable Advertisements) Act (1954). Their Lordships in that case observed that when the delegate is given the power of making rules and regulations in order to fill in the details to carry out and subserve the purposes of the legislation the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed, it is an exercise of delegated legislation. But when the legislation is complete in itself and the legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner of carrying it into effect, it is conditional legislation. Their Lordships further observed that the words "or any other disease or condition which may be specified in the Rules made under this Act" in section 3(d) of the Act are vague. They confer uncanalised and uncontrolled power to the executive. Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the schedule. The power of specifying diseases and conditions as given in Section 3 (d) was, therefore, held to be going beyond permissible boundaries of valid delegation. Accordingly their Lordships in paragraph 35 at page 368 held:—

"We are of the opinion therefore, that the words 'or any other disease or condition which may be specified in the rules made under this Act' confer uncanalised and uncontrolled power to the Executive and are therefore ultra vires"

11. He further submitted that clause(ii) of Section 46 (1) of the Act should be read along with sub-section (1) and the meaning of sub-clause (iii) should be restricted to the specific provisions contained in the Act. He contended that these two provisions contained in sub-clauses (i) and (ii) cannot be splitted in order to give sub-section (ii) substantive power or making substantive provisions of the Act. He urged that Section 46 of the Act cannot give rise to the powers contained under Section 42 of the Act. If Section 42 was not there they could not have introduced Rule 31B on the basis of Section 46 of the Act. But if we refer to the notification by which Rule 31B has been introduced, Section 46 of the Act is clearly mentioned therein. He added that Section 46(2) is also bad because it does not specify the goods which are to be subject of restriction or prohibition nor does it indicate the principles by which the goods can be selected for such prohibition. He also submitted that Section 42 of the Act is also bad on the same ground, namely, it does not specify the goods which are to be subject of restriction etc. According to him, these sections suffer from the defect of excessive delegation. He has also referred to a decision of the Supreme Court in *Hari Chand Sarda v. Mizo District Council*, AIR 1967 SC 829 where their Lordships were dealing with Section 3 of the Lushai Hills District (Trading by Non-Tribals) Regulation (2 of 1953) and the Rules 4, 5 and 7 made thereunder and Articles 14, 19(1)(g) and 19(6) of the Constitution of India and its Schedule 6 paragraph 10(2)(d). Their Lordships at page 834 observed:—

"...The Regulation contains no provisions on the basis of which an applicant would know what he has to satisfy in order to entitle him to a licence. The power to grant or not to grant is thus entirely unrestrained and unguided. The Regulation leaves a trader not only at the mercy of the committee but also without any remedy. Therefore even if the Sixth Schedule can be said to contain a policy and the Regulation may be said to have been enacted in pursuance of such a policy the analysis of the Regulation shows that that is not sufficient. Even if a statute lays down a policy it is conceivable that its implementation may be left in such an arbitrary manner that the statute providing for such implementation would amount to an unreasonable restriction. A provision which leaves an unbridled power to an authority cannot in any sense be characterised as reasonable. Section 3 of the Regulation is one such provision and is therefore liable to be struck down as violative of Art. 19(1)(g)."

12. He referred to Notification No. STGL-AR-1018/67-13361-F.T. dated 26-12-

67 under which an order was made both under Section 42 and Rule 31B prohibiting transport of jute of the quantity of 800 kgs. to any place outside the State of Bihar from the stations mentioned in that notification. The relevant part of the said notification reads as follows:—

"In exercise of the powers conferred by Section 42 of the Bihar Sales Tax Act, 1959 (Bihar Act XIX of 1959) read with Rule 31B of the Bihar Sales Tax Rules, 1959, the Governor of Bihar is pleased to notify that no person shall tender at any railway station mentioned in Schedule II, any consignment of goods mentioned in Schedule I, exceeding the quantity specified in the corresponding entry in the third column of the said schedule I, for transport to any place outside the State of Bihar and no person shall accept such tender except in accordance with the conditions prescribed in Rule 31B of the Bihar Sales Tax Rules, 1959."

He submitted that it is clearly an executive order restricting the movement of goods by putting a ban on the booking of jute of the required quantity from notified railway stations without any legislative authority. Under Article 304 of the Constitution, such legislative authority required prior approval of the President and also would have to satisfy the condition of "public interest". In order to support his contention he has relied on a decision of the Supreme Court in *Khyerbari Tea Co. Ltd. v. State of Assam*, AIR 1964 SC 925 at pp. 938-39 wherein their Lordships have laid down that it was for the State Government to discharge the onus of satisfying the condition that any restriction imposed by law was in public interest. He also referred to another decision of the Supreme Court in *Kalyani Stores v. State of Orissa*, AIR 1966 SC 1686 at p. 1691 wherein it was held that a levy of tax for fiscal purposes does not ipso facto amount to public interest, and if such tax levy contravenes Article 301 read with Article 304 of the Constitution of India, it must satisfy the condition of public interest.

It was also contended that although assent of the President for the Sales Tax Act, 1959 was obtained on 28-4-1959, further assent of the President will be required under proviso to Article 304 of the Constitution, as section 42 of the Act is now being used for completely new purpose. At the time when the said sanction was obtained, there was no purchase tax in contemplation. Therefore, the President while giving the sanction could not have applied his mind regarding the desirability of the purchase tax or from the point of view of public interest and reasonableness of the restriction imposed by Section 42 of the Act to the movements of goods

in order to prevent evasion of purchase tax. The sanction having not been freshly obtained, Rule 31B framed under Section 42 of the Act, for altogether new purpose, is invalid. On that account section 42 also is ultra vires. Rule 31B places complete embargo on the exit of goods, unless certain formalities are complied with. Reliance was placed on a decision of the Supreme Court in *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232 where Articles 301 and 304(b) of the Constitution came up for consideration, while testing the validity of Assam Taxation (on Goods carried by Roads or Inland Waterways) Act (13 of 1954). In this case majority view of their Lordships is that the provision contained in Article 301 guaranteeing the freedom of trade, commerce and intercourse is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character, it is not also a mere statement of a directive principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability, and progress of the political and cultural unity of the country. Their Lordships, further, observed that although the power of levying tax is essential for the very existence of the Government, its exercise must inevitably be controlled by the constitutional provisions made in that behalf. It cannot be said that the power of taxation, per se, is outside the purview of any constitutional limitations. Article 301 read in its proper context, and subject to the limitations prescribed by the other relevant Articles in part XIII, must be regarded as imposing a constitutional limitation on the legislative power of Parliament and the Legislatures of the States. Wherever it is held that Article 301 applies the legislative competence of the Legislature in question will have to be judged in the light of the relevant Articles of part XIII. Their Lordships further expressed their view that Article 301 applies not only to inter-State trade, commerce and intercourse, and their Lordships at page 255, paragraph 54, have held:—

"..... It is common ground that before the Bill was introduced or moved in the State Legislature the previous sanction of the President has not been obtained; nor has the said infirmity been cured by recourse to Art. 255 of the Constitution. Therefore we do not see how the validity of the tax can be sustained. In our opinion the High Court was in error in putting an unduly restricted meaning on the relevant words in Article 301. It is clear that in putting that narrow construction on Article 301 the High Court was partly, if not substantially, influenced by what it thought would be the in-

evitable consequence of a wider construction of Art. 301. As we have made it clear during the course of this judgment we do not propose to express any opinion as to the possible consequence of the view which we are taking in the present proceedings. We are dealing in the present case with an Act passed by the State Legislature which imposes a restriction in the form of taxation on the carriage or movement of goods, and we hold that such a restriction can be imposed by the State Legislature only if the relevant Act is passed in the manner prescribed by Art. 304(b)."

In my opinion, this case does not help the petitioners because their Lordships were not laying down the general principles of law, as their Lordships have made it clear that they did not propose to express any opinion as to the possible consequence of the view which they took in that case. Besides, Section 42 or Section 46 has not been amended. Had they been so amended fresh assent might have been required depending upon the nature of its amendment.

Further, reliance was placed on another decision of the Supreme Court in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, AIR 1962 SC 1406 where also Articles 301 and 304(b) came up for consideration, while testing the constitutional validity of Sections 4, 8 and 11 of the *Rajasthan Motor Vehicles Taxation Act (11 of 1951)* and their Lordships at page 1422 in paragraph 14 observed:—

"After carefully considering the arguments advanced before us we have come to the conclusion that the narrow interpretation canvassed for on behalf of the majority of the States cannot be accepted, namely, that the relevant articles in part XIII apply only to legislation in respect of the entries relating to trade and commerce in any of the lists of the Seventh Schedule. But we must advert here to one exception which we have already indicated in an earlier part of this judgment. Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Art. 301. They are excluded from the purview of the provisions of part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but facilitate them."

Their Lordships further held at page 1424 in paragraph 17:—

"We have, therefore, come to the conclusion that neither the widest interpretation nor the narrow interpretations canvassed before us are acceptable. The interpretation which was accepted by the

majority in the *Atiabari Tea Co. case*, (1961) 1 SCR 809 = (AIR 1961 SC 232) is correct, but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Art. 304(b) of the Constitution."

13. But, in my opinion, this case also does not help the petitioners because their Lordships have clearly observed that regulatory measures do not come within the purview of restriction contemplated by Article 301 and such measures need not comply with the requirements of the proviso of Article 304 (b) of the Constitution.

It was also urged that Rules 8C and 31B are bad because they are restrictions on trade, commerce and intercourse and hamper the flow of trade and in this connection reliance was placed on a decision of the Supreme Court in *Firm A. T. B. Mehtab Majid and Co. v. State of Madras*, AIR 1963 SC 928 where their Lordships were testing the validity of Sections 5(6) and 3(1) of the *Madras General Sales Tax Act (Act 9 of 1939)* and rule 16 made thereunder in the light of the provisions contained under Articles 301 and 304 (a) of the Constitution of India and their Lordships at page 931 in paragraph 10 observed:—

"It is therefore now well settled that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales Tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against Art. 301 and will be valid only if it comes within the terms of Art. 304(a)."

Reference was also made to another decision of the Supreme Court in *State of Madhya Pradesh v. Bhailal*, AIR 1964 SC 1006, where their Lordships were considering the validity of Sections 3 and 5(2) of the *Madhya Bharat Sales Tax Act (30 of 1950)* in the light of the provisions in Articles 301 and 304(a) of the Constitution and in their Lordships' view the sales tax imposed by the notification issued on 30-4-1950 and 28-5-1950 under Section 5(2) of the *Madhya Bharat Sales Tax Act* on tobacco leaves, manufactured tobacco (for eating, smoking and snuffing) and tobacco used for Bidi manufacturing payable at the point of sale by the

importer in Madhya Bharat directly impedes the freedom of trade and commerce guaranteed by Article 301 of the Constitution of India. Therefore, their Lordships at page 1010 in paragraph 13 held:—

"There can therefore be no escape from the conclusion that similar goods manufactured or produced in the State of Madhya Bharat have not been subjected to the tax which tobacco leaves, manufactured tobacco and tobacco used for Bidi manufacturing, imported from other States have to pay on sale by the importer. This tax is therefore not within the saving provisions of Art. 304(a). As already pointed out it contravenes the provisions of Art. 301 of the Constitution. The tax has therefore been rightly held by the High Court to be invalid. It is clear that the assessment of tax under these notifications was thus invalid in law."

Further reference was made to another decision of the Supreme Court in *A. Hajee Abdul Shukoor and Co. v. State of Madras*, AIR 1964 SC 1729 where their Lordships were dealing with Section 2(1) of the Madras General Sales Tax (Special Provisions) Act (11 of 1963) in relation to the provisions contained in Articles 301 and 304 of the Constitution of India where their Lordships at page 1735 in paragraph 36 have observed:—

"It has been argued for the State that the Act is not affected by the provisions of Arts. 301 to 304 of the Constitution as they affect the legislative power with respect to Acts to operate in the future and not the power to enact Acts which would operate in the past. We do not consider the contention sound. The Act makes provision for a period subsequent to the commencement of the Constitution and therefore is to be subject to the provisions of the Constitution."

Their Lordships further in paragraph 37 held:—

"We therefore hold that sub-section (1) of Section 2 of the Act discriminates against imported hides and skins which were sold up to the 1st of August 1957 upto which date the tax on sale of raw hides and hides and skins was at the rate of 3 pies per rupee or 19/16th per cent. This however does not mean that the sub-section is valid with respect to sales which took place subsequent to August 1, 1957. The sub-section being void in its provisions with respect to a certain initial period, we cannot change the provision with respect to the period as enacted to the period for which it could be valid as that would be rewriting the enactment. We have therefore to hold sub-section (1) of Section 2 void, and accordingly hold so."

14. Learned counsel, while summing up the arguments advanced on behalf of the petitioners in the four cases, pointed out that the petitioners have challenged the vires of (i) Sections 3A and 5A of the Bihar Act, (ii) Sections 42 and 46 of the Bihar Act, (iii) Rules 8C and 31B of the Bihar Rules, and (iv) the various orders and notifications made thereunder.

15. The learned Advocate General, appearing on behalf of the State of Bihar, respondent no. 1, on the other hand, contended that the Bihar Act is within the legislative competence of the Bihar Legislature, being a law made under Entry 54 of List II of the 7th Schedule of the Constitution of India, namely, "Taxes on the sale or purchase of goods etc." Therefore, he submitted that unless it contravenes some provisions of the Constitution or some paramount law, it cannot be invalid, however inartistically it may be complex.

16. He submitted that the petitioners have challenged sections 3A and 5A of the Act on the ground that they contravene Article 301 of the Constitution. According to him, the argument advanced on behalf of the petitioner was made on the footing mainly (i) that a law imposing tax on sale is, per se, an impediment in the way of movement, and (ii) because of the provisions of Section 42 and Rule 31B, which control movements of goods, the tax itself becomes an impediment. He has contended that the *Atiabari* case AIR 1961 SC 232 (supra) imposed a tax with reference to movement itself and the cases reported in AIR 1963 SC 928 (Supra) and AIR 1964 SC 1006 and AIR 1964 SC 1729 (Supra) were all cases of discriminatory taxes favouring one territory to the purchase of another territory. Therefore, these cases do not apply to the instant case, where no such discrimination is involved. He has further contended that a non-discriminatory tax on intra-State sales does not per se, offend Article 301 of the Constitution, unless it directly impedes the very movement or transport of the goods. He has relied on a recent decision of the Supreme Court in *Andhra Sugars Ltd. v. State of Andhra Pradesh*, AIR 1968 SC 599 at pp. 607-608 where their Lordships were testing the validity of Section 21 of the *Andhra Pradesh Sugar-cane (Regulation of Supply and Purchase) Act (45 of 1961)* in relation to Article 301 of the Constitution, and their Lordships observed that the tax levied under Section 21 did not discriminate against any imported cane. Under Section 21, the same rate of tax is levied on purchases of all cane required for use, consumption or sale in a factory. There is no discrimination between cane grown in the State and cane imported from out-

side. As a matter of fact, under the Act the factory can normally buy only cane grown in the factory zone. A non-discriminatory tax on goods does not offend Article 301, unless it directly impedes the free movement or transport of the goods. Normally a tax on sale of goods does not directly impede the free movement or transport of goods. Section 21 is not exception. It does not impede the free movement or transport of goods and is not violative of Article 301.

17. The learned Advocate General urged that under the Bihar Act the tax imposed by Sections 3A and 5A is similarly non-discriminatory. It places the burden uniformly on goods without reference to the territory or the source wherefrom they may be derived. The tax being a tax on intra-State sale is not with reference to movement, and does not otherwise impede movement. Section 42 and Rule 31B do not impede movement at all. Even assuming that they do so the tax is not conditioned by or with reference to movement. The tax burden does not impede movement. He has pointed out that Sections 3A and 5A were made at a different point of time than sections 42 and Rule 31B, and the former were quite independent of the latter. He further added that Sections 3A and 5A are completely independent and separate and they do not depend upon the existence of Section 42 and Rule 31B. He submitted that the burden of the tax arises immediately when a first purchase by the registered dealer takes place, which has been made abundantly clear in Rule 8C quoted earlier. The movement may or may not take place at all of such purchased goods. They may be consumed in the State itself, and if at all they are moved, that is an event distinct and separate from the purchase. Sections 3A and 5A are not attracted to a case where the purchase is connected with movement and where the movement is in pursuance of a contract of sale or purchase, when such transactions become inter-State sales, they are expressly excluded under the provisions of Sec. 4 of the Bihar Act. The relevant provisions of Section 4 read:—

"4. Exemption—(1) No tax shall be payable under this Act on sales or purchases of goods which have taken place.

(a) in the course of inter-State trade or commerce;

(b) outside the State;

(c) in the course of import of goods into, or export the goods out of the territory of India.

(2) The provisions of the Central Sales Tax Act, 1956 (LXXXIV of 1956) shall apply for determining when a sale or purchase of goods shall be deemed to have taken place in any of the ways mentioned in Clauses (a), (b) or (c) of sub-section (1).

xx xx xx xx"
Therefore, complete safeguard has been provided in the Act itself for the petitioners to get exemption from the tax when the authority is satisfied that it is a case of inter-State sale or purchase as contemplated in Section 4 of the Bihar Act. Sections 3A and 5A he urged, have no application to such inter-State sales. According to him, these two sections are attracted only to the transactions which are taxable as intra-State purchases, which are transactions distinct from the movement. The distinction between intra-State sale of goods which are moved later and the sales which are in the course of inter-State trade and commerce, he submitted, has been clearly brought out in the cases reported in AIR 1964 SC 1752 (Supra) and in (1968) Pat LJR 241=(AIR 1968 Pat 329) (FB). In substance their Lordships have observed that the main distinction is that where the purchased goods are transported across the State borders and such movement is by virtue of or by pursuance of the terms of the contract of sale or purchase, then such a sale or purchase, becomes an inter-State sale or purchase. While after goods have been purchased and possession has been completely delivered, the subsequent transportation of the goods by the purchaser himself, without any reference to any term or condition arising from the contract of sale or purchase, is an event distinct and unconnected with the transaction of the sale or purchase itself. In such cases, the sale is clearly inter-State sale and taxable under the State law. Their Lordships in the Full Bench decision in 1968 Pat LJR 241=(AIR 1968 Pat 329) (supra) have observed that all the three elements namely, (1) common intention of the parties to the transaction to export, (2) actual exportation and (3) obligation to export, must exist and be found to bring the case within the exemption of Article 286(1)(b). In the absence of the obligation on the part of the assessee to export the goods, it cannot be held that the goods were actually exported to Nepal in pursuance of the contract of sale between the parties. Mere proximity of time between the acts connected with the sale and the acts connected with the export of goods will not be decisive. Mere export of goods soon after purchase will not suffice to show in all cases that there was an obligation to export. Some further materials have to be produced to justify such irresistible conclusion.

Relying on the above observations, the learned Advocate General has contended that the transactions in the instant cases are intra-State and they are attracted under the provisions contained in Sections 3A and 5A. These sections operated

on the field of intra-State sales unconnected in point of law with the later movement. He submitted that it is not the purchase governed by Sections 3A and 5A which cause the movement. The purchase does not impede movement at all.

18. He also contended that the principles laid down by their Lordships of the Supreme Court in the case of *M/s. Bhawani Cotton Mills Ltd.*, AIR 1967 SC 1616 (supra) on which much reliance has been placed on behalf of the petitioners, are not applicable to the Bihar Act. Their Lordships were dealing with the Punjab Act and according to that Act it was impossible for the assessee at the end of every quarter or even at the close of the year, to know whether his purchases were taxable or not under that Act, inasmuch as the taxability of those purchases depended upon the future uncertain event, namely, whether he would be able to sell the commodity purchased by him within a period of six months from the close of the year or not. Further, the Punjab Act read with the rules and the forms, may compel a dealer to include in his returns and pay tax regarding purchases, which are non-taxable, in violation of Section 15(a) of the Central Act, which provides that the tax cannot be levied at more than one stage. There was no machinery by which a dealer can ascertain whether his vendor of the declared goods has paid the tax already. Under those circumstances, their Lordships struck down the orders of assessment made under the Punjab General Sales Tax Act, being inconsistent with Section 15(a) of the Central Sales Tax Act.

19. Learned Counsel, appearing for the petitioners, laid much stress upon the observations made by their Lordships in AIR 1967 SC 1616 (supra), particularly in paragraph 20, which have already been quoted earlier, to show that the Act or the Rules made thereunder, in order to be valid, must provide the following:—

(a) The machinery by which a dealer can ascertain whether his vendor of the declared goods has paid the tax already in order to avoid tax at more than one stage, and

(b) There should not be any scope for intervention of a non-registered dealer.

He contended that, however, these two provisions will not be required only in those cases, where there is a provision to levy the tax on the last purchaser and in this connection he has relied on the decision of the Supreme Court reported in (1968) 22 STC 365 (Punjab) (supra) where their Lordships observed at page 374.

"It is thus apparent that 'the last purchase' by a dealer liable to pay tax under this Act 'will be the purchase by the dealer who himself consumes it or sells

it to a consumer or to a dealer in the course of inter-state trade or commerce so that as long as the goods remain with him in the condition he purchased them, he does not become liable to pay the tax. Every dealer will thus be able to know whether he is liable to pay the tax under the Act or not and the stage having been prescribed, no machinery is required to be prescribed to ascertain that stages."

20. The learned Advocate General, however, contended with great force that the Bihar Act and the Rules made thereunder providing for levy of tax on the first purchase is valid. He submitted that the only thing which is required is that the stage at which the tax is to be levied either on purchase or on sale, should be definite and clearly indicated and that was the view of their Lordships both in the case of *Bhawani Cotton Mills Ltd.*, AIR 1967 SC 1616 as well as in the case of *Niamat Rai Milk Raj Ahuja*, (1968) 22 STC 365 (Punjab) (supra); and in these two cases the provisions for such levy contained in Andhra Pradesh, Madras, Mysore and Uttar Pradesh have been approved by their Lordships. He has drawn our attention to the provisions contained under the Madras General Sales Tax Act, 1959, where the tax is levied both in the case of cotton yarn as well as jute at the point of the first sale. Similarly in the case of Mysore Sales Tax Act, 1957, the tax levied on the jute is on the sale by the first or the earliest of the successive dealers. He developed his argument that under the Bihar Act, like Madras and Mysore Acts, the impact of the tax is unequivocally, definitely and clearly placed, at the point of the first purchase, made from a person other than a registered dealer. The first purchase by registered dealer is clearly and definitely made by the Act as the taxable event and no subsequent purchase of the same commodity is taxable under Sections 3, 3A, 5A, 6(3) and Rule 8C.

21. He further contended that the question of machinery does not involve by itself the contravention of any provision of the Constitution or the provision of any paramount law and cannot by itself be a ground for invalidity of the Act of a competent Legislature. The question of machinery, nevertheless, is a practical question, and that may be relevant in regard to the cotton industry in the Punjab with numerous mills and cottage industries in the context of taxing law under the Punjab Act, but the same would not be relevant to the jute industries with reference to the Bihar Act, because, in the Bihar Act as soon as a registered dealer makes his first purchase, he is bound to know that his purchase is taxable. He knows it and needs no investigation. In order to support his con-

tention he has relied on a recent unreported judgment of the Supreme Court decided on 29-10-1968 in Writ Petition No. 133 of 1968 (SC) and other analogous cases, *M. S. Rattan Lal & Co. v. The Assessing Authority*, where their Lordships were considering the Punjab General Sales Tax (Amendment and Validation) Act and the Punjab Sales Tax (Haryana Amendment & Validation) Act, 1967. In that judgment their Lordships have also referred to the case of *M/s Bhawani Cotton Mills Ltd.* AIR 1967 SC 1616 and have referred to the Act as it stood on April, 1, 1960. Their Lordships have mentioned that in the *Bhawani Cotton Mills* AIR 1967 SC 1616 case the provision for taxing purchases of cotton were challenged on the ground that there was a possibility of the tax being levied at more than one stage. The learned Advocate General has drawn our attention to the passage in the judgment, where their Lordships have observed that learned counsel had showed by way of contrast how the Madras, Mysore, Andhra Pradesh and Uttar Pradesh had avoided such consequences. In the case which the learned Advocate General has referred, the amending Acts had removed the defects which were pointed out in the *Bhawani Cotton Mills* case AIR 1967 SC 1616. However, these amendments were again challenged on the same line. The amendments clearly provided that in respect of declared goods tax shall be levied at one stage and that stage will be, in the case of the goods liable to sales tax, the stage of sale of such goods by the last dealer liable to pay the tax under the Act. There was further a provision, in the case of the goods liable to purchase tax, of the stage of purchase of such goods by the last dealer liable to pay tax under the Act. In that case it was further argued that the amendments had been made retrospective but no machinery was provided to enable the dealer to discover that the goods had been taxed before, and the single stage at which tax was to be levied was still not clearly discernible. Their Lordships observed:—

"It will be seen that the matter is now in the hands of the dealer. He has to find out for himself whether he is liable to pay the tax or not. A dealer knows what he has done with his goods or is going to do with them. If he knows that he is not the last dealer having parted with the goods to another dealer or he knows that he is going to use the goods or sell them to consumers he knows when he is not liable to tax and when is. Therefore he will not include the transaction in his taxable turnover in the first case but include it in the second. Goods in the hands of a dealer are not taxed. They are only taxed on the last purchase or sale. This information is always pos-

sessed by a dealer and by providing that he need not include in his turnover any transaction except when he is the last dealer the position is now clear. It is contended that even so the dealer may not know that he is the last dealer and may make some mistakes. The law does not take into account actions of persons who are negligent or mistaken, but only of persons who act correctly according to Law. If the dealer is clear about his own position he is now quite able to see whether he is the last purchaser liable to pay the tax or the seller liable to pay the tax. The Act by specifying the stage as the last purchase or sale by a dealer liable an option to him not to include such transactions in his return saves him from the liability to pay the tax till he is the dealer liable to pay the tax. In our opinion therefore the present provisions of the Act are quite clear and are quite sufficient to make the amended Act accord with the Central Act. The arguments noted in the earlier case of this Court do not therefore arise."

The learned Advocate General has submitted that in regard to a scheme of taxation where the last sale is sought to be taxed, possibly some machinery might be needed as their Lordships of the Supreme Court in AIR 1968 SC 194=21 STC 1 while dealing with sections 3 and 4 of the Madras General Sales Tax Act (1 of 1959) and its Schedule II, Item 2, in relation to Section 15 of the Central Sales Tax Act (1956) observed that Sections 3 and 4 speak of a financial year, and it is the turnover during that year that is liable to taxation in the hands of the assessee, but Section 4 has to be read with the second schedule, and reading Section 4 with the second schedule, it is clear that a dealer is not liable to pay a tax on the purchases until the purchases acquire the quality of being the last purchases inside the State. When dealer files a return and declares the stock in hand, the stock in hand cannot be said to have been acquired by last purchase, because he may still during the next assessment year sell it or he may consume it himself or the goods may be destroyed, etc. He would be entitled to claim before the assessing authorities, that the character of acquisition of the stock in hand was undetermined; in the light of subsequent events it may or may not become the last purchase inside the State. Their Lordships further observed that this construction is in consonance with Section 15 of the Central Act. Otherwise it would mean that the States could with impunity levy purchase tax on declared goods at more than one stage, i. e., on purchases in the hands of one dealer during one assessment year and purchases of the same

goods in the hands of another dealer in a subsequent assessment year, and so on.

He contended that as regards the Bihar Act, which provides for the taxation of the very first sale or purchase by a registered dealer no machinery is required because the tax is unequivocal and definite. There is no uncertainty about it. As soon as a registered dealer makes his first purchase, he is bound to know that his purchase is taxable. He knows it and needs no investigation.

22. As regards the contention which was raised on behalf of the petitioners regarding the intervention of a non-registered dealer in the transaction by illustrating that the first purchase may be by a non-registered dealer or that the registered dealer may sell to another small dealer with an annual business of less than Rs. 15,000 and a registered dealer making the purchase from that un-registered dealer, the learned Advocate General urged that these submissions on behalf of the petitioners are purely hypothetical, and do not reflect the course of business in the jute industries as indicated in the various writ applications. Moreover, he stressed that all the necessary records are statutorily to be maintained by the dealers, and the slightest enquiry would easily reveal to every purchaser all the necessary information required. He has referred to paragraph 4 of the supplementary counter-affidavit filed on behalf of the State on 25-10-68 in C. W. J. C. 6, which reads as follows:—

"That I say that the normal trade channels are as follows:

The growers generally sell to the small dealers known as 'Farias' and sometimes direct to the registered dealer.

In all there are about 250 registered dealers and approximately about 800 'Farias'.

A group of growers and 'Farias' have normally settled trade relations with a group of registered dealers.

Thus people engaged in the trade are generally known to each other and the course of dealings are also channelled and known. The growers, evidently never purchase the commodity and the 'Farias' are small traders and they are unregistered because the total volume of their transactions does not reach Rs. 15000 a year. The registered dealers purchasing in small quantities sell in bulk and no un-registered small dealer does actually purchase from these registered dealers. They in their turn sell either directly or to the agents of Mills situated either in Bihar or outside Bihar. The account of trade relations and trade channels given in paragraphs 6 to 11 of the affidavit is incorrect and misleading. It is evident,

therefore, that there is hardly room for ignorance or doubt as to whether the commodity which any purchaser would acquire has or has not paid the tax."

In this connection the learned Advocate General referred to the observations made by their Lordships of the Supreme Court in the aforesaid writ petition No. 133 of 1968 (SC) quoted earlier, where their Lordships held that the dealer has to find out for himself whether he is liable to pay the tax or not, that the law does not take into account actions of persons who are negligent or mistaken, but only of persons who act according to law.

23. It was also urged on behalf of the petitioners that they have mentioned specifically that their transactions are all inter-State transactions and they fall under exemption and no tax can be levied on such transactions. The learned Advocate General has urged that these allegations of fact have been explicitly denied in the counter-affidavit filed on behalf of the State of Bihar. Besides, the question whether a particular transaction is or is not exempt by virtue of Section 4 of the Bihar Act is not a question of the validity of law, but it is purely the investigation of facts concerning individual transaction, and for their investigation machinery is provided in the Act. These matters cannot be investigated in the writ applications, particularly when the facts alleged by the petitioners have been disputed. The question whether a transaction is an inter-State transaction or not has got to be tested in the light of the observations made by their Lordships in 1968 Pat LJR 241=(AIR 1968 Pat 329) (supra).

24. In view of the discussions and observations made above, I am inclined to accept the contentions of the learned Advocate General. In my view, the provisions contained under Sections 3A and 5A of the Bihar Act do not contravene Section 15 of the Central Act nor they are violative of Article 301 of the Constitution of India.

25. The next question is with regard to the validity of Sections 42 and 46 and Rules 31B and 8C. The learned Advocate General has contended that Section 42 by itself is inchoate, and has got to be read with one or other of the relevant rules which have been made under Section 46 of the Bihar Act which confers upon the State Government the power to make rules. Rules are delegated legislation. In this connection he has relied on a decision of the Supreme Court in State of Uttar Pradesh v. Babu Ram Upadhyay, AIR 1961 SC 751 where their Lordships while dealing with the Police Act and the Regulations observed in paragraph 23 at pages 761-762:—

"What then is the effect of the said proposition in their application to the provisions of the Police Act and the rules made thereunder? The Police Act of 1861 continues to be good law under the Constitution. Paragraph 477 of the Police Regulations shows that the rules in chapter XXXII thereof have been framed under Section 7 of the Police Act. Presumably, they were also made by the Government in exercise of its power under Section 46(2) of the Police Act. Under para. 479(a) the Governor's power of punishment with reference to all officers is preserved; that is to say, this provision expressly saves the power of the Governor under Art. 310 of the Constitution.

'Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act, and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation. See Maxwell 'on the Interpretation of Statutes' 10th Edn., pp. 50-51. The statutory rules cannot be described as, or equated with, administrative directions. If so, the Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of Police officers and prescribing the procedure for their removal. It follows that where the appropriate authority takes disciplinary action under the Police Act or the rules made thereunder, it must conform to the provisions of the statute or the rules which have conferred upon it the power to take the said action. If there is any violation of the said provisions subject to the question which we will presently consider whether the rules are directory or mandatory, the public servant would have a right to challenge the decision of that authority."

He submitted that the entire argument advanced on behalf of the petitioners is built on the assumption that Section 42 and Rule 31B have the effect of completely prohibiting transport or at least they make transportation of goods dependent on permit granted by the authority in their absolute discretion. He urged that the assumption, however, is entirely erroneous. Neither Section 42 nor Rules 31B and 8C require that the person who intends to transport goods should be registered as a dealer. The only requirement is that such a person shall obtain a permit before attempting to transport. According to him, Rule 31B clearly provides that once the authority is satisfied about the particulars furnished, it shall sign copies of the applications and prepare a permit and shall return to the applicant true copies of the application along with the permit. The rule, therefore, does not forbid transportation nor

does it require that the person intending to transport shall get himself registered as a dealer. The rule does not vest any discretion in the authority. Once the particulars are properly filled up the authority shall be bound to grant a permit. His only jurisdiction is to scrutinise the application, and the particulars which are mentioned in the application. He emphasised that such a rule does not substantially impede movement. According to him, such a measure is absolutely necessary to prevent the evasion of the tax law and he has referred to paragraph 10 of the counter-affidavit dated 2-11-67 filed on behalf of the State in C. W. J. C. 520 which reads:—

"10. That with reference to paragraph 8 of the petition I say that the deponent came to know on confidential enquiry that in order to evade payment of purchase tax on jute, the dealers liable to tax under the provisions of Bihar Sales Tax Act, 1959, were booking jute in the names of fictitious persons with a view to conceal their transactions and thus evade payment of tax leviable under the provisions of the Act. The deponent, therefore, wrote the letter in question making the request mentioned in the letter. Subsequently the request was modified by requesting the authorities to book jute even when a certificate from Jute Merchants' Association was produced to the effect that the consignor was carrying on business in jute."

Therefore, he submitted that particulars required for obtaining permit as provided in Rule 31B were necessary in order to find out whether there was benami transaction or not, or whether the transaction was meant for evading the tax. These are the only purposes for requiring the petitioners to obtain permit. These provisions are no more than the provisions in the nature of the check-post. It is purely a reasonable measure for regulating purpose. In order to support his contention he has relied on a decision of the Supreme Court on which reliance was also placed by the petitioners in AIR 1962 SC 1406 (supra) where their Lordships were dealing with the Constitutional validity of Sections 4, 8 and 11 of Rajasthan Motor Vehicles Taxation Act (11 of 1951) in relation to Articles 301 and 304(b) of the Constitution of India and their Lordships observed that the taxes imposed upon the Rajasthan Motor Vehicles Taxation Act are compensatory taxes which do not hinder the freedom of trade, commerce and intercourse assured by Article 301. They further observed that regulatory measure or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated

by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution.

In my opinion, the contentions of the learned Advocate General are well grounded. These provisions are purely regulatory measures and they are valid. These rules have been introduced simply for plugging the various loopholes for evasion of tax. These are not meant for levying any tax on inter-State transactions or for impeding genuine inter-State transactions. As indicated above Section 4 of the Bihar Act is sufficient safeguard for it. Besides, Section 15(b) of the Central Act clearly provides that where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in course of inter-State trade or commerce, the tax so levied shall be refunded to such persons in such manner and subject to such conditions as may be provided in any law in force in that State. Judging from all aspects, in my view, no prejudice is caused to the petitioners and the rules framed under Sections 42 and 46 of the Bihar Act are reasonable, valid and legal.

26. It may be recalled that it was also vehemently argued on behalf of the petitioners that there is an excessive delegation of its essential legislative functions provided in Sections 42 and 46 of the Bihar Act. It is said that these sections do not define the goods in respect of which the section is to operate or the principles with reference to which the goods can be selected. Much stress was laid upon the meaning of the expression "no person shall transport from any railway station . . ." occurring in Section 42 of the Act and on the expression "no person shall tender at the railway station." occurring in Rule 31B. Learned Counsel on behalf of the petitioners urged that the word "transport" in Section 42 means only for incoming goods from the railway station etc. According to him, if the goods from railway station is brought outside the railway station, rules can be made for ensuring evasion of tax. Section 42, in his opinion, did not provide for prohibiting tendering or booking goods from a particular railway station to other place; whereas Rule 31B by using the words "tender at the railway station" has completely prohibited the booking of the goods to be transported from one railway station to the other and thereby Rule 31B has exceeded the scope and the power, which it derived from Section 42. In my opinion, the word "transport" used in Section 42 means both incoming and outgoing and I am not inclined to give narrow construction to the word. Besides Section 46(1)(ii) by which the rules mak-

ing power is derived, is wide enough to include such a rule which specifically provides:—

"any other matter for which there is no provision or no sufficient provision is in the opinion of the State Govt. necessary for giving effect to the purposes of this Act."

As regards this, learned counsel for the petitioners has contended that it clearly amounts to excessive delegation and surrendering of legislative power. In my view, these arguments on behalf of the petitioners cannot be accepted. Section 42 in the very nature of the things could not limit the process of scrutiny to specified goods. All goods which are subject to tax need scrutiny, and the problem of evasion is common to all of them. Unless all goods are checked up, and scrutinised it would not be possible to prevent evasion. With that object in view, in my opinion, it was necessary to give such power under Section 46(1) (ii) of the Act in order to give effect to the purposes of the Bihar Act. Otherwise rules could not have been made in order to secure evasion. In my view, this has uniformly been the legislative practice for giving such guidance, while granting rule making power for carrying out the purposes of the Act and the matters ancillary and incidental thereto. It will be pertinent to refer to a decision of the Supreme Court in AIR 1964 SC 925 where their Lordships were considering the validity of Section 3 of the Assam Taxation (on goods carried by road or on Inland Waterways) Act (10 of 1961). Their Lordships at page 935 in paragraph 19 observed:—

"This argument of legislative incompetence seems to assume that Entry 56 requires that the tax must be levied by the State Legislature on goods which are carried only against the owner of the goods that are carried or against the persons who carry them. We do not see any justification for introducing such limitations in the said Entry. It is hardly necessary to emphasise that Entries in three Lists in the Seventh Schedule which confer legislative competence on the respective Legislatures to deal with the topics covered by them must receive the widest possible interpretation; and so it would be unreasonable to read in the Entry any limitation of the kind which Mr. Pathak's argument seems to postulate. Besides, it is well settled that when a power is conferred on the Legislature to levy a tax, that power itself must be widely construed; it must include the power to impose a tax and select the articles or commodities for the exercise of such power; it must likewise include the power to fix the rate and prescribe the machinery for the recovery of the tax. This power also

gives jurisdiction to the Legislature to make such provisions as, in its opinion, would be necessary to prevent the evasion of the tax. In imposing taxes, the legislature can also appoint authorities for open to the legislature to prescribe the procedure for determining the amount of taxes payable by any individual; all these provisions are subsidiary to the main power to levy a tax and, therefore, once it is shown that the tax in question has been levied on goods carried, it would be open to the legislature to prescribe the machinery for recovering the said tax
.....

Similar view was taken in *Caltex (India) Ltd., Calcutta v. Presiding Officer, Labour Court, Patna*, AIR 1966 SC 1729, where their Lordships were considering the validity of Section 26(1) of the Bihar Shops and Establishments Act (Act 8 of 1954) and their Lordships in paragraph 4 at page 1730 held:—

"We are of opinion that there is no substance in this contention. Under Section 40 of the Act, the State Government has been given the power to make rules to carry out the purposes of the Act. Clause (c) of Section 40(2) specifically empowers the State Government to frame rules to provide for the nature of misconduct of an employee for which his services may be dispensed with without notice. By virtue of that power, the State Government framed Rule 20(1) which specifies as many as 11 acts which are to be treated as misconduct on proof of which no notice as required by Section 26 (1) would be necessary."

In view of the above observations, in my opinion, there is no merit in the contentions of learned counsel for the petitioners.

27. Now I turn to the last contention made on behalf of the petitioners that fresh assent of the President will be required under proviso to Article 304 of the Constitution, as Sections 42 and 46 of the Bihar Act are being used for completely new purpose. For that reliance was placed on the decisions reported in AIR 1961 SC 232 at p. 255 (supra) and AIR 1962 SC 1406 at p. 1422 (supra) about which I have already expressed my view that these cases do not help the petitioner, because in the latter case their Lordships have clearly expressed that regulatory measures do not come within the purview of restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution. I have already held earlier that in the instant case all these measures are regulatory in nature. Besides, Sections 42 and 46 have not been amended. Had they been so amended fresh assent might have been

required depending upon the nature of its amendment. Besides in the other cases relied on by the petitioners their Lordships have not laid down the general principle of law as their Lordships have made it clear that they do not propose to express any opinion as to the possible consequence of the view which they took in that case. Further Sections 3A and 5A of the Bihar Act in themselves do not require assent, because I have already held that they do not contravene Art. 301 of the Constitution. Besides, it is admitted case of the parties that the President had already given assent for the Sales Tax Act, 1959 on 24-4-1959. In my view that assent still continues to hold good. Therefore, I am not impressed with this contention also which has been raised on behalf of the petitioners. Yet this may also be examined from another aspect.

It has been contended on behalf of the State by the learned Advocate General that the problem of evasion of the tax law, and the need to prevent evasion are not necessarily related to Sections 3A and 5A imposing purchase tax. Even if those sections were to be repealed, the problem would still be there with reference to tax and sales. Assuming that instead of imposing the purchase tax a sales tax, as provided in the original Act, was levied on jute, the problem of evasion would still be the same problem. The fact that the law has shifted the burden of the tax from the seller to the purchaser makes no difference to the problem. This shifting has not made the least difference to Sections 42 and 46 under which Rule 31B has been made. In that view of the matter Section 42 or Section 46 has not altered qualitatively, nor they have imposed a larger burden quantitatively. The very purpose of a check or a check-post is to sift and separate the movements of goods, which are in accordance with law from those which are in contravention of a law. How is it possible to know as to whether an attempted transaction is in accordance with law or is in contravention of law? It is really the process of check, which discovers and separates the goods, which are in accordance with law, from those which are in contravention of law.

28. The contention of the learned Advocate General is well founded and has got to be accepted. Therefore, the contention regarding the assent of the President raised on behalf of the petitioners also fails.

29. Having due regard to the various matters mentioned above, in conclusion, I am satisfied that there is no merit in the contentions raised on behalf of the petitioners. If on scrutiny, the authorities are satisfied that the transactions in reality relate to inter-State transactions,

certainly they will grant permit. If on the returns filed by the petitioners, taxes are imposed even in the case of inter-State transactions, the petitioners have adequate remedy to take appropriate steps provided in the Act itself. Before having taken such steps the petitioners' grievances cannot be met by this court in writ jurisdiction, particularly when the facts are controverted by the respondent. Besides, under Section 15(b) of the Central Act the tax imposed on inter-State transactions if so levied, shall be refunded to the petitioners. Therefore, no substantial prejudice is caused to the petitioners by the impugned orders and notifications.

30. In the result, all the four applications are dismissed with costs of Rs. 200 to be paid in each case to the State of Bihar, respondent no. 1.

31. MISRA, C. J. :— I agree.
Petitions dismissed.

AIR 1970 PATNA 79 (V 57 C 9)

S. C. MISRA C. J. AND
B. D. SINGH, J.

Dr. Vijay Narayan Singh, Petitioner v. Vice Chancellor, Patna University and others, Respondents.

Civil Writ Jurisdiction Case No. 512 of 1968, D/- 12-2-1969.

(A) Education — Patna University Act, 1951 (Bihar Act 25 of 1951), S. 10(12) — Resolution of the syndicate of University — Vice-Chancellor has power to write to Government for concurrence, if in his opinion resolution is not in accordance with provisions of Act.

(Para 7)

(B) Constitution of India, Article 226 — Patna University Act (25 of 1951), Section 9(4) — Alternative remedy, under — Petitioner, a Principal of Medical College and Professor of Surgery — Letter received by petitioner from Registrar of University under direction of Vice-Chancellor requiring him to hand over charge — Even after protest made by petitioner to Vice-Chancellor the latter insisted upon compliance of order — Held, there was no alternative remedy left to petitioner than to file writ application—Decision by the Vice-Chancellor might have taken longer time and meanwhile prejudice might have been caused to him.

(Para 7)

(C) Constitution of India, Article 226 — Petitioner a Principal of Medical College & Professor of Surgery — Resolution of University Syndicate to re-employ him until age of 62 years on his superannuation from Health Service of State on attaining age of 58 years — University requiring him to handover

charge — Writ petition — Prayer for injunction refused — Fact that charge from the petitioner had been taken will not make petition infructuous — If order of Syndicate re-employing petitioner is held valid, order directing to hand over charge to petitioner can be passed by High Court.

(Para 14)

(D) Education — Patna University Act, 1961 (Bihar Act 3 of 1962), Ss. 52, 2(g) and (4) — Patna University Act (25 of 1951), S. 50—Head of 'University Department' and 'University Professor' meaning of — Distinction — Petitioner appointed as Principal of Medical College and Professor of Clinical Surgery and Head of University Department — Expression 'Head of Department' does not mean also 'University Professor' — Head of Department need not be a University Professor — Held, on facts, and circumstances that the resolution of syndicate of University re-employing petitioner as Professor of Surgery and Principal of Medical College until age of 62 years on his superannuation from Health service of Government on attaining age of 58 years without concurrence of State Government was invalid — Since it was not established that he was appointed as a University Professor, provisions of S. 52 were attracted — Government's approval for his re-employment was necessary — Language used in S. 52 of 1962 Act and S. 50 of 1951 are more or less identical. (Paras 9, 18, 25)

Balbhadar Prasad Singh, Nagendra Prasad Singh, Umesh Prasad Singh and G. P. Shahi, for Petitioner; K. P. Varma and Tara Kant Jha, for the State; B. C. Ghose and Ramananda Sinha, for Vice Chancellor; Basudeva Prasad and Ramananda Sinha, for the University; B. K. Banerji and S. N. Misra, for Dr. G. Achari; J. C. Sinha, Karuna Nidhan Keshava and Devendra Prasad Sinha, for Dr. R. V. P. Sinha.

B. D. SINGH, J. :— This application has been filed under Art. 226 of the Constitution of India for quashing and cancellation of Letter No. 921/R, dated 10-7-68 (Annexure 1 to the writ application) received by the petitioner from the Registrar of the Patna University (Respondent No. 3) under the direction of the Vice-Chancellor of the said University (respondent no. 1) requiring the petitioner to hand over charge of the office of the Principal, Prince of Wales Medical College, to Dr. G. Achari, Professor and Head of the Department of Pharmacology, Patna University (respondent no. 4) and to hand over his office of Professor of Surgery No. I to Dr. R. V. P. Sinha who was then Professor of Surgery No. II (respondent no. 5). The petitioner had further prayed for an order of interim injunction restraining the respondent Vice-Chancel-

lor and the respondent Registrar, or either of them, from interfering, or in any way intermeddling with the discharge of his duties by the petitioner as the University Professor of Surgery and Principal of the Prince of Wales Medical College. The said letter was based on another letter dated the 6th July, 1968, from the Secretary, Health Department, addressed to the Chancellor, Patna University in reply to the Vice-Chancellor's letter No. 837, dated 13-6-68 informing him that the Government after due consideration have decided that Dr. Vijoy Narain Singh will not be re-employed in Government service after his retirement on 14-7-68 in the forenoon. The Vice Chancellor was further directed to take action accordingly (Vide enclosure to Annexure 1).

2. The facts which have given rise to the letters referred to above may briefly be summarised as follows:—

The petitioner is a Fellow of the Royal College of Surgeons (England) and had been in the Medical Service of the Provincial Government and of its successor, the State of Bihar (respondent no. 6), under whose authority the Medical service was recently re-organised and constituted and named as the Bihar Medical Health Service. The then Provincial Government used to depute its officers under the Medical Service for teaching jobs at the Prince of Wales Medical College maintained and run by the Government and affiliated to the Patna University constituted under the Patna University Act of 1917. The petitioner was appointed Professor of Clinical Surgery of the Prince of Wales Medical College by the State Government in the year 1947. On the repeal of the Patna University Act of 1917 and its re-enactment as the Patna University Act, 1951 (Bihar Act XXV of 1951) (hereinafter referred to as 'the Act') and on the re-constitution of the Patna University, the said Prince of Wales Medical College, along with some other colleges specified under Section 51 of the Act, was transferred to the control of the Patna University constituted under the Act. Consequential to the transference of the said college the University was enjoined under Section 52 of the Act to employ, on such terms as may be determined by the State Government, all members of the teaching staff and other servants of the State Government employed in the Colleges transferred to the University under sub-section (1) of Section 51 of the Act, who, immediately before the commencement of the Act, were serving in, or were attached to the colleges. The services of the petitioner were transferred to the Patna University in January, 1952. According to the petitioner, he was appointed as Professor of Surgery and the Head of the University

Department in 1958. Further since 1961 he was also working as the Principal of the Prince of Wales Medical College. On the 15th July, 1968, the petitioner, on attaining the age of 58 years, was to retire on his superannuation from the Health Service of the respondent State.

3. On the 31st of May, 1968, the Members of the Syndicate of the Patna University in its ordinary meeting held on the 31st of May, 1968, considered the question of re-appointment of the petitioner until the age of 62 years on his superannuation from the Government service after attaining the age of 58 years. The relevant portion of the resolution reads as follows:—

"Resolved that Dr. V. N. Singh, Professor of Surgery and Principal, Prince of Wales Medical College, who is due to superannuate from Government service on attaining the age of 58 years with effect from 14-7-1968, be re-employed in the University Service until he attains the age of 62 years subject to concurrence of the State Government." (Vide Annexure 2)

By another ordinary meeting held on the 10th of June, 1968 the Members of the Syndicate of the University deleted the last portion of the above resolution, namely, "subject to concurrence of the State Government" (vide Annexure 2/A).

4. According to the opinion of the Vice Chancellor the resolution dated the 10th of June, 1968, was not valid and in his opinion it was necessary to obtain the concurrence of the State Government. Therefore, he wrote letter No. 837, dated 13-6-68 to the Government for concurrence. In reply to his letter he received the aforesaid letter dated the 6th July, 1968 intimating that the Government had decided not to re-employ Dr. Vijoy Narain Singh in the Government service after his retirement. After the receipt of the said letter the Vice-Chancellor directed the Registrar to send the letter dated 10-7-68 (Annexure 1) to the petitioner. The petitioner after receipt of the letter contained in Annexure 1, wrote a letter dated 13-7-68 to the Vice-Chancellor protesting against the direction contained in the said letter and requesting him to act in accordance with the decision of the Syndicate re-employing the petitioner against the posts held by him (vide Annexure 11). But the Vice-Chancellor insisted upon the compliance of the directions contained in Annexure 1. Hence this writ application was filed by the petitioner, which was admitted on 16-7-68 but the prayer for the stay or issue of injunction was refused.

5. The main points which fall for consideration in this case are:

(i) Whether the resolution of the Syndicate for the re-employment of the petitioner as Professor of Surgery and Principal, Prince of Wales Medical College in the University Service until he attains the age of 62 years without concurrence of the State Government is valid.

(ii) Whether the Vice-Chancellor was under a duty to give effect to the orders of the Syndicate regarding the appointment of the petitioner?

(iii) Whether internal remedy was available to the petitioner?

(iv) If in the absence of the Government's approval the petitioner would not be able to teach in the hospital clinical subjects in surgery, is he entitled to claim re-employment as a Professor of Surgery alone in the University Department as per resolution of the Syndicate?

6. First I will take up for consideration the points nos. (ii) and (iii) together. Mr. Balbhadra Prasad Singh, learned counsel appearing on behalf of the petitioner has contended that the Syndicate is the Chief Executive Body of the University and it has powers to appoint officers and teachers of the University and the Vice-Chancellor, according to him, was under a duty to give effect to the orders of the Syndicate regarding the appointment of the petitioner. After the said resolution was passed by the Syndicate, according to him, it was irregular for him to have written to the Government for its approval or concurrence. Learned Counsel in order to support his contention has referred to the various provisions of the Patna University Act and has drawn our attention that the said Act was repealed by the Bihar State Universities (University of Bihar, Bhagalpur and Ranchi) Act, 1960 (Bihar Act XIV of 1960) which in its turn in so far as it was applicable to the Patna University established under it, was repealed by Patna University Act, 1961 (Bihar Act III of 1962). In short, so far this case is concerned, only the two Acts, namely 1951 Act and 1962 Act, are relevant. The terms appearing in the 1951 Act substantially bear the same meaning in the definition section as in the 1962 Act. Learned Counsel has referred to Section 20 of the 1962 Act which provides that the Syndicate shall be the executive body of the University. He has also referred to Section 21 of the Act which provides the power and the duties of the Syndicate and clause (e) of the said section gives power to the Syndicate to appoint teachers of the University. According to him, the petitioner was rightly appointed by the Syndicate under the said provision. Then he has drawn our attention to Section 10, Clause 10, of the Act which provides that the Vice-Chancellor shall give effect to the orders of the

Syndicate regarding the appointment etc. Learned Counsel has, therefore, submitted that the Vice-Chancellor had no jurisdiction or power after the said order of the Syndicate to write to the Government for its approval contrary to the second resolution of the Syndicate.

7. On the other hand, Mr. B. C. Ghose, learned counsel appearing on behalf of the Vice-Chancellor has urged that the Vice-Chancellor has overriding power under Section 10, Clause 12 of the Act which reads to this effect:—

"It shall be the duty of the Vice-Chancellor to see that the proceedings of the University are carried on in accordance with the provisions of this Act, the Statutes, the Ordinances, the Regulations and the Rules and to report to the Chancellor every proceeding which is not in conformity with such provisions."

Learned counsel has submitted that if the proceeding of the University is not in accordance with the provisions of this Act it is his bounden duty to report to the Chancellor. He also drew our attention to Section 9(4) of the Act which provides that the Vice-Chancellor may by order in writing annul any proceeding of the University which is not in conformity with the Act, the Statute, the Ordinance or the Regulations. He also submitted that the petitioner ought to have moved the Chancellor instead of filing this writ application. He had alternative remedy which he ought to have availed of. Mr. Basudeva Prasad appearing on behalf of the University including the Syndicate, as also learned counsel appearing on behalf of other respondents, have adopted the argument advanced by Mr. Ghose on this point, and have urged that this application should fail solely on the ground that the petitioner has alternative remedy.

In view of the provisions contained under Section 10(12) referred to above, I am inclined to hold that the Vice-Chancellor had power to write to the Government for the concurrence, if in his opinion the resolution of the Syndicate was not in accordance with the provisions of the Act. Therefore, the contention of learned counsel for the petitioner fails. However, considering the facts and circumstances of the case I am not inclined to hold that this application should fail merely because the petitioner had alternative remedy provided under Section 9(4) of the Act. The impugned letter contained under Annexure 1 was demanding handing over the charge by the petitioner to respondents 4 and 5. Besides, even after protest made by the petitioner to the Vice-Chancellor, the latter insisted upon the compliance of the order contained in Annexure 1. In my opinion, there was no alternative left to the peti-

tioner than to file this writ application before this Court, as the decision by the Vice-Chancellor might have taken longer time and meanwhile prejudice might have been caused to the petitioner. Thus, we are inclined to examine the merit of the resolution of the Syndicate as to whether it was in accordance with the provisions of the Act or not.

8. Now I turn to the consideration of point No. (i) which is of real importance. It is mainly dependent upon the interpretation of Section 50 of 1951 Act and Section 52 of 1962 Act, since the language used in both these sections, is more or less identical. Reference was made by the parties to Section 52 of 1962 Act which is to this effect:—

“Teachers of clinical subjects and Pathology in the Prince of Wales Medical College to be nominated by Government—Notwithstanding that the Prince of Wales Medical College is a college the hospitals attached to that college shall not be transferred to the University until such date as the State Government may, by notification, appoint and until the date of such transfer, all teachers of clinical subjects and pathology in the said college shall be appointed in accordance with the provisions of this Act by the University from amongst officers nominated by the State Government and all teachers so appointed shall be deemed to be members of the staff of the hospitals attached to said college”.

Learned counsel has contended that the provisions of the above Section 52 are not applicable in the case of the petitioner. He has urged that the concurrence or approval of the State Government was not required in the case of the re-employment of the petitioner as resolved by the Syndicate. Once the Syndicate has decided, the Government has no say in the matter. In order to support his contention he has referred to the notification dated the 8th July, 1960 of the State Government which was issued in pursuance of clause (1) of Section 52 of the 1951 Act. By the said notification the terms were laid down on which the Patna University was to employ the members of the teaching staff, and the other servants of the State Government employed in the Prince of Wales Medical College who were transferred to that University under sub-section (1) of Section 51 of the 1951 Act. He has drawn our attention to clause 18 of the said notification the relevant portion of which is to this effect:—

“(1) The rules regulating the retirement of Government Servants shall apply to transferred Government servants.

(2) If the University decides to re-employ such Government servants, such re-employment will be treated as fresh appointment under the University and

will not affect his pension and leave accounts in respect of his service (under) the State Government. Such a Government servant on re-employment shall draw the initial pay of the post in which he is re-employed unless the University sanctions advance increments.”

According to learned counsel, the resolution of the Syndicate contained in Annexure 2 read with Annexure 2/A, was in accordance with the provisions of clause 18 (2) quoted above. He has drawn our attention to paragraphs 12 to 15 of the writ application wherein it is specifically stated that the Senate of the Patna University on the 25th November, 1954, created University Departments including, inter alia, Medicine and Surgery. An extract from the minute of the Senate has been marked as Annexure 4 to the application. In the aforesaid University Department of Surgery, Dr. U. P. Sinha was appointed as Professor of Surgery. On the retirement of Dr. Sinha, the petitioner was appointed as the Head of the University Department of Surgery. Learned counsel has drawn our attention to the copy of the letter of the appointment of petitioner dated the 16th October, 1968, which is marked as Annexure 6. With reference to paragraph 16 of the application learned counsel has submitted that the petitioner was later appointed as Principal of the Prince of Wales Medical College in addition to his own duties as Head of the University Department of Surgery on the retirement of Dr. Gaya Prasad with effect from the 21st of April, 1961 as per notification which is marked as Annexure 7. This fact is also borne out from a true copy of demi-official letter received by the petitioner from the then Vice-Chancellor which is marked as Annexure 8. According to learned counsel, the petitioner was thus appointed by the University Department in order to teach the post-graduate course in that Department, according to the powers of the University contained under Section 4 read with Section 53 of the 1962 Act. He has referred to S. 4, sub-section (7), which gives power to the University to institute Professorships, Readerships, Lecturerships and any other teaching posts required by the University and to appoint persons to such Professorships, Readerships, Lecturerships and post. Then he has referred to sub-section (15) of the said section, which reads as follows:—

“The purposes and powers of the University shall be the following, namely:—

* * * *

(15) to undertake the conduct of post-graduate teaching, research and work in departments established and maintained by the University;

Provided that if the University, at any time decides to conduct the post-graduate teaching in any college, it shall be lawful for the University to arrange and provide for the post-graduate teaching in that subject in that college, and to utilise, for the said purpose, the buildings of that college or any portion thereof and such members of the staff and the articles of furniture, library, books, laboratories, stores, instruments and other equipments of that college as may be prescribed in the Statutes.

9. Learned counsel has also drawn our attention to Section 2(g) of the 1962 Act which defines Head of the University Department as "the Head of any department established and maintained by the University for imparting instruction to the students of the University in the post-graduate standard under conditions prescribed in the Statutes" He has also referred to Section 2, clause (u) of the said Act which defines University Professor as "a teacher engaged in giving instruction in a department established and maintained by the University for imparting instruction in the post-graduate standard or in an institute and possessing such qualifications as may be prescribed by the Statutes."

10. Learned counsel has submitted that since the petitioner was appointed as the Head of the University Department of Surgery and as University Professor to teach post-graduate students in the University Department, the provisions contained under Section 52 are not applicable at all in his case. According to him, the unambiguous words used in Section 52 clearly indicate that the application of its provision is confined only to the teachers or professors of clinical subjects and Pathology in the Prince of Wales Medical College meant for teaching undergraduate students. Therefore, he concluded that the resolution of the Syndicate contained in Annexure 2 read with Annexure 2/A re-employing the petitioner as Professor of Surgery and Principal, Prince of Wales Medical College until he attains the age of 62 years, without concurrence by the State Government, is valid and in accordance with the provisions contained in the two University Acts referred to above.

11. On the other hand, Mr. B. C. Ghose, appearing on behalf of the Vice-Chancellor, has contended that according to clause (a) of paragraph 1 of the terms under the notification dated 18th July, 1960, read with section 48 of the 1951 Act, the State Government gave an option to the members of its Services either to retain their lien in the State Service or to opt for the University service. The petitioner opted to retain his lien in the

service of the State which fact the petitioner has also admitted in paragraph 10 of his petition. Therefore, he has urged that the petitioner's services were merely a loan to the University. The University never appointed him as a University Professor nor he was ever described as such. He further submitted that the University could not create a post of University Professor of Surgery in the Faculty of Medicine and this fact is clearly stated in paragraph 8 of the counter-affidavit which has been filed on behalf of the University on 15-7-68 the relevant portion of which reads as:—

"In 1956 the Patna University Senate passed a Resolution for the creation of posts of University Professors in the Faculty of Medicine against existing posts, but, it did not materialise, for the State Government did not concur in the proposal."

Therefore, he urged that the petitioner was never appointed as a University Professor to impart instruction to post-graduate students. Even for teaching the post-graduate students, according to him, it is not necessary to appoint a University Professor. In this connection he has referred to the proviso to clause 15 of Section 4 of the 1962 Act which has already been quoted earlier; and he has laid stress on the expression "it shall be lawful for the University to arrange and provide for the post-graduate teaching in that subject in that college, and to utilise for the said purpose, the buildings of that college or any portion thereof and such members of the staff and the articles of furniture. . . ." He also submitted that if the petitioner was the Head of the Department it does not mean that he was also University Professor and, according to him, a Head of the Department need not be a University Professor according to the definition under Section 2(g) of the 1962 Act, and has emphasised upon the expression in the said clause which stands:—

"and includes the Director of any institution established by the University for the promotion of research"

Therefore, he submitted that the Head of a University Department may even be the Director of any institution. In conclusion, he urged that when the question of his re-employment was taken up by the syndicate, the petitioner was a teacher of clinical subjects in surgery and he was not a University Professor. Therefore, S. 52 of 1962 Act was clearly applicable in his case and the Government's approval for his re-appointment was necessary according to the provisions of the Act.

The subsequent resolution of the Syndicate contained in Annexure 2/A deleting the expression "subject to the concurrence by the State Government" is invalid and not in accordance with law. According to

him, the petitioner could not be re-employed without the concurrence of the State Government.

12. Mr. Basudeva Prasad, learned counsel appearing on behalf of the University, adopted the arguments advanced by Mr. Ghose on behalf of the Vice-Chancellor and he further added that the resolution which was passed by the Syndicate contained in Annexure A, could not have been modified by the subsequent resolution of the Syndicate contained in Annexure 2/A. In other words, the second ordinary meeting of the Syndicate was called to transact the formal business of the previous resolution of the Syndicate. Therefore, the subsequent resolution could not have deleted any part of the resolution, which was passed in the previous meeting of the Syndicate. In this connection he has referred to Blackwell's Law of Meeting, 1937 Edition, page 57. I am not inclined to accept this part of his argument. In my opinion, the Syndicate in the subsequent meeting could have deleted the said portion of the resolution. They had such power to do so provided all other formalities of calling the meetings etc. were observed. But none has challenged that the formalities of calling the meeting, quorum etc., were not observed. But whether the Syndicate had power to re-employ the petitioner as Professor of Surgery and the Principal of Prince of Wales Medical College is a different question altogether. That will depend upon the interpretation of Section 52 of the 1962 Act and upon the question whether the petitioner was appointed University Professor of the University Department in order to impart education to the post-graduate students. Mr. Basudeba Prasad has further contended that if the subsequent resolution deleting the requirement of the concurrence by the State Government is invalid, no writ will lie to perpetuate the illegality.

13. Mr. B. K. Banerji, learned counsel appearing on behalf of Dr. G. Achari, respondent no. 4, also adopted the argument of Mr. B. C. Ghose, and further added that the terms of transfer contained in the notification dated the 8th July, 1960, completely control the tenure of service of the Government servant irrespective of the fact whether he is paid by the University or working for the University. He has drawn our attention to paragraph 3 of the said notification which says that a transferred Government servant who is member of the Bihar Civil Medical Service, shall, subject to the provisions of the Act, continue to be a member of that service, so long as he is a teacher in the College. He also referred to paragraph 5 in which it is mentioned that when the confirmation of

a transferred Government servant against a post in the cadre under the State Government is due the University shall refer the matter for the orders of the State Government. He has laid stress upon paragraph 6 thereof in which it is clearly stated that the standards for the crossing of efficiency bar of the transferred Government servants shall be determined by the University, subject, in the case of the teachers in the clinical department, to the approval of the State Government. Learned counsel has contended that the petitioner's case was considered for reappointment by the Syndicate when he was a teacher in clinical surgery in the Prince of Wales Medical College. According to him, therefore, the approval of the State Government was imperative if he was going to be re-employed by the University. He has further submitted that under Section 52 of the 1962 Act no appointment other than that of the Government Officers can be made by the Patna University in the Clinical and Pathology Department of the Prince of Wales Medical College; and in the case of the petitioner the Government has categorically mentioned in the letter dated the 6th July, 1968, addressed to the Chancellor that the Government have decided that the petitioner will not be re-employed in Government service after his retirement on 14-7-68. He has also drawn our attention to paragraph 3 of the counter-affidavit which has been filed on behalf of the State of Bihar wherein it is stated that according to Section 52 of the Patna University Act no appointment other than that of the Government officers can be made by the Patna University in the Clinical and Pathological Department of the Prince of Wales Medical College and it is also mentioned therein that in the case of Dr. V. N. Singh the Government decided, after due consideration, not to grant him re-employment in Government service after retirement.

14. Mr. Jagdish Chandra Sinha, learned counsel appearing on behalf of Dr. R. V. P. Sinha, respondent no. 5, adopted the arguments advanced by Mr. Ghose and other counsel for the respondents. He also submitted that since the prayer for injunction was refused, Dr. R. V. P. Sinha has already taken charge from the petitioner and hence the petitioner's application has become infructuous.

In my opinion, this contention of learned counsel is unacceptable. If it is held that the order of the Syndicate re-employing the petitioner is valid, certainly order can be passed by this Court directing Dr. R. V. P. Sinha to hand over charge to the petitioner.

15. Mr. Tara Kant Jha, appearing on behalf of the State of Bihar, contended that the concurrence of the State Govern-

ment for the re-employment of the petitioner was imperative and he has referred to paragraphs 2 and 3 of the counter-affidavit, which has been filed on behalf of the State of Bihar.

16. Mr. Singh, learned counsel for the petitioner, however, maintained that the University has created University Department and the petitioner was appointed University Professor. In this connection he has referred to the Statutes with relevant extracts from the Act of 1951 and the Rules to be found in the Book published by the University in the year 1955. He has drawn our attention to its Chapter I at page 5 where under the heading "Representative Members of the Senate" it is mentioned that thirty-five seats allotted to the teachers under Section 15(1), Class III(i), shall be distributed among the colleges and the University Departments. Under the heading "Colleges", in item no. 4 the Prince of Wales Medical College is mentioned amongst other colleges. In the 'University Departments', among departments like English, History, Economics etc. the following are mentioned

- * * * *
27. Physiology,
 28. Medicine
 29. Surgery
 30. Obstetrics and Gynaecology
 31. Ophthalmology and Otorhinolaryngology
 32. Pathology
 33. Pharmacology
 34. Anatomy".

Further at page 7 it is mentioned that three teachers are to be elected, one from each of the following University Departments, by rotation, in the cyclic order according to the list of priority as indicated below:—

1. Physiology
2. Ophthalmology and Otorhinolaryngology
3. Anatomy
4. Obstetrics and Gynaecology,
5. Pharmacology
6. Medicine
7. Pathology
8. Surgery.

He has also drawn our attention to page 26 where it is mentioned that the two Principals and four Heads of University Departments shall hold office by rotation in a cyclic order as members of the Syndicate according to the list of priority, their terms of office being one year from the date of their office. In the list of priority of principals in item no. 2, P. W. Medical College is mentioned; whereas in the list of priority of Heads of University Departments among others, in item no. 12, Surgery is mentioned. He has also referred to Chapter X of the Book dealing with the "Organisation of Teach-

ing under the University" under Section 7(2) of the 1951 Act and the University framed Statutes. In paragraph 1 of the Statute it is mentioned that all recognised teaching in the University shall be conducted in the University Departments or Institutes established and maintained by the University or in colleges maintained or controlled by it. In paragraph 2 it is mentioned that each University Department shall be under the Head of University Department who shall be a teacher of the subject of the rank of the University Professor, Professor or Reader. He has also drawn our attention to paragraph 3 of the Statutes which says that the University Department may be located in the building directly under the University or in any of its colleges. Paragraph 4 thereof deals with the teaching in the colleges which shall be conducted in the departments each of which shall be under the Head of College Department who shall be a teacher of the subject of the rank of a Professor or Reader. Paragraph 5 says that the Head of the University or the College Department shall be responsible to the Dean of Faculty for the organisation of teaching in the Department. Paragraph 6 provides that where a University Department and a College Department in a subject are located in the same premises, the Head of the University Department shall co-ordinate the teaching in the two departments in consultation with the Head of the College Department. Lastly paragraph 7, which is also relevant for the disposal of this case, says that a teacher assigned to a University Department shall participate in the teaching work of the College Department and vice versa, if called upon to do so by the Dean of the Faculty.

17. Learned counsel for the petitioner, by reference to these provisions in the Statute, has contended that the University has kept the University Department and the colleges separately so far the appointment of the staff of the University Department and the colleges are concerned. This also indicates that the University Department was created by the University and the University Professors were appointed. This further shows that the University Department and the college may be located in the same premises and the teacher of the University Department may also teach in the College Department if he is called upon to do so by the Dean of the Faculty.

18. But I find that in paragraph 2 of the Statute it is also mentioned that "pending the appointment of University Professor, Professor or Reader in the Department the seniormost Lecturer in the subject shall be acting as Reader and Head of the Department." This may go against

the contention of learned counsel that the petitioner was appointed as University Professor as it has been stated in paragraph 8 of the affidavit filed on behalf of the respondent Patna University that in 1956 the Patna University Senate passed a resolution for the creation of the post of the University Professors in the Faculty of Medicine against the existing posts but it did not materialise, for, the State Government did not concur in the proposal. The University has, therefore, categorically denied the creation of University Professors in the Faculty of Medicine; whereas the petitioner has nowhere in his petition stated that he was appointed as a University Professor nor he has annexed any letter of the University showing that he was appointed as a University Professor.

19. However, learned counsel for the petitioner, in order to establish that the University Department was created and the petitioner was also appointed as a University Professor, has referred to the various printed budgets of the University of those years which were available to the petitioner. He has drawn our attention to page 34 of the budget for the year 1954-55 which relates to the Prince of Wales Medical College. In Item No. 9 at page 35, under the heading "name of post" Professor of Surgery is mentioned and under the heading "name and incumbent" Dr. U. P. Sinha is written. It also mentions his grade with scale of pay as well as his salary. Similarly, under item no. 10, Professor, Clinical Surgery, is mentioned and the name of incumbent is Dr. V. N. Singh (petitioner). Likewise his grade of pay and salary are also mentioned. Learned counsel has submitted that this related to the time when no separate University Department of Surgery was created.

20. He has then referred to the next budget for the year 1955-56. Here also, at page 16 which relates to the Prince of Wales Medical College, in item no. 11, name of post is Professor of Surgery, incumbent is the same Dr. U. P. Sinha and in item no. 12 the name of post is Professor of Clinical Surgery and the incumbent is Dr. V. N. Singh (petitioner). Upto this time also there was no creation of a separate University Department.

21. Next he has referred to the budget for the year 1958-59 at pages 16-17 under the Department of Surgery, the relevant portion of which reads as follows:—

"Details of post: University Professor—1
Professors or Readers—3
Lecturers —5
Tutor —1

(a) University Department — 4

1. Dr. U. P. Sinha
2. Dr. B. Mukhopadhyaya
3. Dr. S. K. Sinha

4. Vacant.

(b) P. W. Medical College

1. Dr. V. N. Singh (petitioner)
2. Dr. R. V. P. Sinha (respondent no. 5)
3. Dr. U. N. Sahi
4. Dr. R. N. Sinha
5. Dr. Avoy Singh
6. Vacant

Learned counsel contended that this clearly indicates that the University created University Department. Out of the above 10 posts, 4 were for the University Department and 6 were for the Colleges. At that stage Dr. U. P. Sinha was in the University Department and Dr. V. N. Singh, the petitioner, was in the Prince of Wales Medical College.

22. Then he referred to the budget for the year 1960-61 at page 32. Here also the details of the post are: University Professor 1, Professors or Readers 3, Readers 4 and Tutor 1. Under the University Department there were 4 posts which are as follows:—

1. Prof. V. N. Singh (petitioner)
2. Dr. S. K. Sinha
3. Dr. B. Mukhopadhyaya
4. Vacant.

In the Prince of Wales Medical College there were the following 5 posts: —

1. Vacant
2. Dr. R. V. P. Sinha (Respondent no. 5)
3. Dr. U. N. Sahi
4. Dr. R. N. Sinha
5. Dr. A. Singh.

This related to the year in which, according to the petitioner, he was appointed the University Professor on the retirement of Dr. U. P. Sinha from the University Department. In order to support this, he has also drawn our attention to a letter dated the 16th October, 1958 from the then Registrar, Patna University, addressed to the Dean of the Faculty of Medicine of the Patna University, which he has annexed to his petition and marked as Annexure 6, the relevant portion of which reads as follows:—

"I am directed to inform you that the Vice-Chancellor has been pleased to appoint Dr. V. N. Singh, Professor of Clinical Surgery, P. W. Medical College, Patna to act as Head of the University Department of Surgery vice Dr. U. P. Sinha retired."

In my opinion, this letter does not indicate that he was appointed as a University Professor. Rather, it indicates that he was appointed as Head of the University Department in Surgery on the retirement of Dr. U. P. Sinha. The expression "Professor of Clinical Surgery" used in the letter clearly mentions that it related to his being a Professor of Clinical Surgery in the Prince of Wales Medical College. The expression "Head of the Department" does not mean that he was

University Professor because Head of the Department as defined in the Act may also include Director of any Institute maintained by the University for the promotion of the research, whereas the University Professor is defined separately in the Act vide Section 2(u) of the 1962 Act. The definition of teacher is to be found in Section 2(r) of the said Act which is as follows:—

“Teachers’ means Principals, University Professors, Professors, lecturers, demonstrators and any other person imparting instruction in departments established and maintained by the University or in any of its colleges or institutes;”

Paragraph 7 of the Statute also, which has been mentioned earlier, says that a teacher assigned to the University Department shall participate in the teaching work of the College Department and vice versa.

23. Learned counsel has then referred to the budget for the year 1963-64 at page 31. Here also the details of the post are: University Professor 1, Professors or Readers 2, Lecturers 4 and Tutors 4. In the University Department there were 3 posts which were held by (1) Dr. V. N. Singh (petitioner), (2) Dr. S. K. Sinha, and (3) Dr. A. Singh, and in the Prince of Wales Medical College Dr. R. V. P. Sinha (respondent no. 5) held the first post; the names of other doctors mentioned therein are not necessary to be mentioned here for the purposes of this case.

24. Lastly, he has referred to the budget for the year 1967-68 at pages 31-32. Here also under the heading “Details of post” in the Department of Surgery it is mentioned as follows:

University Professor — 1
Professors or Readers — 2
Lecturers—4
Tutors — 4.

In the University Department there were 3 posts which were held by (1) Dr. V. N. Singh (petitioner), (2) Dr. S. K. Sinha, and (3) Dr. Abhay Singh. In the Prince of Wales Medical College there were 5 plus 3=8 posts out of which the first was held by Dr. R. V. P. Sinha (respondent no. 5) in place of Dr. V. N. Singh (petitioner) who was appointed as Professor in the University Department. The remaining posts need not be mentioned here in this judgment.

Learned counsel has emphasised that so far the creation of University Department and the appointment of the petitioner as Professor are concerned, the same is clearly established by these budgets. He has drawn our attention to paragraph 15 of the application where the petitioner has stated that he has been drawing his salary in accordance with the provisions made in the University

budget in respect of the salary of the Head of the University Department of Surgery.

But in this paragraph also the petitioner has not stated that he was drawing his salary as University Professor. I have already pointed out earlier the distinction between the Head of the Department and University Professor. I have already referred to the counter-affidavit which was filed on behalf of the University on 15-7-68 denying the creation of the posts of University Professors in the Faculty of Medicine. Further, I find that in paragraph 7(D) of the supplementary counter-affidavit which was filed on 29-7-68 on behalf of the University and also in paragraph 14 of the counter-affidavit which was filed on behalf of the University on 22-8-68 it has been reiterated that in 1956 the Patna University Senate passed a resolution for the creation of posts of University Professors in the Faculty of Medicine against existing post but it did not materialise, for, the State Government did not concur in the proposal and in the former affidavit it is further stated that after this the Patna University Syndicate framed statutes. The relevant statutes are in the following terms:—

“5.2 Recognition of Teachers:

The Heads of University Departments, who possess the qualifications laid down in the Statutes for University Professors may be recognised as University Professors by the Vice-Chancellor for the purpose of appointment as Dean of the Faculty concerned.

Provided that the recognition of a teacher under this Statute shall not in any way have the effect of altering conditions of service, emoluments and other privileges of the teacher concerned.

Provided further that in Departments where there are posts of University Professors no such recognition as aforesaid shall be given.”

25. Therefore, it was rightly contended on behalf of the University that, according to the aforesaid Statute the status of the Head of the University Department was recognised as equivalent to a University Professor for the purpose of appointment of Deans of the Faculties only. Further, in sub-paragraph (E) of the same paragraph it is also stated that the Syndicate of the Patna University had already resolved that all appointments of the transferred clinical teachers shall be subject to the sanction of the Government and it is categorically stated that the said resolution was never modified or rescinded. In sub-paragraph (E) of paragraph 24 of the said counter-affidavit, with reference to paragraph 15 of the application of the petitioner, it is stated that before the petitioner was ap-

pointed to act as Head of the University Department of Surgery in place of Dr. U. P. Sinha, he was appointed as Professor of Surgery in accordance with law on his nomination for the purpose, by the State Government under Section 50 of the Patna University Act, 1951. It is true that by reference to the budgets of the University it appears that the University Department was created and the petitioner was appointed University Professor in the Department of Surgery, but in my opinion, from this we cannot rebut the specific assertions made in the various counter-affidavits filed on behalf of the University. Besides, considering the terms of transfer quoted earlier, the petitioner's exercise of option to retain his lien in the service of the respondent State, and considering the other facts and circumstances of this case referred to above in my opinion, the resolution of the Syndicate contained in Annexure 2, read with the subsequent resolution contained in Annexure 2/A, re-employing the petitioner as Professor of Surgery and Principal, Prince of Wales Medical College until the age of 62 years on his superannuation from the Government service on attaining the age of 58 years without the concurrence of the State Government is not in accordance with law. Since in this case it cannot be clearly established that the petitioner was appointed as a University Professor, in my opinion, the provisions contained under Section 52 of the University Act, 1962 shall apply. However, it has been urged on behalf of the petitioner that even if the Government has refused to re-employ the petitioner in the Government service after his retirement on 14-7-68 by its letter dated the 6th July, 1968, the Syndicate could have appointed the petitioner as University Professor of Surgery for teaching non-clinical surgery and for that admittedly no sanction will be required.

26. This brings us to the consideration of the last point, i. e., point no. (iv). It is admitted case of the parties that in view of the aforesaid letter of the Government the petitioner could not have gone to the said college to teach clinical subjects in surgery. I have referred to Dorland's Illustrated Medical Dictionary, 23rd edition, for the meaning of the word "clinical" which stands: "Pertaining to a clinic or to bedside; pertaining to or founded on actual observation and treatment of patients, as distinguished from theoretical or experimental." More or less similar meaning is given in the Oxford English Dictionary, Vol. II, published in 1933 and reprinted in 1961. According to it, the word "clinical" means "of or pertaining to the sick-bed, spec. to that of indoor hospital patients: used in connexion with the practical instruction given to

medical students at the sick-beds in hospitals; Clinical lecture — a lecture at the bedside of the patient upon his case; Clinical medicine, surgery, medicine or surgery as learnt or taught at the bedside 'usually applied to hospital practice in which the physician, in going round the wards, comments upon the cases under his care'.

It seems the petitioner could have been re-employed by the University only as a Professor of Surgery. In the University budget for the year 1954-55 I find that Professor of Surgery was Dr. U. P. Sinha whereas the petitioner was the Professor of Clinical Surgery in the Prince of Wales Medical College. Therefore, it would have been possible for the University to appoint two Professors, one as Professor of Surgery and the other as Professor of Clinical Surgery. The petitioner, in that case, would have taught only the theoretical side of surgery to the post-graduate students.

27. Mr. Basudeva Prasad, learned counsel appearing on behalf of the University has contended that when the petitioner was proposed to be re-employed by the Syndicate and before the petitioner retired, he was teaching clinical surgery and the Syndicate by the resolution contained under Annexure 2 clearly meant to re-employ him as Professor of Surgery for teaching clinical subjects and that was the intention of the Syndicate. Now the said resolution cannot be stretched to mean that the Syndicate wanted to re-employ him only as Professor of Surgery for teaching non-clinical subjects to the post-graduate students. Besides, the Syndicate never meant to appoint two University Professors, one for teaching clinical subjects and the other for teaching non-clinical subjects, in surgery. He further submitted that for post-graduate teaching the clinical training plays very important role. Reference may be made to the counter-affidavit which was filed on 22-8-68 on behalf of respondent nos. 1 to 3 in reply to the surrebutter filed on behalf of the petitioner. In paragraph 11 of the said affidavit the relevant Syndicate resolution has been reproduced wherein it is stated that the post-graduate degree is not only in the nature of research degree, but a degree of higher scholarship in the clinical and other subjects and that the alumni are to receive guidance in their studies from the professors and lecturers of surgery in the Prince of Wales Medical College either assigned to the University Department or not, and they carry on their research in the laboratory of the Patna Medical College Hospital and not in any laboratory established and maintained by the University. The University never established

any laboratory separately for Faculty of post-graduate teaching in surgery. The post-graduate teaching in surgery is conducted in the different wards of the Patna Medical College Hospital which are owned, controlled and maintained by the Government, and thus it would be clear that the studies pursued by the aforesaid alumni are mainly clinical studies.

28. Further, that paragraph also contains the relevant Syndicate resolution regarding the post-graduate studies in clinical subjects. Paragraph 4 of the memorandum of resolution specifically mentions that the period of training for the diploma course may extend for a period of one academic year. M.Sc. and Ph.D. courses will ordinarily extend for a period of two years of which at least two terms will be devoted to lectures, demonstrations and clinical training. Even the course of M. D. and M. S. Examination contains special clinical lecturers. Further, Mr. Prasad has also drawn our attention to the application form for permission to appear at the Master of Surgery Examination. In that printed form there is a column for a certificate to be granted to the applicant by the Head of the University Department. The relevant portion of the certificate to be given reads:—

"Certified that Dr. has worked under my supervision at the Patna Medical College Hospital for a period of 4 terms and has completed his thesis under my guidance. The thesis embodies result of the candidate's own research work."

Therefore, he submitted that the research including the clinical part of it, has to be done by the Head of the University Department of Surgery. In the circumstances, there is no doubt in my mind that the clinical part of the training plays important role in surgery. I have also referred to the Patna University Regulation compiled in the year 1965 regarding the M. D. Examination which shall consist of (1) Thesis, (2) 4 theoretical papers, (3) oral examination, and (4) clinical examination. Therefore, from that point of view also, clinical teaching must have been an important consideration when the Syndicate had proposed the re-employment of the petitioner. Hence, this contention of learned counsel for the petitioner also fails.

29. Since, however, the application is being dismissed on the ground that the post of Professor, Clinical Surgery, implies attendance in the hospital which is under the control of the Government and not of the University, it must be stated that if the University could manage to engage the petitioner in an administrative job which would not imply any cli-

nical work in the hospital or he could be assigned the job of purely theoretical teaching in surgery, our order in the present writ petition cannot affect the power of the University in regard to the Prince of Wales Medical College, Patna.

30. In the result, there is no merit in this application which is accordingly dismissed; but in the circumstances of the case there will be no order as to costs.

31. MISRA, C. J. :— I agree.
Petition dismissed.

AIR 1970 PATNA 89 (V 57 C 10)

B. D. SINGH, J.

Hajari Shafi and others, Petitioners v. Ramasis Thakur and others, Opposite Parties.

Criminal Revn. No. 382 of 1968, D/- 25-11-1968, against order of Sub. Divnl. Magistrate, Sitamarhi, D/- 13-9-1967.

(A) Limitation Act (1963), Art. 131 — Revision against order of Magistrate — Party filing revision application before Sessions Judge in spite of established rule of filing revision direct to High Court — Party alleging that they followed that procedure under wrong legal advice — Condonation of delay — Held, that since substantial question of law was involved in the case the delay would be condoned. (Para 2)

(B) Criminal P. C. (1898), Section 350 — Judgment written by predecessor — Succeeding Magistrate cannot sign and deliver judgment.

Under Section 350 after its amendment a Magistrate may act upon the evidence already recorded by his predecessor, but that is also, his option. If he so likes he may order a de novo enquiry, and he may take fresh evidence. But it does not empower him to sign the judgment written by his predecessor and to deliver the same. Even if he chooses to rely on the evidence recorded by his predecessor, he will have to write his own judgment and then he will have to sign and deliver it in accordance with law. Thus, an order passed by the S. D. O. directing the succeeding Magistrate to sign, date and deliver the judgment written out by his predecessor is contrary to the provisions of law. AIR 1948 Pat 414, Foll. (Para 9) Cases Referred: Chronological Paras (1948) AIR 1948 Pat 414 (V 35)= 49 Cri LJ 704, Jagarnath Singh v. Francis Kharia 9, 11

Mrs. D. Lall, Rameshwar Choudhary and Mathura Nath Rai, for Petitioners; L. M. Sharma, Bhupendra Narayan Sinha and Brajeshwar Pd. Sinha, for Opposite Parties.

JM/JM/E82/69/MVJ/M

ORDER:— This revision was filed by Hajari Shafi and 112 others. They were first party in the court below under Section 145 of Criminal Procedure Code. It has been filed against the order dated 13th of September, 1967 of the Sub-Divisional Officer, Sitamarhi, directing Sri Jaideo Das, Magistrate, 1st class, to sign, date and deliver the judgment already written by Sri Balram Singh, the predecessor in office who heard the case because he was transferred to some other place.

2. Before I take up the consideration of this revision it will be necessary to dispose of the application of the petitioners dated 7-3-1968 in which they have prayed for condonation of delay in filing the revision before this Court. According to provisions under Article 131 of the Limitation Act, 1963, the period for filing revision against the order is 90 days whereas in the instant case the petitioners have filed the petition much beyond the period of limitation prescribed. In the past, the practice was that in such cases reference petition used to be filed before Sessions Judge and that used to take long time. Therefore, now it has been decided by a Bench of this Court that instead of going to Sessions Judge, in order to save time revision should be filed direct to this Court. In spite of that the petitioners in this case filed the application before Sessions Judge for reference against the impugned order. In the ground for condonation of the delay they have alleged that due to wrong advice given by the lawyers they filed the application before the Sessions Judge, Muzaffarpur. There are some decisions of this Court which do not favour condonation of delay in such cases, as sufficient opportunities now have been given to the members of the public to know about limitation prescribed by the said Act. But in this case since a substantial question of law is involved I feel inclined to condone the delay and to hear the application on merits and I order accordingly.

3. It appears that in 1963 a proceeding under S. 144 of the Code of Criminal Procedure (hereinafter referred to as the Code) was drawn up by the Sub-Divisional Officer against both the parties due to apprehension of breach of the peace in respect of about 300 bighas of land in village Birpur of police station Sursand in the district of Muzaffarpur.

4. On 12-12-1963 the said proceeding was converted into one under Section 145 of the Code. On 13-9-1966, the conduct of the proceeding was ended and 13th of October, 1966 was fixed for final order.

5. Sri Baliram Singh, who was the trying Magistrate, gave various adjournments and ultimately fixed 20-4-1967 for

delivering the judgment in the said proceeding. A day earlier that is on 19-4-1967, the petitioners filed an application before the Sub-Divisional Officer under Section 528, Clause (2) of the Code to recall the case from the court of Sri Baliram Singh and to hear the case on merit and to deliver the judgment.

6. On the same day i. e. on 19-4-1967 Sri R. N. Tewary, 3rd Officer who was acting as Sub-Divisional Officer in the absence of the Sub-Divisional Officer recalled the case and ordered the application under Section 528 of the Code to be put up before Sub-Divisional Officer for final order.

7. On 20-4-1967, the petitioners again filed a petition before Sri Baliram Singh that he should not sign the judgment as the record has already been called from his file. Sri Baliram Singh, however, made a note in the order-sheet that the judgment of 42 pages has already been written by him but he will not deliver the same as the record has been called from his file. Subsequently Shri Baliram Singh was transferred.

8. On 13-9-1967, the petitioner's application under Section 528 of the Code was heard by the Sub-Divisional Officer and he directed Shri Jaideo Das, who succeeded to the office of Sri Baliram Singh, to date, sign and deliver the judgment which was written by Sri Baliram Singh, the then trying Magistrate. Against this order this revision has been filed.

9. Mrs. Lall, learned counsel appearing on behalf of the petitioners, has contended that under Section 350 of the Code the succeeding Magistrate cannot date, sign and deliver the judgment which was written by Sri Baliram Singh, the trying Magistrate. Section 350 of the Code reads as follows:—

"(1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself.

She has contended that after the amendment under Section 350 it is true that a Magistrate may act upon the evidence already recorded by his predecessor, but that is also, his option. If he so likes he may order a de novo enquiry, and he may take fresh evidence. But it does not empower him to sign the judgment written by his predecessor and to deliver the same. Even if he chooses to rely on the evidence recorded by his predecessor, he will have to write his own judgment, and

then he will have to sign and deliver it in accordance with law. She has further contended that the proceeding under Section 145 of the Code amounts to 'inquiry' as defined under Section 4(1)(k) of the Code. She has drawn my attention also to section 145(4) of the Code the relevant portion of which reads as follows:—

"The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, documents and affidavits, if any, so put in, hear the parties and conclude the inquiry, as far as may be practicable, within a period of two months from the date of the appearance of the parties before him and, if possible, decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Provided that the Magistrate may, if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained therein.

According to her, this provision clearly directs the Magistrate to peruse the statements, documents and affidavits, if any, hear the parties and then conclude the enquiry. Even, according to this provision the Magistrate has to hear the parties afresh. Therefore, she has submitted that the impugned order passed by the S. D. O. directing the succeeding Magistrate Shri Jaideo Das, to sign, date and deliver the judgment written out by his predecessor is contrary to the provisions of law. In order to fortify her contention, she has relied on a decision of this Court in Jagarnath Singh v. Francis Kharia, AIR 1948 Pat 414. That case also related to a proceeding under Sec. 145 of the Code. In that case also Section 350 of the Code came up for consideration. Meredith, J. (as he then was) observed in paragraph 3:—

"... The matter is then postponed for one reason or another, and the judgment is not finally delivered until June — nearly six months after the conclusion of the hearing — and finally the judgment is written by a Magistrate who has heard no arguments in the case. A Magistrate may no doubt act in suitable cases on evidence recorded by his predecessor, but I fail to understand how he can act upon arguments made before his predecessor which he has never heard."

10. On the other hand, Mr. Brajeshwar Prasad Sinha, appearing on behalf of the opposite party, has contended that the impugned order is valid and legal. He has urged that an order under Section 145 of the Code is not a judgment and, therefore, the provisions contained under Section 367 of the Code are not ap-

plicable. He has further urged that Shri B. Sinha, who had written out the judgment in the said proceeding has clearly written in the order-sheet as follows:—

"Adesh Aj taiyar hai aur abhilekh ke sath 42 prista me adesh sanlangna hai. Chunki 528 ka adesh patra par abhilekh manga gaya hai atah anumandal padadhikari ke pas abhilekh bhej de. Mai adesh nahin sunaunga."

Therefore, he has submitted that the judgment was ready on that date and although he did not sign the judgment it will amount to his judgment, and the succeeding Magistrate can sign the same and deliver it. No prejudice will be caused to the petitioners.

11. In my opinion, in view of the above decision of this Court reported in AIR 1948 Pat 414 (supra), his contention cannot be accepted. In my view, the contentions of learned counsel appearing on behalf of the petitioners, are well founded. The order of the S. D. O. cannot be sustained.

12. In the result, I set aside the order and allow this application. I further direct that the proceeding should be disposed of either by the permanent S. D. O. or by Shri Jaideo Das, Magistrate, as soon as possible, in accordance with law. Application allowed.

AIR 1970 PATNA 91 (V 57 C 11)

N. L. UNTWALIA AND M. P. VERMA, JJ.

M/s. Matanhella Brothers and others, Appellants v. M/s. Shri Mahabir Industries Pvt. Ltd., Respondent.

A. F. A. D. No. 181 of 1965, D/- 11-2-1969, against decision of 3rd Addl. Sub. J., Purnea, D/- 23-12-1964.

(A) Civil P. C. (1908), S. 20 — Suit on contract — Defendant at Gorakhpur — Plaintiff at Forbesganj — Defendant to send goods by rail to Forbesganj — Delivery of goods to common carrier is delivery to buyer at Gorakhpur — No part of cause of action arises as Forbesganj. (Para 5)

(B) Civil P. C. (1908), S. 20 — Contract — Communication of breach or cancellation of — Place where it is received is a place where part of cause of action arises. (Para 5)

(C) Civil P. C. (1908), S. 21 — Objection as to jurisdiction taken at the earliest stage — No prejudice caused to the defendant — Plea, held, could not succeed at second appellate stage. (Para 5)

...(D) Contract Act (1872), S. 2(a) — Place of acceptance of the offer. (Civil P. C. (1908), S. 20 — Contract — Suit on).

The defendant, at Gorakhpur sent a telegram on 22-3-61 to plaintiff at Forbes-

ganj communicating the prevailing rate of Tora at Gorakhpur. The plaintiff wrote a letter to the defendant asking them to purchase certain quantity of tora at a particular rate. The defendants accordingly purchased it and communicated the fact of purchase.

Held, that the telegram by the defendant dt. 22-3-61 was a mere invitation to offer and not an offer itself, that the letter from the plaintiff in response to the invitation was the offer and the communication of the defendant to the plaintiff about the receipt of letter and purchase of goods was the acceptance. The contract was therefore completed at Gorakhpur on the date when the telegram of acceptance was despatched. Hence, the court at Araria within whose jurisdiction Forbesganj was situate had no jurisdiction to try the suit on the contract.

(Para 5)

(E) Contract Act (1872), S. 73 — Performance of contract — Unilateral extension of time not possible — Other party should be shown to have expressly or impliedly agreed to it.

The contract alleged was that the defendant was to despatch the goods purchased for the plaintiff immediately after such purchase on 28-3-61. The defendant did not do so disputing that the goods contracted for were with reference to a sample and not of pure quality as claimed by the plaintiff. He wrote to the plaintiff to the above effect on 9-4-61 in reply to demands by the plaintiff for delivery of the goods of pure quality. The plaintiff repeated such demands the last of which was in June 61. Later, the suit for damages for breach of contract calculated at the rate by which the price had gone up in the month of June was filed. The plaintiff was silent as to on what date the breach occurred, the prevailing rate on such date and as to whether the defendant had expressly or impliedly agreed to deliver the goods at a later date.

Held, that in the absence of any pleading or proof about the defendant agreeing to deliver the goods at a later date, damages could not be claimed at a rate said to be prevailing on such subsequent date. The unilaterally repeated demand on the part of the plaintiff could not extend the time for delivery until the defendants, either expressly or impliedly had agreed to extend it. The breach must be held to have occurred in the middle of April 1961 when the defendant disputed the quality of goods agreed to be despatched. Hence the suit for damages based upon the difference between the contract price and the market price prevailing in June 61 was unsustainable. AIR 1932 PC 196 & AIR 1957 Pat 586 & AIR 1962 SC 113 & AIR 1962 SC 366 & AIR

1968 SC 741, Rel. on; AIR 1964 Pat 250, Dist. (Para 8)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 741 (V 55)=

1968-2 SCR 239, P. S. N. S. Ambalavana Chettiar & Co. Ltd., v. Express Newspapers Ltd., Bombay

(1964) AIR 1964 Pat 250 (V 51)=

1963 BLJR 426, Rampratap Mahadeo Prasad v. Sasansa Sugar Works Ltd.

(1962) AIR 1962 SC 113 (V 49)=

1962-2 SCR 880, Bhikhraj Jaipuria v. Union of India

(1962) AIR 1962 SC 366 (V 49)=

1962-1 SCR 653, Murlidhar Chiranjilal v. Harischandra Dwarkadas

(1957) AIR 1957 Pat 586 (V 44)=

ILR 36 Pat 633, Dominion of India v. Bhikhraj Jaipuria

(1932) AIR 1932 PC 196 (V 19)=

59 Ind. App. 398, Erroll Mackay v. Kameshwar Singh

S. N. Bhattacharyya, Chunni Lal, for Appellants; Rameshwar Prasad, B. P. Gupta, for Respondents.

UNTWALIA, J. :— This second appeal came up before us for hearing on a reference by a learned Single Judge of this Court. The defendants are the appellants. The suit filed by the plaintiff-respondent was for recovery of Rs. 1,800 on account of damages for breach of a contract of sale of 180 bags of pure Tora. Both the Courts below have decreed the suit of the plaintiff.

2. The plaintiff is a private limited company carrying on business at Forbesganj in the district of Purnea. Defendants 2 and 3 are said to carry on business in the town of Gorakhpur in the name and style of defendant no. 1. According to the plaintiff's case, the defendants, by their telegram dated the 22nd March, 1961, offered to the plaintiff at Forbesganj to purchase for it Pai Tora at the rate of Rs. 26.50 paise per maund and linseed at Rs. 25.00 per maund, and sought its approval and acceptance of the offer. The plaintiff accepted the offer made by the defendants and communicated the same to them by its letter dated the 23rd March, 1961, whereby the defendants were directed to purchase for the plaintiff one wagon of pure Tora at Rs. 28.00 per maund and to despatch the same to Forbesganj. The defendants purchased 180 bags of Pure Tora at Rs. 28.00 per maund and informed the plaintiff by their telegram dated the 28th March, 1961. The goods, however, were not despatched after the purchase, even up to the 10th April, 1961. The plaintiff, by its letter dated the 11th April, 1961, wrote to the defendants to enquire from them as to why the commodity could not be despatched, and requested them to despatch

180 bags to Forbesganj without any further delay. Even then, the defendants did not despatch.

On the 2nd May, 1961, the plaintiff wrote again complaining about the delay in the despatch but the goods were not despatched. The market of Tora went on rising and it went up to Rs. 32.50 paise per maund in the Forbesganj market. It is not stated in any part of the plaint as to at what point of time was this market rate. According to the plaintiff's case, 180 bags of Tora would be equal to 405 maunds; as each bag contains 2 maunds 10 seers. The difference between the contract price and the market price thus came to Rs. 1,822.50 at the rate of Rs. 4.50 paise per maund. Giving a remission of Rs. 22.50 paise, the total claim in the suit was Rs. 1800.00.

3. The defence set up by the appellants was that, as per instructions of the plaintiff, defendant no. 1 had purchased the Tora and sent a sample of the purchased goods to it; but the plaintiff company informed that the Tora contained 50% of Pai and expressed its inability to accept the goods. Thus, the transaction failed. The plaintiff insisted on despatch of the Tora. The defendants asked the plaintiff to send its men to take delivery of the goods which had been purchased by them for the plaintiff as per sample. The plaintiff never sent any man to take delivery. The breach of the contract, therefore, was on the part of the plaintiff company, and not on the part of the defendants. The defendants also contended and took the plea that the Court at Araria had no jurisdiction to try the suit as the contract was completed at Gorakhpur, the delivery was to be made at Gorakhpur, and no part of the cause of action arose within the jurisdiction of the Araria Court.

4. Both the Courts below have found that, since the goods were to be delivered at Forbesganj, the Araria Court had jurisdiction to try the suit. They have further found that there was a concluded contract between the parties and the contract was for purchase of pure Tora at Rs. 28.00 per maund, the defendants had committed breach of the contract, and the plaintiff was entitled to the damages claimed, as the prevalent market rate of Tora in June, 1961 was Rs. 32.50 paise per maund.

5. Several points have been urged in support of the appeal by learned counsel for the appellants. I shall state them and briefly indicate that there is no substance in any of the points urged on behalf of the appellants, except in one which point is fatal to the cause of the plaintiff. The points are:—

(i) that the Araria Court had no jurisdiction to try the suit;

(ii) that at no point of time any contract was concluded between the parties as the sample sent by the defendants was rejected by the plaintiff;

(iii) that arbitrarily the Courts have taken the contents of 180 bags to be 405 maunds, and

(iv) that the breach, if any, had occurred long before June, 1961, and, there being neither any pleading nor any proof of the prevailing market rate of Tora at or about the date of the breach, the plaintiff is not entitled to any damages.

There is substance in the contention put forward on behalf of the appellants that the Araria Court had no jurisdiction to try the suit. The telegram sent by the defendants on the 22nd March, 1961 (Ext. 5) was a mere communication of the prevailing rate of Pai Tora at Gorakhpur and an invitation to offer, not an offer itself. The letter (Ext. 1) dated the 23rd March, 1961, sent by the plaintiff to the defendants in response to the invitation to offer contained in Ext. 5 was the offer of the plaintiff. The plaintiff offered to purchase pure Tora at Rs. 28.00 per maund; the quantity being 180 bags, which is the capacity of a wagon. The defendants accepted this offer by their telegram (Ex. 5/a) dated the 28th March 1961, which merely said — "Received letter, Bought 180 bags Tora 28/- Linseed 24/-" The price of linseed was also quoted, but that is immaterial for our purpose. The fact to be emphasised is that this was an unconditional acceptance of the plaintiff's offer to purchase 180 bags of Tora at Rs. 28.00 per maund. There was no statement that the purchase was as per sample which was being sent. The contract, therefore, was completed at Gorakhpur when the telegram of acceptance was despatched from that place on the 28th March, 1961.

The plaintiff's case is that the defendants were to despatch the goods by rail to Forbesganj. That being so, under Section 39 of the Sale of Goods Act, the delivery at the request of the buyer to the common carrier was tantamount to delivery to the buyer at Gorakhpur. The Courts below seem to have fallen into an error in thinking that the defendants had undertaken to deliver the goods at Forbesganj in the eye of law. Viewed in that light, one may say that no part of the cause of action arose within the jurisdiction of the Araria Court.

I may further add that, although it is not the plaintiff's case in the plaint that the communication of the breach of the contract, if any, was received by the plaintiff at Forbesganj within the jurisdiction of the Araria Court, it is also one of the settled principles of law, so far as this court is concerned, that the place

where the communication of the breach of the contract or cancellation of the contract is received is a place where in such a suit a part of the cause of action can be said to have arisen. I need not, however, pursue this matter any further as the point of jurisdiction can be finished with reference to the provision of law contained in Section 21 of the Code of Civil Procedure. Although the point was taken at the earliest stage, no prejudice could be shown to have been caused to the appellants by the trial of the suit by the Araria Court. In that view of the matter, this point is not fit to succeed in the second appellate court.

6. The concurrent finding of the Courts below that there was a concluded contract between the parties is correct in view of the discussion which I have made in regard to the point of jurisdiction. There does not seem to be any error of law in this regard in the judgments of the Courts below.

7. The fact that the contents of 180 bags of Tora were 405 maunds does not seem to have been disputed in the Courts below. On the case of the plaintiff, the finding recorded upon its basis is correct. There is no error of law in this regard either.

8. The point of importance which is fatal to the claim of the plaintiff-respondent is the fourth and the last one. The plaint is very much defective in this regard. According to the case made out in the plaint, the goods were to be despatched immediately after the purchase, as the plaintiff had to send the reminder for their despatch, when the goods did not arrive at Forbesganj till the 10th April, 1961. Nowhere in the plaint it is stated as to how, according to the plaintiff, this time of despatch, or in other words, the time of delivery of the goods was extended. The unilaterally repeated demand on the part of the plaintiff could not extend the time for delivery until the defendants, either expressly or impliedly, had agreed to extend it. On the case made out in the plaint, there is nothing to indicate that the defendants had agreed to extend the time, expressly or impliedly. As stated above, rather the plaint is silent on the point as to when actually the breach occurred and on what date the prevailing rate of the contracted quality of Tora was Rs. 32.50 paise per maund.

9. On the basis of the defendants' case, and especially Ext. 4/a, which is the latter's reply dated the 9th June, 1961, sent on behalf of the defendants to the plaintiff's pleader's notice dated the 29th May, 1961 (Ext. 4), it was submitted on behalf of the plaintiff-respondent that the defendants had agreed to deliver the

goods at least by the 29th May, 1961, if not later. I am not prepared to accept this argument. The correspondence, as noticed in the judgments of the Courts below, as also Ext. 4/a clearly shows that the difference between the parties arose in the very beginning in April, 1961. According to the plaintiff, the defendants had agreed to purchase and despatch pure Tora for it, while, according to the defendants, they had agreed to purchase and despatch Tora as per sample sent by them, which, as is the finding of the Courts below, was not a sample of pure Tora. The breach, therefore, on the part of the defendants had occurred in April, 1961. At no point of time thereafter, either expressly or tacitly or impliedly, the defendants had agreed to despatch pure Tora as per contract. Their so-called readiness and willingness to despatch the Tora was a qualified fresh offer to despatch the Tora as per sample sent by them, which was not the contract between the parties. The parties were never consensus ad idem in regard to such an alleged contract, and they were never agreed to the despatch or to the extension of time for the despatch in regard to the contracted quality of the Tora. In that view of the matter, I am definitely of the opinion that the breach of the contract occurred and the defendants were responsible for that breach in April, 1961, to be more accurate, near about the middle of April, 1961. The claim of the plaintiff for damages based upon the difference between the contract price and the market price prevailing in June, 1961 was unsustainable. There being no claim or evidence in regard to the prevailing market rate in or about the middle of April, 1961, the suit, as framed, must fail. In this connection reference may be made to the following decisions in Erroll Mackay v. Kameshwar Singh, AIR 1932 PC 196, Dominion of India v. Bhikhraj Jaipuria, AIR 1957 Pat 586, Bhikraj Jaipuria v. Union of India, AIR 1962 SC 113 and Murlidhar Chiranjilal v. Harischandra Dwarkadas, AIR 1962 SC 366.

9A. Reliance was placed on behalf of the plaintiff-respondent upon the decision of this Court in Firm Rampratap Mahadeo Prasad v. Sasansa Sugar Works Ltd., AIR 1964 Pat 250 and a decision of the Supreme Court in P. S. N. S. Ambalavana Chettiar & Co. Ltd. v. Express Newspapers Ltd., Bombay, AIR 1968 SC 741. In my opinion, none of these two cases helps the contention of the plaintiff-respondent. In the Patna case, the question was that if during the time when the goods ought to have been delivered and when they were not delivered, the buyer had re-purchased the goods in the market whether that re-purchase rate could be taken as the market rate for ascer-

taining the quantum of damages under Section 73 of the Contract Act. Their Lordships held, it could be so. If I may say so with respect, there is no scope for doubting the proposition of law which was laid down in that case. The point to be noticed with reference to that case also is that the market rate, which, on the facts of that case, was taken to be the re-purchase rate, was the rate which was prevalent when the goods ought to have been delivered, but were not delivered; that is to say, on the date of the breach of the contract on the part of the seller.

The Supreme Court case relied on behalf of the respondent is rather against it on principle. In the Supreme Court case, Bachawat, J., speaking for the Court, has said at page 744 —

"(13). The respondent is entitled to claim as damages the difference between the contract price and the market price on the date of the breach. Where no time is fixed under the contract of sale for acceptance of the goods, the measure of damages is prima facie the difference between the contract price and the market price on the date of the refusal by the buyer to accept the goods, see Illustration (c) to Section 73 of the Indian Contract Act. In the present case, no time was fixed in the contract for acceptance of the goods. On March 29, 1952, the appellants refused to accept the goods. The respondent is entitled to the difference between the contract price and the market price on March 29, 1952."

In the instant case, even according to the plaintiff, the goods were to be despatched immediately after the purchase. This is, therefore, not a case where it can be said that there was no time fixed under the contract for despatch or acceptance of the goods. Secondly, even assuming that there was no time fixed in the sense of a particular specified date, the refusal on the part of the defendants was clear in April, 1961, when they insisted to despatch the goods as per sample sent by them, and not pure Tora, as they had intimated to have purchased for the plaintiff by their telegram dated the 28th March, 1961 (Ext. 5/a). In either view of the matter, the date of breach, which was March 29, 1952, on the facts of the case before the Supreme Court, was near about the middle of April, 1961 in the instant case.

10. For the reasons given above, I allow the appeal, set aside the judgments and the decrees of the courts below and dismiss the plaintiff's suit. Since I have affirmed the findings of the Courts below that there was a concluded contract and that the defendants were responsible for the breach of the contract, on the facts

and in the circumstances of the case, I would direct the parties to bear their own costs throughout.

11. M. P. VERMA, J. :— I agree.

Appeal allowed.

AIR 1970 PATNA 95 (V 57 C 12)

R. J. BAHADUR AND P. K. BANERJI, JJ.

Doman Mahton, Petitioner v. Surajdeo Prasad, Opposite Party.

Criminal Misc. No. 501 of 1968, D/-6-12-1968.

(A) Evidence Act (1872), Ss. 145, 155— Statement of a witness made in previous case — Use of it in subsequent case to contradict him or impeach his character — Before so using it, the party should be allowed to draw the witness's attention to his previous statements. (Paras 6, 7)

(B) Criminal Procedure Code (1898), S. 162 — Statements made in an investigation of a case other than that which results in a trial in which those statements are sought to be used — Section does not apply. (Para 6)

Dinesh Charan, for Petitioner; Narayan Singh, for Opposite Party.

ORDER:— This application is by an accused person in a criminal case before a Munsif Magistrate, Monghyr, where the question arose as to whether the attention of a witness could be drawn in cross-examination to the previous statement made by him in another case.

2. The facts are these. At 9.15 A. M., on 27-4-1965, the petitioner, who is a Low Tension Fuseman of Bihar State Electricity Board at Lakhisarai, filed a case of assault, at Police Station Lakhisarai, against the opposite party, who was arrested and later on released on bail on the same day by the police. The said case was registered as G. R. Case No. 668 of 1965. The opposite party was a Member of the Lakhisarai Notified Area Committee (hereinafter referred to as 'the Area Committee'). The Police examined one Jamadar of the Area Committee named Ramgovind Prasad. After investigation, the Police submitted charge sheet, and the trial is now pending in the Court of the Munsif Magistrate at Monghyr.

3. It appears that in respect of the above incident, the opposite party also filed a complaint for various offences, such as Sections 323, 352, 504, 379 and 109 of the Penal Code, before the Sub-divisional Officer, Monghyr, on 29-4-1965. Cognizance was taken and the trial is also proceeding before the said Munsif Magistrate at Monghyr, namely, Shri Raghuraj Singh, and it is registered as Case No. 239C of 1965.

4. When the trial of the complaint case filed by the opposite party, Surajdeo Prasad, was taken up by the Munsif Magistrate, a number of witnesses were examined and cross-examined; and when Ramgovind Prasad was examined, and was being cross-examined after charge, the cross-examining lawyer on behalf of the petitioner, wanted to draw the attention of the witness (P. W. 5) to certain statements made by him before the Police in the earlier case, namely, No. 668 of 1965, to contradict his statement given in court in the present trial, but the same was disallowed by the Court. The learned Munsif Magistrate in his order dated 23-1-1968, has observed that under Section 162 of the Code of Criminal Procedure, the statement of a witness made before the Police could be brought into evidence in the same case, and as, no statement of this witness had been taken in this case, nor did the Police make investigation in this case, the defence lawyer was directed not to draw the attention of the witness in this case to the statement made by him before the Police in the counter-case. The present application is directed against the said order.

5. We have heard learned Counsel for the parties, and the sole question that arises for consideration is whether the statement of Ramgovind Prasad, who has been examined as prosecution witness No. 5 in this case, which he had made in the course of the investigation in the earlier counter-case, could be used, and whether he could be confronted with the statements then made. Mr. Dinesh Charan, appearing in support of the petition, has urged that the learned Munsif Magistrate was in error, and has drawn our attention to note 12 to Section 162 in Chitaley's Code of Criminal Procedure, 6th Edition, volume I, which may be reproduced here:—

"At any inquiry or trial in respect of any offence under investigation at the time when such statement was made,"

A is alleged to have murdered X. In the course of the investigation by the Police into the case of murder, B makes a statement to the Police Officer. Can B's statement be used in a subsequent inquiry or trial unconnected with the murder case? Before the amendment of 1923 there was a conflict of opinion on the point: some decisions holding that it could not be used and others holding that it could be used. The section as amended in 1923 made it clear that statements made during the course of investigation could be used in a subsequent case which was not under investigation when the witness made the statement. Although this section was again amended in 1955 the legal position in this regard remains unchanged because even after the amend-

ment the wording of the section continues to be the same as under the old section so far as this part of it is concerned."

6. There can be no doubt that the provisions of section 162 of the Code of Criminal Procedure do not apply to statements made in an investigation other than that which results in a trial in which those statements are sought to be used. The object is obvious, as will appear from the provisions of Section 145 of the Evidence Act which reads thus:—

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

Further, if it is intended to impeach the credit of a witness, as is provided under Sec. 155 of the Evidence Act, then the credit of a witness may be impeached by the adverse party, or, with the consent of the Court, by the party who calls him, by various ways, one of which is as provided by sub-section (3) of Section 155 of the Evidence Act; namely, by proof of former statements inconsistent with any part of his evidence, which is liable to be contradicted. Impeaching the credit of a witness, either under Section 145 of the Evidence Act (written statements), or under Section 155 thereof (oral statements), can be done by drawing his attention to those statements, whether written or oral. Further, those parts of the statement before the Police, which are intended to be used in cross-examination, to contradict the witness, must be proved and brought on the record. This can ordinarily be done by the admission of the witness that he had made the statement, or, by examination, of the Police Officer who recorded it.

7. For these reasons, we are satisfied that the learned Munsif Magistrate was in error in not permitting the petitioner to draw the attention of the witness, for the purpose of cross-examination, to his earlier statements made before the Police, which was reduced into writing, or submitted by the witness in writing before the Police, in the counter-case. Accordingly, the order of the learned Munsif Magistrate dated 23-1-1968 in this respect is set aside, and the cross-examination of Ramgovind Prasad (P. W. 5) on the statements said to be made by him at the time of the investigation into the counter-case, must proceed. The application is, therefore, allowed.

Application allowed.

AIR 1970 PUNJAB AND HARYANA 81

(V 57 C 13)

TEK CHAND, J.

Bhagwat Parshad, Petitioner v. Inspector General of Police, Punjab and others Respondents.

Civil Writ No. 756 of 1966 D/- 1-8-1967.

(A) Constitution of India, Articles 226, 311 — Disciplinary enquiry into misbehaviour of Police Constable — Copy of report of Reserve Inspector not supplied — Petitioner having knowledge of contents — Held no prejudice was caused.

Where, in a disciplinary inquiry into the misbehaviour of a Police Constable creating rowdysom under the influence of drink in the Police Lines, a Reserve Inspector in his report had stated how he had been sent for and that he had taken the petitioner to the hospital in the Police Lines where the doctor had examined the petitioner and had opined that he (the petitioner) had taken liquor, no prejudice, whatsoever, could be caused to the petitioner as a result of the copy of that document not having been furnished to him, since he knew that the Police doctor had examined him and had found him under the influence of liquor. He could have examined the Police doctor if he wanted. (Para 4)

(B) Civil Services — Punjab Police Rules (1934), Vol II Chap. XVI, R. 16.2(1) — Punishments under — Lacuna indicated — Punjab Civil Services (Punishment and Appeal) Rules (1952), R. 4 (vi) not applicable — (Civil Services — Punjab Civil Services (Punishment and Appeal) Rules (1952), R. 4 (vi)).

In the list of punishments in the Police Manual one noticeable omission is of punishment by removal from service which does not disqualify from future employment. This penalty can be imposed upon the members of the Punjab Civil Services under R. 4(vi) of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, but members of the Police force are not governed by these rules. (Para 8)

(C) Civil Services — Punjab Police Rules (1934), Vol. II Chapter XVI, R. 16.2(1) — Word 'acts' — Interpretation of — Does not exclude single act — (Civil P. C. (1908), Preamble—Interpretation of Statutes)—(General Clauses Act (1897), S. 13(2)).

The use of the word 'acts' in R. 16.2 (1) does not exclude a single act of misconduct. In order to give effect to the legislative intent the words in plural number may be construed to include the singular, and the words importing the singular only, may be applied to plurality of acts, things or persons. In order to gauge gravity of misconduct, what matters, is not frequency, as obliquity or delinquency. It cannot, therefore, be accepted that a single act of misconduct, howsoever grave, can never result in dismissal. What really matters is the enormity of the misconduct. (Para 9)

(D) Civil Services — Punjab Police Rules (1934), Vol. II, Chap. XVI, R. 16.2 (1) — Words "gravest acts of misconduct" — Interpretation of — Intention of Legislature — Meaning of 'misconduct' and 'grave' — Use of superlative degree — Significance of, explained — (Words and Phrases — 'Misconduct') — (Words and Phrases — 'Grave and gravest').

The words "gravest acts of misconduct" used in R. 16.2 (1) are incapable of definition. One has to apply one's mind to the words and give a meaning to each of them in the light of the actual deed, situation and circumstances. (Para 11)

"Misconduct" is a generic term and means "to conduct amiss; to mismanage; wrong or improper conduct; bad behaviour; unlawful behaviour or conduct." There is, a distinction between misconduct and grave misconduct. Misconduct in order to earn the epithet of gravity has to be gross or flagrant. Consequently the degree of misconduct to justify dismissal has to be higher or more serious. (Paras 10, 11)

To look at the matter exclusively from a grammatical angle, 'gravest' is the highest degree of misdeed as compared to what is just 'grave'. The superlative degree may be used either to denote the highest or maximum degree in a given aggregate, or simply to indicate a supreme or very high degree without definite comparison. It cannot be said that the intent of the framers of the rule was, that absolutely the worst misconduct could alone merit dismissal, and so long as, comparatively speaking, there could be a possibility of a still worse conduct, it could not be termed the gravest act of misconduct. In the circumstances, the use of the superlative degree, appears to be intended to indicate a super-eminent, or a very high degree of misconduct, and not, that the degree should be so high or so low as cannot be outclassed or excelled. (Para 12)

(E) Civil P. C. (1908), Preamble — Interpretation of Statutes — General rules of construction — Legislative intention in use of superlative degree — Grammatical construction, explained.

Though effect must be given, where possible to every word, clause and sentence of a statute and a statute is to be construed, so that effect is given to all its provisions and, nothing is to be deemed superfluous or insignificant the literal interpretation of the words should not prevail if it creates a result contrary to the apparent intention of the Legislature and if the words are sufficiently flexible, to admit of a construction which will effectuate the Legislative intention. The intention must prevail over the letter; the letter, must, if possible, be read so as to conform to the spirit of the Act. The use of superlative is one of the modes of laying stress on a particular requirement. The

tendency to use superlative for that purpose is to be found even in formal documents.

(Para 13)

From the grammatical point of view the use of the superlative degree in order to emphasise a particular quality without intending that it cannot be surpassed, is permissive.

(Para 14)

(F) Civil P.C. (1908), Preamble — Interpretation of statutes — Relevant canons of construction.

The relevant canons of construction of statutes, statutory rules, or formal documents are (i) that the general words should receive a general construction and their meaning may in an appropriate case be expanded or restricted with a view to see that construction does not lead to injustice. Oppression or to an absurd consequence, (ii) that the rules of grammar, though ordinarily applied for the purpose of ascertaining the meaning of a statute are, however, not controlling, when the Legislative intention would be defeated, (iii) that contemporaneous construction placed by the Officers or departments charged with the duty of acting upon it or executing it should be given worthy weight.

(Paras 15, 16, 17)

(G) Constitution of India, Articles 226, 311—Dismissal of Police Constable for misbehaviour — Writ petition against — No interference — When department has not used discretion wantonly or arbitrarily — (Civil Services—Punjab Police Rules (1934), Vol. II Chap. XVI Rule 16.2(1)).

The officers of the Police Department are charged with the duty of maintaining and observing discipline. As to the standard of discipline required to be enforced in their case the judgment of their superior officers deserves to be respected and should not be lightly interfered with. Moreover, it was for the police officers who judged the infraction of the police rules to determine the seriousness of the misconduct and to decide upon the suitability of the punishment. It will not be within the ambit of the powers of High Court, when petitioned to issue the extraordinary writs of certiorari, mandamus etc., to interfere with the discretion of the Heads of the Departments when it has not been exercised wantonly or arbitrarily. AIR 1963 SC 779 and AIR 1965 SC 111 and AIR 1964 SC 477, Relied on.

(Paras 17, 18)

Cases . Referred: Chronological Paras

(1965) AIR 1965 SC 111 (V 52) =

(1964) 5 SCR 1030, T. Prem Sagar v. Standard Vacuum Oil Company, Madras

18

(1964) AIR 1964 SC 477 (V 51) =

(1964) 5 SCR 64, Syed Yakooob v. K. S. Radhakrishnan

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(1963) AIR 1963 SC 779 (V 50) =

(1963) Supp 1 SCR 648, State of Orissa v. Bidyabhusan

18

(1961) AIR 1961 SC 1623 (V 48) =

1961 Jab LJ 702, State of M. P. v. Chintaman Sadashiv Waishampayan

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R. C. Dogra and R. N. Narula, for Petitioner; Abnasha Singh, for Advocate General, Punjab and P. S. Jain, for Advocate General, Haryana, for Respondents Nos. 2 and 3.

ORDER: Bhagwat Prasad petitioner, Constable No. 1751 Police Lines, Ambala, has filed this writ petition praying that the order of his dismissal be quashed.

2. On 3rd of January 1965 he was posted in the Police Lines, Ambala, and when off duty was alleged to have taken liquor along with Constable Ram Pal. At about 10 P. M. in Barrack No. 1, Ram Pal, Constable No. 1669, had abused Kuldip Raj, Constable No. 846. It was alleged that the petitioner was under the influence of drink and was noisy and did not desist even when told to do so by Foot Constable Kuldip Raj. Kuldip Raj reported to Nanak Chand Reserve Inspector about the misbehaviour of the petitioner and of Ram Pal. It was about 10-30 P. M. that the Reserve Inspector along with a Head Constable and a Foot Constable came to the barrack and found Ram Pal absent. The petitioner was in his bed and the Reserve Inspector asked him to accompany him to the Police doctor in the Police Lines. The doctor examined the petitioner and was of the view that he had taken liquor. The same night the matter was reported to the Superintendent of Police, Ambala. He deputed Sub-Inspector Basant Singh to make an inquiry and the latter submitted his report to the Superintendent of Police on 12th of February 1965.

According to Sub-Inspector Basant Singh, the petitioner and also Constable Ram Pal were guilty of having taken liquor and creating rowdyism under its influence in the Police Lines premises. The report was considered by the Superintendent of Police, who passed a detailed order on 4th of March, 1965. He came to the conclusion that Bhagwat Prasad petitioner had committed grave misconduct and in his view if Police Officers in Police Lines were allowed to drink, that would be the end of all discipline in the Police Force. The Superintendent of Police observed that the gravity of the misconduct of the petitioner was "of the most reprehensible nature" for which there could be only one punishment, namely dismissal from service. He accepted the testimony of Dr. Chaman Lal, in charge Police Hospital, Ambala, as to the petitioner having been under the influence of drink. The statements of other prosecution witnesses were also considered.

The defence of the petitioner was that he had pain in his chest and teeth and had gone to a private practitioner, Dr. Arjan Dev, who had applied chloroform spirit on his aching tooth. The Superintendent of Police rejected this plea and commented that petitioner, if actually in pain, ought to have consulted the police doctor in the Police Lines rather than have gone to a private practitioner in the city. The petitioner filed an appeal to the

Deputy Inspector-General of Police, Ambala Range, which was rejected. The Deputy Inspector-General thought that "creating rowdiness under the influence of liquor in the Police Lines was a matter for severe consideration." The petition for revision filed before the Additional Inspector-General of Police was also unsuccessful. The petitioner has now come up to this Court and has filed the present writ petition.

3. His first contention is that his application to the Inquiry Officer, Sub-Inspector Basant Singh, remained un-heeded. In that application he had asked that he be supplied with the copies of the documents to be proved against him during the departmental inquiry. He had also asked for the copies of the statements of all the prosecution witnesses that had been recorded and also of the report sent to the District Magistrate, Ambala, for his sanction, along with the actual sanction. As the statements of the prosecution witnesses had not yet been recorded, no copies could be supplied. There was no report to the District Magistrate, Ambala, for sanction, and the question of supplying a copy of any such report could not arise. There is really only one document, which is the report dated 3rd of January, 1965 of Sub-Inspector Basant Singh, the Inquiry Officer. In this report he had recorded the fact of the information he had received about the petitioner and the other Constable having taken alcoholic drinks at night in the barracks and that he had taken the petitioner to the Police Doctor who had reported that the petitioner was examined and that he had taken liquor. The statement of Kuldip Raj Foot Constable was recorded by the Inquiry Officer on 16th of January 1965, wherein he had stated inter alia that the petitioner was smelling of liquor and he started making noise. The petitioner cross-examined Kuldip Raj, but did not cross-examine him with a view to challenge the latter's statement as to his having taken liquor or his having made noise. The statement of Kuldip Raj regarding this aspect was not challenged.

4. I do not think that the petitioner has been prejudiced by copy of the report of Nanak Chand Reserve Inspector, dated 3rd of January 1965 (copy Annexure "A" to the writ petitioner), not having been supplied to him. He merely stated therein how he had been sent for and that he had taken the petitioner to Dr. Chaman Lal of the hospital in the Police Lines and that the doctor had examined the petitioner and had opined that he (the petitioner) had taken liquor. No prejudice, whatsoever, could be caused to the petitioner as a result of the copy of this document not having been furnished to him. He knew that the Police doctor had examined him and found him under the influence of liquor. He could have examined the Police doctor if he wanted. As a matter of fact he produced in his defence Dr. Arjan Dev, a private medical practitioner of

Ambala, to show that he had taken a medicine containing alcohol.

5. The learned counsel for the petitioner has next drawn my attention to State of Madhya Pradesh v. Chintaman Sadashiva Waishampayan, AIR 1961 SC 1623, regarding the right of a public servant to have a reasonable opportunity to meet the charges framed against him. The decision of the Supreme Court is distinguishable on facts. The inquiry was not vitiated by any defects of the character noticed in that decision. The petitioner had been given ample opportunity to substantiate his contention. He had made his own statement and produced some evidence.

6. The next point urged is that the imposition of the penalty of dismissal was not permissible in view of the provisions of the Punjab Police Rules, 1934 (Volume II), Chapter XVI, Rule 16.2 (1), which provides:

"Dismissal shall be awarded only for the gravest acts of misconduct or as the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service. In making such an award regard shall be had to the length of service of the offender and his claim to pension."

7. The other punishments provided under the Punjab Police Rules are reduction to a lower rank or from the selection grade of a rank to the time-scale of the same rank; and if in a graded rank, to a lower position in the seniority list of the grade or to a lower grade. The increment of a police officer in a time-scale may be withheld as a punishment. He may be confined to quarters or censured. There are also other modes of departmental punishments. A police officer is also liable to be prosecuted criminally where such a course is considered expedient in the interest of administration.

8. In the list of punishments in the Police Manual one noticeable omission is of punishment by removal from service which does not disqualify from future employment. This penalty can be imposed upon the members of the Punjab Civil Services under Rule 4 (vi) of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, but members of the Police force are not governed by these rules.

9. The main argument rests on the meaning and import of the words "dismissal shall be awarded only for the gravest acts of misconduct." The first contention of the petitioner is, that on the assumption that he was under influence of liquor and making noise in the barracks when off duty, he cannot be punished except when there are several acts of misconduct. This is because the police rule refers to "acts" and not to an 'act' of misconduct. The contention that there must be plurality of acts of misconduct does not appear to me to be sound as this interpretation can lead to absurd results. Taking an extreme illustration, can it be said, that the framers of the Police Rules contemplated,

that if a foot constable were to subject a high police officer to a wanton and serious assault, or were to be guilty of a single act of gross insubordination, the punishment of dismissal could not be imposed, unless such conduct was repeated at least once. The use of the word 'acts' does not exclude a single act of misconduct. In order to give effect to the legislative intent, the words in plural number may be construed to include the singular; and the words importing the singular only, may be applied to plurality of acts, things or persons. In order to gauge gravity of misconduct, what matters, is not frequency, as obliquity or delinquency. I cannot persuade myself to accept the argument that a single act of misconduct, howsoever grave, can never result in dismissal. What really matters is the enormity of the misconduct.

10. "Misconduct" is a generic term and means "to conduct amiss; to mismanage; wrong or improper conduct; bad behaviour; unlawful behaviour or conduct." It includes malfeasance, misdemeanour, delinquency and offence. The term "misconduct" does not necessarily imply corruption or criminal intent.

11. The word "grave" is used in many senses and implies seriousness, importance, weight etc. There is, however, a distinction between misconduct and grave misconduct. The adjective 'grave' in this context makes the character of the conduct, serious or very serious. The words "gravest acts of misconduct" are incapable of definition. One has to apply one's mind to the words and give a meaning to each of them in the light of the actual deed, situation and circumstances. 'Misconduct' in order to earn the epithet of gravity has to be gross or flagrant. Consequently the degree of misconduct to justify dismissal has to be higher or more serious.

12. The use of the superlative 'gravest' and the adverb 'only' is not entirely without significance. To look at the matter exclusively from a grammatical angle, 'gravest' is the highest degree of misdeed as compared to what is just 'grave'. This is because of the use of the superlative degree as against the positive or comparative degree. The superlative degree may be used either to denote the highest or maximum degree in a given aggregate, or simply to indicate a supreme or very high degree without definite comparison. In the former sense, particularly when construing a statute, no misconduct can be styled to be of such an extreme degree as to be without a parallel or which cannot be worsted or bettered. "Misconduct" even if of the very worst cannot reach such a peak or depth which cannot be surpassed. Even in the case of superlative degree of misconduct there are grades and degrees. The argument does not admit of serious consideration, that the intent of the framers of the rule was, that absolutely the worst misconduct could alone merit dismissal, and so long as, comparatively speaking, there could be a possibility of a still worse conduct, it

could not be termed the gravest act of misconduct. Human conduct or behaviour cannot be graded and there can be no precise scale of graduation in order to arithmetically compare the gravity of the one from the other. In the circumstances, the use of the superlative degree, appears to be intended to indicate a supereminent, or a very high degree of misconduct, and not, that the degree should be so high or so low as cannot be outclassed or excelled.

13. It is no doubt a rule of construction, that effect must be given, where possible to every word, clause and sentence of a statute. It is equally true that a statute is to be construed, so that effect is given to all its provisions and, nothing is to be deemed superfluous or insignificant. But the literal interpretation of the words should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to admit of a construction which will effectuate the legislative intention. The intention must prevail over the letter; the letter, must, if possible, be read so as to conform to the spirit of the Act. In quest of the intention of the legislature, words or clauses may have to be given enlarged or restricted meaning. What is of moment, is not the abstract force of the words, or what they may conceivably comprehend, but in what sense they were intended to be used in the Act. In speech and expression resort is occasionally had to exaggeration for the purpose of emphasis; there is a general proneness to overstress; and superlative is often used where the intention is to mean only a very high degree. The use of superlative is one of the modes of laying stress on a particular requirement. The tendency to use superlative for that purpose is to be found even in formal documents.

14. The superlative degree, in relation to material things may admit of arithmetical accuracy in order to express the highest degree of the quality or attribute indicated in the adjective or adverb used. By way of illustration, one can refer with mathematical precision to the tallest building in the town, the highest mountain in the State, the longest river in the country, the deepest ocean etc. In these cases the highest attribute is intended not to be eclipsed. In the realm of the non-material or the notional, in particular in relation to thought, action, conduct or to mental qualities, the superlative is used in an exaggerating heightening or hyperbolic sense, or in order to indicate simply a high degree of the quality mentioned. From the grammatical point of view the use of the superlative degree in order to emphasise a particular quality without intending that it cannot be surpassed, is permissive.

15. I may now refer to the relevant canons of construction of statutes, statutory rules, or formal documents. The general words should receive a general construction

and their meaning may in an appropriate case be expanded or restricted with a view to see that construction does not lead to injustice, oppression or to an absurd consequence. It would certainly lead to an absurd conclusion if one were to confine the passing of an order of dismissal in cases of misconduct, the gravity of which cannot be transcended.

16. It is also a well known principle of interpretation of statutes that the rules of grammar, though ordinarily applied for the purpose of ascertaining the meaning of a statute, they are, however, not controlling, when the legislative intention would be defeated. In construing the words of a statute the Courts adhere to the plain common sense meaning of the language rather than apply refined and technical rules of grammatical construction. Statutes are construed primarily with an eye to legislative intent rather than with a view to look for niceties and refinements of grammar. The general purpose of a statute is a more important aid to meaning than any rule which grammar may lay down.

17. Another consideration which is worthy of weight, is the rule of contemporaneous construction placed by the officers or departments charged with the duty of acting upon it or executing it. In this case the Superintendent of Police, the Deputy Inspector General, and finally the Inspector General of Police, assessed the conduct of the petitioner to be of the requisite gravity so as to merit the imposition of the punishment of dismissal. The officers of the Police Department are charged with the duty of maintaining and observing discipline. As to the standard of discipline required to be enforced in their case the judgment of their superior officers deserves to be respected and should not be lightly interfered with. The police force is required to discharge highly responsible and onerous duties for maintenance of law and order, and for other purposes essential to the life of the Community. These duties from their very nature have to be of an exacting nature. The result of laxity in conduct, or infringement of rules of discipline can undermine the optimum usefulness of the force.

18. Moreover, it was for the police officers who judged the infraction of the police rules to determine the seriousness of the misconduct and to decide upon the suitability of the punishment. It will not be within the ambit of the powers of this Court, when petitioner, to issue the extraordinary writs of certiorari, mandamus etc. to interfere with the discretion of the Heads of the Departments when it has not been exercised wantonly or arbitrarily. These are well settled limitations which High Courts impose upon themselves when exercising the extraordinary jurisdiction. As observed by the Supreme Court in *State of Orissa v. Bidyabhusan*, AIR 1963 SC 779 (786) the Court in a case

in which an order of dismissal of a public servant is impugned, is not concerned to decide whether the sentence imposed, provided it is justified by the rules, is appropriate having regard to the gravity of the misdemeanour established. The reasons, which induce the punishing authority, if there has been an enquiry consistent with the prescribed rules, are not justiciable; nor is the penalty open to review by the Court. The condition necessary for the issuance of a writ of certiorari is, that the order of the inferior tribunal suffers from an error which is apparent on the face of the record, or, in the exercise of its jurisdiction, the tribunal has acted illegally or arbitrarily. The evidence has been considered and the conclusion drawn from its appraisal cannot be reopened. No error of fact will be corrected by this Court, when exercising its supervisory jurisdiction. It is not permissible to advance the argument, that the evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. This view is amply supported by a long series of decisions and reference may be made to *T. Prem Sagar v. Standard Vacuum Oil Company*, AIR 1965 SC 111 and *Syed Yakooob v. K. S. Radha Krishnan*, AIR 1964 SC 477.

19. Having carefully gone through the impugned orders, I cannot find any error or lacunae which may be deemed to be apparent on the face of the record. After giving due weight to the issues raised, I find the petition devoid of merit and it is, therefore, dismissed. The petitioner has been dismissed from service and I will not burden him with costs.

Petition dismissed.

AIR 1970 PUNJAB AND HARYANA 85
(V 57 C 14)

GURDEV SINGH AND
S. S. SANDHAWALIA, JJ.

Het Ram Lallu Singh and others, Appellants v. State, Respondent.

Criminal Appeal No. 766 of 1968 and Murder Ref. No. 47 of 1968, D/-8-5-1969, from order of S. J. Ferozepur, D/-8-7-1968.

(A) Penal Code (1860), Ss. 97, 99 — Right of private defence — Persons constructing permanent water course on land of another without his consent — They commit criminal trespass and mischief — Occupier of land has right of private defence of property — He need not resort to public authorities.

The law of private defence does not require that a person suddenly called upon to face an assault must run away and thus protect himself. Where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property.

FM/FM/C441/69/DRR/B

It is therefore, wrong to hold that the occupiers of the land on which criminal trespass and mischief is committed in their presence by constructing a permanent water course on their land without their consent were not entitled to the right of private defence because they were bound to resort to public authorities. AIR 1963 SC 612 and AIR 1945 Pat 283 and AIR 1959 Pat 22 and 1961 BLJR 824, Rel. on.

(Paras 16, 17, 18)

(B) Evidence Act (1872), S. 5 — Appreciation of evidence — Interested witnesses — Testimony not final.

In a case where injuries have been caused on both sides and a precise counter version is being pleaded on behalf of the accused, it is but natural that the testimony of their eye witnesses should be partial to the version which they have chosen to give. All the eye-witnesses, therefore, come clearly within the ambit of the term 'interested testimony' and their testimony cannot possibly be final.

(Para 19)

(C) Penal Code (1860), S. 103 — Complainant's party armed with deadly weapons entering upon land occupied by accused and constructing permanent water course on it without any right — Party of accused resisting them — Fight between the parties resulting in death of two persons on complainant's side and injuries to persons on both sides — Held that accused had right of private defence of property and had not exceeded it — Being protected by the right there was no offence committed by them.

(Para 23)

| Cases Referred: | Chronological | Paras |
|--|---------------|-------|
| (1963) AIR 1963 SC 612 (V 50) = | | |
| 1963 (1) Cri LJ 495, Jai Dev v. State of Punjab | | 17 |
| (1961) 1961 BLJR 824, Mozam Ansari v. State | | 16 |
| (1959) AIR 1959 Pat 22 (V 46) = | | |
| 1959 Cri LJ 71, Barisa Mudi v. State | | 16 |
| (1945) AIR 1945 Pat 283 (V 32) = | | |
| 46 Cri LJ 672, Summa Behra v. Emperor | | 16 |
| (1942) AIR 1942 Pat 96 (V 29) = | | |
| 43 Cri LJ 41, Hariram Mahatha v. Emperor | | 16 |
| (1938) AIR 1938 Pat 518 (V 25) = | | |
| 39 Cri LJ 785, Satnarain Das v. Emperor | | 16 |
| (1934) AIR 1934 All 829 (2) (V 21) = | | |
| 35 Cri LJ 780, Abdul Hadi v. Emperor | | 16 |
| (1927) AIR 1927 Lah 705 (V 14) = | | |
| 28 Cri LJ 848, Phula Singh v. Emperor | | 16 |
| M. R. Mahajan with P. S. Jain, for Appellants; D. D. Jain, for Advocate General, Punjab, for Respondent. | | |

S. S. SANDHAWALIA J.: The six appellants being the sons and grandsons of Mangla Ram were brought to trial on charges under Sections 148, 302/149, 302/149, 307/149, 323/149 and 323/149, Indian Penal Code,

before the Court of Session at Ferozepur. Brij Lal, appellant was charged in a separate case under Section 27 of the Arms Act for the unlawful use of his licenced gun but both the cases were tried together on the appellants' request in order to avoid any prejudice to them by separate trials. By a curious process of reasoning the learned Sessions Judge convicted Het Ram and Banwari Lal appellants only under Section 302 read with Section 149, Indian Penal Code, for the murders of Shiv Lal and Gopi Ram deceased respectively and sentenced them to death but held the other four appellants guilty under Section 326 read with Section 149, Indian Penal Code. He imposed a sentence of 4 years' rigorous imprisonment under Section 326 read with S. 149, Indian Penal Code, on three counts on Lalu Ram, Brij Lal and Kanshi Ram appellants whilst Balram appellant due to his tender age and on the finding that he acted under the influence of his father was sentenced to one year's rigorous imprisonment on these counts. Separate convictions and sentences were also recorded under S. 323/149, Indian Penal Code, and Section 148. All these sentences were, however, directed to run concurrently. Brij Lal appellant was, however, acquitted of the charge under Section 27 of the Arms Act. All the convicts appeal and the death sentences of Het Ram and Banwari Lal appellants are also before us for confirmation of the same.

2. The appellants Lalu Ram and Kanshi Ram are brothers. Brij Lal and Banwari Lal are the sons of Kanshi Ram whilst Het Ram and Balram are the sons of Lalu Ram. Shiv Lal and Gopi Ram deceased, both of whom were killed in the incident, were also brothers and the three injured P. Ws. namely, Balwant Ram Jagdish Lal and Devi Lal are sons of Shiv Lal, deceased. The motive for the commission of the offence is the rather common place one pertaining to the alignment of an irrigation watercourse. The two feuding families of the appellants and the deceased are not land owners in their own right but are tenants of agricultural land. Kanshi Ram appellant held the land of Tek Chand, Lambardar in his cultivating possession whilst his brother Lalu Ram appellant was the tenant of some land owned by Rai Sahib Kundan Lal in village Dhaban Kokarian. Gopi Ram and Shiv Lal, the two deceased brothers had been for long in cultivating possession of some other land of Tek Chand, Lambardar. Before the consolidation of holdings in the said village which took place approximately two years prior to the occurrence the watercourse irrigating the land of the complainant family used to run through the land of R. S. Kundan Lal which was in cultivating possession of the appellants. After the consolidation the said watercourse was discontinued and a new watercourse was provided which, however, did not satisfactorily command the fields of the complainants as it ran at a

lower level. Shiv Lal deceased is said to have made an application to the Canal Department and another watercourse was provided by the authorities and the same continued to be in use for a period of nearly two years. The prosecution alleges that Tek Chand the landlord of the complainants wanted to evict them from the said land and to give that tenancy to the appellants' family which was not agreed to by the complainants. It is alleged, however, that in order to harass them and to pressurise them for vacating the same, the appellants demolished the watercourse, thus obstructing the irrigation of the land of the deceased. It is thus the case of the prosecution (which is stoutly controverted on behalf of the defence) that the matter was reported to the Panchayat in which the appellants and the complainants' families were represented and it was decided in the said Panchayat that the original watercourse as it existed before the consolidation of holdings, should be restored and be reconstructed by the complainants. We have adverted in detail to these matters as a plea of private defence of property and person has been taken on behalf of the appellants and it is thus necessary to have the events leading to the incident in a clear perspective.

3. The occurrence took place on Diwali day that is the 1st of November, 1967, at about 3 P. M. Gopi Ram and Shiv Lal deceased along with Balwant Ram, Jagdish Lal and Devi Lal P. Ws. had on the said day gone at about 2.30 P. M. to reconstruct the old watercourse and were doing so when at about 3 P. M. all the six appellants came there armed. Het Ram and Banwari Lal appellants were armed with sais. Kanshi Ram appellant had a kassia, Balram a kulhari, Lalu Ram a dang whilst Brij Lal appellant was carrying his licenced gun. A challenge is said to have been thrown by the appellants declaring that they would not allow the complainants to construct the watercourse and will further eject them from the land whereupon the deceased and the P. Ws. suspended the work of constructing the watercourse nevertheless Brij Lal appellant is said to have fired two shots in succession accompanied by a threat that anyone who would withdraw from the spot would be shot to death. The deceased and the P. Ws. out of fear are said to have then withdrawn to the path going to village Sardarpur which is closeby, but the appellants are said to have followed them up and opened an attack on them which was both sudden and simultaneous. Het Ram appellant is said to have struck two fatal blows to Shiv Lal with a spear in his chest and back whilst Kanshi Ram and Balram also inflicted injuries on him with their respective weapons. Banwari Lal appellant similarly is said to have struck the fatal spear blow to Gopi Ram on his chest and left arm-pit whilst Kanshi Ram appellant dealt a blow on his head with his kassia. Jagdish Lal P. W. who attempted to intervene with

a spade, which he was carrying, was also assaulted with a spear by Het Ram whilst Kanshi Ram appellant hit him with a kassia and Balram with a kulhari. Injuries were then caused by the appellants with their weapons to the three prosecution witnesses, namely, Balwant Ram, Devi Lal and Jagdish Lal, out of whom Jagdish Lal and Devi Lal who had spades retaliated with their weapons against Brij Lal and Lau Ram appellants. Shiv Lal and Gopi Ram died at the spot and thereafter the appellants are said to have withdrawn from the place of occurrence with their respective weapons towards their homesteads which are not very distant from there. After the incident Balwant Ram accompanied by Sohan Lal was proceeding to the police station when he met Sub-Inspector Iqbal Singh at the Bus Stand, Dotarianwali, and made a statement, Exhibit P. 17 which forms the basis of the first information report recorded at police station, Abohar, regarding the incident. The Investigating Officer forthwith reached the spot and collected the bloodstained earth therefrom, prepared the relevant inquest reports as well as the site plan and completed the other details of the investigation thereat.

4. On the 9th of November, 1967, Head Constable Ram Bhagwan had interrogated Het Ram, Banwari Lal, Balram and Kanshi Ram appellants and in pursuance of their respective disclosure statements they led to the recovery of the respective bloodstained weapons said to have been wielded by them at the time of the commission of the offence and these two spears, a kulhari and a kassia were subsequently found on chemical analysis to be stained with human blood and the earth collected from the spot was also similarly found to have the presence of blood of human origin. The licenced gun of Brij Lal was also taken into possession vide memo, Exhibit P. 33. There was, however, no recovery of the dang said to have been wielded by Lalu Ram, appellant.

5. Dr. H. C. Ohri performed the autopsy on the dead body of Gopi Ram on the 2nd November, 1967, at 2.30 P. M. and found five injuries on his person of which two were stab wounds and the other three were incised wounds. Death was opined to be the result of injury No. 1 which had ruptured the heart and consequent shock and haemorrhage therefrom. The time that elapsed between death and injury was opined to be immediate and between death and post-mortem about one day.

6. Lady Dr. Adrash Yakhmi on the 2nd of November, 1967, at 3 P. M. had conducted the post-mortem on the dead body of Shiv Lal deceased and found three incised wounds and a stab wound on its person. On internal examination the costal cartilage and the pleurae was found cut and similarly the left lung was perforated and the left ventricle of the heart was also cut. The

wounds in the heart were communicating with each other. Death was opined to be the result of the stab wound, being injury No. 4, which was sufficient to cause death in the ordinary course of nature. The probable time between injury and death was immediate and between death and post-mortem about one day. This witness in cross-examination stated that under injury No. 4, the wound on the back was the wound of entry of the spear and the wound in the chest on the front is the wound of exit of the spear and both these injuries were the result of the same blow.

7. On the 1st of November, 1967, at 5.30 P. M. Dr. H. C. Ohri had examined Jagdish Lal son of Shiv Lal and found 9 injuries on his person of which injuries Nos. 1, 8 and 9 were opined to be the result of blunt weapon whilst others were inflicted with a sharpened weapon. On the 2nd of November, 1967, Dr. H. C. Ohri had also examined Dev Raj son of Shiv Lal (subsequently mentioned as Devi Lal son of Shiv Lal in the prosecution evidence) and found one reddish contusion and one abrasion on his person. On the 3rd of November, 1967, at 6.45 P. M. Dr. Mrs. Shakuntala Bawa had examined Balwant Ram son of Shiv Lal and found one contusion 3" x 2" on the middle and outer part of the left thigh and it was opined to be the result of a blunt weapon and its duration was about three days. The above medical testimony brings on record the injuries suffered by the two deceased persons and the three prosecution witnesses in the case. On the side of the appellants, Lal Chand was seriously injured and was medico legally examined by Dr. H. C. Ohri on the 1st of November, 1967, at 8.50 P. M. He was accompanied by his brother Kanshi Ram appellant and the following injuries were found on his person:

1. Incised wound 3" x ½" bone deep, on the left side of top of head, running from side to side, 6" above the left ear, cutting the underlying bone. He was semiconscious. Pupils were sluggish. He was vomiting. Substance resembling grey matter of the brain was flowing. The injury was blood-covered and shirt was profusely blood-covered.

2. Incised wound ½" x ¼", skin deep on the front of top of head, in the middle, 2" from the hair margin. Injury No. 1 was grievous and the duration of the two injuries was mentioned within 12 hours. The injured had developed aphasia (loss of speech) as a result of head injury and was not fit to be moved. In cross-examination it was further opined that the injury on the head of Lal Chand could be caused with a weapon like gandasa and the said injury was dangerous to life as the brain matter was also flowing out of the wound. Apart from aphasia it also caused a weakness of one side of the body. The other appellant Brij Lal who was injured was examined on the 8th of

November, 1967, at 6.45 P. M. by Dr. S. Saini and a granulating wound 5 cm x 1 cm x 1/6 cm on the back of left chest 8 cm above the lower rib margin was found on his person. The duration was opined to be 7 to 10 days but in view of the time that had elapsed the kind of weapon used for the infliction of the injury could not be determined. It was in cross-examination when this witness opined that in case the injury would have been an incised wound it could have been caused by a sharpened weapon like gandasi.

8. The eye-witness account in the present case rests solely on the evidence of the three brothers P. W. 5 Balwant Ram, P. W. 6 Jagdish Lal and P. W. 12 Devi Lal being the sons of the deceased Shiv Lal. P. W. 13 Sohan Lal and P. W. 15 Kanshi Ram who are real brothers have deposed regarding the lodging of the first information report by Balwant Ram and the recoveries at the instance of some of the appellants respectively. P. W. 17 Iqbal Singh S. H. O. and P. W. 18 Ram Bhagwan, Head Constable, are the two Investigating Officers. One Court witness Madan Lal, Canal Patwari, was examined. He was a prosecution witness but the Public Prosecutor did not wish to examine him and he was examined as a Court witness on the request of the defence under Section 540 of the Criminal Procedure Code.

9. In their statements under Section 342, Criminal Procedure Code, three of the appellants, namely, Kanshi Ram, Banwari Lal and Balram pleaded false implication and denied their presence at the spot. Kanshi Ram appellant further pleaded that he was nearly blind and being in his seventies was too old to have participated in the fight. A positive version, however, has been set up by Het Ram, Lalu and Brij Lal appellants. This appears in the reply of Het Ram appellant in the commitment Court in the following terms:

"It is incorrect. My father had gone alone to protest to Shiv Lal and Gopi Ram against digging of the khal by taking copy of an order, which he had already obtained. The opposite party started shouting at Lalu Ram and abused him. Shiv Lal and Gopi Ram were armed with gandasis and apprehending an attack on him, I rushed to rescue him with a saila. By the time, I arrived, Gopi Ram dealt a blow on Lalu Ram's head. I dealt him a blow in order to save my father. Then Shiv Lal aimed another blow on his head which brought him reeling to the ground. I consequently struck him also with my saila and just as I and Brij Lal were trying to attend on Lalu Ram, Gopi Ram dealt a gandasi blow on the back of Brij Lal and so I dealt a blow at Gopi Ram." This plea was reiterated by Lalu appellant who further added that the complainants were communists and had been advised to dig the watercourse by force. Brij Lal appellant whilst admitting his presence at the

spot denied the fact that he had gone there armed with a gun and suggested the prosecution story to be implausible as he would have used the gun against the complainants if he was so armed. No defence evidence was, however, adduced in support of the pleas taken on behalf of the appellants.

10. In view of the above plea taken up on behalf of the appellants, three crucial questions arise for determination in the present case. Firstly, whether the complainants had any legal justification for digging and constructing a watercourse through the lands in the cultivating possession of the appellants. Secondly, if the act of the complainants was not so justified, would the appellants have a right of private defence against it? Thirdly, the subsidiary question arises whether the injuries were inflicted on the land of the appellants or upon the adjoining path leading to village Sardarpur.

11. Ere we go to the area of controversy betwixt the parties it deserves notice that certain facts are admitted or stand conclusively proved on the record. Of these it is apparent that prior to the consolidation of holdings in the village, which took place nearly two years before the present incident, a watercourse existed through the lands of the appellants which had served the lands of the complainants for irrigation. After the consolidation this watercourse was admittedly discontinued and became non-existent and in its place a new watercourse considerably to the south passing through the land of Bogha Ram was constructed and remained flowing for nearly two years. Apart from the faint suggestion that is now made that the landlord of the complainants wanted to evict them and substitute the appellants in their place, there exists no hostility or any serious enmity or any cause for hostility between the party of the complainants and the appellants.

12. It is in the light of the above facts that the prosecution evidence regarding the justification of the complainants for building a watercourse in the lands of the appellants has first to be appraised. At the very outset it is noticeable that the present prosecution suggestion that Tek Chand landlord of the complainants wanted to evict them and give the lands to the appellants does not find specific mention in the first information report and is not stated to be the motivating cause of any hostility. On this aspect, apart from the bald statement of Balwant Ram P. W., there is not a hint of any evidence regarding the same. Even his own brothers, Jagdish Lal and Devi Lal, are blissfully unaware of any such fact. Almost similarly there exists no credible evidence that the existing watercourse serving the lands of the complainants was ever demolished by the appellants. Neither the date, time, nor the person in whose presence it was so done has been remotely suggested in the prosecution evidence. As a matter of

fact, far from there being a corroborative evidence on this score, the evidence of CW 1 Madan Lal, the Canal Patwari of the Circle Dhaban Kokarian, who is an official witness and had deposed from the record, is clearly contrary to this aspect of the prosecution case. This witness had deposed that the watercourse prepared subsequent to consolidation of holdings was still in existence and had never been demolished. Nor has the prosecution brought any evidence regarding its allegation that such demolition was brought before a Panchayat and a resolution regarding the reconstruction of the watercourse through the lands of the appellants was passed. Balwant Ram P. W. stated that Soni Ram Dhanal Ram, Sohan Lal and Kanshi Ram, apart from others, were the persons who had constituted the said Panchayat. Surprisingly, none of these persons or any other has come forward to support such a version. Nor any documentary record or any other evidence, apart from the statement of Balwant Ram P. W., appears in this context. There is not the faintest suggestion regarding this Panchayat in the first information report and the maker of this statement Balwant Ram has been falsified by confrontations therein in cross-examination. A further weakening of this version arises from the fact that Devi Lal, a brother of Balwant Ram PW, shifted considerably from the stand taken by the former regarding the demolition and the reporting to the Panchayat. Devi Lal PW made no mention of any demolition or the reporting thereof or the constitution of a Panchayat on this score. He rather attempted to build an altogether new case on the basis that the appellants had themselves agreed that a watercourse be constructed through their lands. Apart from the evidence the probability is also wholly against the prosecution story in this regard. It appears utterly unreasonable and unexplained that whilst in the forenoon the appellants had willingly agreed to the construction of a watercourse through their lands but by the afternoon they had become almost murderously hostile to any such act. It is thus that, an overall consideration of this aspect of the prosecution case, leaves one in no manner of doubt that this is a belated and puerile attempt on the part of the prosecution witnesses Balwant Ram, Jagdish Lal and Devi Lal to concoct some justification for their illegal act in going upon the lands of the appellants and digging a channel therein. The conclusion is thus inescapable that the prosecution version that they were digging the watercourse through the appellants' lands with either the express consent of the appellants or on the basis of the authority of a Panchayat resolution is nothing but a blatant falsehood.

13. On the above finding it follows that the complainants had gone upon the lands in the physical possession of the appellants and attempted to construct a watercourse therein without any legal justification. Once it

is so found that they were doing so without any authority or the consent of the appellants, it stands to reason that they were doing so by force and in such an eventuality must have gone to the spot armed to meet any opposition which they must necessarily have anticipated. The trial Court had itself come to the finding that the act of the complainants was wholly unjustified in the following words:—

“And unilateral decision of the members of the Panchayat could not bind the accused, who could act in the exercise of a private defence of property, if such a right was available to them. Then it is improbable that the accused had consented to the construction of the watercourse by the deceased because a little later when the construction of the watercourse is said to have started, they came out, armed variously, to obstruct it. Therefore, it cannot be said that the deceased had any right to construct the watercourse in the fields of the accused.” Having arrived at the above finding, nevertheless the trial Court denied the right of private defence to the appellants on two grounds: firstly that the lands through which the watercourse was being dug at the time of the occurrence bore no crop and, secondly, that the appellants were bound in such a situation to have recourse to public authority. Both these findings, in our view, cannot possibly be sustained.

14. The prosecution evidence makes it wholly evident that the complainants had without authority started the construction of the watercourse on the said day passing through the lands of Lalu Ram and Kanshi Ram appellants and had completed considerable parts thereof prior to the incident. That this watercourse had been built through the lands of the appellants which bore cotton crops appears clearly. In the words of Balwant Ram P.W. who had stated thus:

“On the other side of the path through which we had constructed the watercourse that day there were the fields of Kanshi Ram accused. It was through those fields that we had constructed the watercourse from the path to our fields. There were cotton crops in the fields of Kanshi Ram where the watercourse had been constructed. That land was in the tenancy of Kanshi Ram which was owned by Tek Chand Lambardar. We did not take permission of Tek Chand for constructing the watercourse.”

Nothing could be more explicit. This is further borne out from the site plans which clearly show that the land of Kanshi Ram appellant is situate on the western side of the path and there was cotton crop therein. That this land may not be diametrically opposite to that of Lalu Ram appellant is hardly of any consequence. The trial Court was alive to the clear statement of Balwant Ram PW and the site plans but chose to brush it away in the following terms:—

“There appears to be some confusion in the mind of this witness, obviously because of his comparative youth.”

We fail to see how if the conviction of the appellants can be sustained on the evidence of Balwant Ram despite his supposedly tender years, this crucial statement in favour of the defence can be ruled out on the ground of his comparative youth.

15. A reference to the ocular evidence as well as the documentary evidence in the shape of site plans further shows that at the place where the complainants were engaged in digging there was cotton crop of the appellants in the close proximity thereof. The complainants were as yet continuing in their attempt to complete the water channel to join it up with the existing watercourse. It is thus evident that in this process they had already destroyed the cotton crops of the appellants and also by continuing to do so, gave reasonable apprehension to them that in the completion of the channel further damage to the crops may ensue. We are thus clearly of the view that the act of the complainants fell clearly within the ambit of both the offences of criminal trespass and mischief.

16. Even assuming for a moment entirely for the sake of argument that there had been no actual or apprehended destruction of the cotton crop, the act of the appellants would still fall within the two offences above-mentioned. The learned trial Court was of the view that even though it may be so the appellants were bound to resort to the public authorities and as such were not entitled to a right of private defence. We regret that we cannot possibly agree with this view of the law. The proposition that a person in physical possession of land and in whose presence criminal trespass and mischief is being committed by force (and without any semblance of a right a permanent watercourse is being constructed thereon) is nevertheless obliged to retreat therefrom and resort to the fitful relief he might secure from a police station ten miles away, is to our mind wholly untenable. The right of private defence of property cannot be whittled down to something so inconsequential. The trial Court had placed reliance for its view on two authorities of the Patna High Court and one of the Lahore High Court. In our view these three cases are inapplicable and clearly distinguishable on the facts of the present case. In *Hariram Mahatha v. Emperor*, AIR 1942 Pat 96 on which reliance had been placed, the facts were entirely different. There existed a bona fide dispute about the land in question and the finding was that the complainants had a good title to the same and were acting lawfully on going upon the land. It was further held that there was neither theft nor mischief and the act of the appellants was not to prevent these offences but to enforce their own right with force in execution whereof they had made a designedly violent

attack on the complainants' party. Further the finding was that the complainants had gone to the field which at the relevant time was unoccupied. In these circumstances the plea of private defence was negatived.

In *Satnarain Das v. Emperor*, AIR 1938 Pat 518 on the facts it was found that both the parties had gone to the land fully armed in full expectation of an armed conflict and determined to have a trial of strength. It was in this context that it was laid down that the right of private defence would not be attracted. In *Phula Singh v. Emperor*, AIR 1927 Lah 705 which is a Single Bench authority, the complainants had already ploughed and sown the land in dispute with chari. It was subsequently that an attempt was made of forcible eviction therefrom. On considering the argument that the right of private defence would arise, the learned Judge observed that while there was something to be said for that proposition but on the facts of the case it was opined that the appellant should have resorted to the authorities for redress. In our view the observations in this judgment are no warrant for the view that in case of criminal trespass and mischief in the presence of the occupier in possession thereof, the latter is disentitled to the right of private defence. The provisions of Section 97 of the Indian Penal Code, clearly envisage the right of private defence against any act which falls within the definition of the offences of mischief or criminal trespass or which is even an attempt to commit such an offence. Section 105 of the Penal Code further lays down that this right of private defence of property commences when a reasonable apprehension of danger to the property commences and continues as long as the offender continues in the commission of criminal trespass or mischief. The words of the statute are themselves explicit and are fully supported by authorities. In *Abdul Hadi v. Emperor*, AIR 1934 All 829 (2) the complainants were excavating upon a portion of the land so as to make it fit for some purpose in manufacturing sugar. It was held that such digging on the land which was in possession of the appellants would constitute the offences of criminal trespass and also of mischief which would entitle them to a right of private defence. The applicability of Section 99 was expressly considered and negatived in such a circumstance with these observations:

"It could not have been the intention of the framers of Sections 97 and 99 to compel a person having the right of private defence of property to acquiesce in criminal trespass or mischief, and not exercise his right of private defence at all. In most cases if recourse is had to public authorities the mischief complained of will have been committed before the Public authorities come to his rescue."

In *Summa Behera v. Emperor*, AIR 1945 Pat 283 Sinha and Das JJ. had held that a

person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose, if he sees an actual invasion of his rights, which amounts to an offence under the Indian Penal Code and it would be lawful for such a person who has seen an invasion of his right, to go to the spot and object. It was also observed as follows:

"It is not the law that the rightful owner in peaceful possession of a piece of property must run away, if there is an actual invasion of his right and an attempt on his person." This view was reiterated again in *Barisa Mudi v. State*, AIR 1959 Pat 22, wherein K. Sahai J. on a difference of opinion between C. P. Sinha J. and K. Ahmad J. whilst agreeing with Sinha J. held that the right of private defence in similar circumstances was attracted and had not been exceeded. In *Mozam Ansari v. State*, 1961 BLJR 824 after a consideration of the earlier authorities *Ramratna Singh J.* summed up the law in the following terms:—

"The law applicable to such cases is well settled. It is not the law that the rightful owner in peaceful possession of property must run away, if there is an actual invasion of his right and an attempt on his person. The person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose, if he sees an actual invasion of his rights, which invasion amounts to an offence under the Penal Code, and when there is no time to get police help. It is lawful for a person, who has seen an invasion of his rights, to go to the spot and object. It is also lawful for such persons, if the opposite party is armed, to take suitable weapons for his defence (see, AIR 1945 Pat 283). The right of private defence of property arises as soon as there is a reasonable apprehension of danger to the property. The person entitled to exercise that right can act before actual harm is done. It is not a right of retaliation and hence he need not wait until the aggressor has started committing the offence which occasions the exercise of his right of private defence."

17. Lastly their Lordships of the Supreme Court whilst considering the ambit and the scope of the right of private defence in *Jai Dev v. State of Punjab*, AIR 1963 SC 612 have observed as follows:

"This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property."

and further

“ So long as the threat lasts and the right of private defence can be legitimately exercised, it would not be fair to require, as Mayne has observed, that he should modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force.”

18. In view of the above enunciation of the law we are clearly of the opinion that the learned trial Judge was wrong in holding that the appellants were disentitled to the right of private defence because they were bound to resort to the public authorities. In our view they were clearly protected by the right of private defence of property on the facts of the present case.

19. Whilst considering the last question whether the injuries were caused to the complainants at the spot where they were digging the land of the appellants or upon the adjoining path leading to Sardarpura, it is necessary to examine critically the prosecution version of the incident and the nature of the evidence adduced in support thereof. Regarding the assault, the sole testimony is that of the three brothers who are the sons of the deceased Shiv Lal. In the present case where injuries have been caused on both sides and a precise counter version is being pleaded on behalf of the appellants it is but natural that the testimony of these witnesses should be partial to the version which they have chosen to give. All the three eye-witnesses, therefore, come clearly within the ambit of words termed as ‘interested testimony’ and unfortunately in the case no independent ocular testimony is available to lend assurance to the story put forward by them. In such a situation where the spot of occurrence varies only by a few paces in the two versions given the testimony of such interested witnesses cannot possibly be final.

20. Whilst considering the evidence of the three eye-witnesses on the point of motive we have already held it to be false on that point and deliberately modulated to negative the plea raised by the appellants. All these three eye-witnesses stand further falsified by the medical testimony. Dr. Adarsh Yakhmi P. W. 4 had clearly opined that injury No. 4 on the person of Shiv Lal was the result of a single blow and the wound on the back was the wound of the entry and the wound in the chest was the wound of the exit. The deceased had no other injury in that region, the other three being on the head. All the eye-witnesses, however, have deliberately prevaricated in saying that two distinct blows were given to Shiv Lal one on the back and the other on the chest.

This deliberate and designed attempt to exaggerate and in a clumsy way to modulate their account according to the two injuries which were noticed at the time of the inquest report on this part of the body of Shiv Lal shows to what length these witnesses can go falsely in support of their story. Subsequent autopsy and the opinion of the medical witness has given the lie direct to this version.

21. On two other material aspects the version of the prosecution is also patently unsatisfactory. The version that the injuries on Lalu Ram and Brij Lal appellants were given by Balwant Ram and Devi Lal P. Ws. with their kassis cannot stand the test of a close examination. It is noticeable that in the first information report neither the weapons nor the prosecution witnesses who had inflicted these injuries were specified at all. No bloodstained spades were either found on the spot or were produced before the police. The appellants are said to be armed with long handled weapons like two spears, a kassia and dang and it appears improbable to our mind that against such weaponry the two prosecution witnesses with such clumsy instruments like spades were able to retaliate and cause a grievous and a simple injury on Lalu Ram and also one on Brij Lal. On the broader aspect it further appears wholly improbable as suggested that after both Gopi Lal and Shiv Ram had been fatally stabbed and Jagdish Lal P. W. who was unarmed was incapacitated with injuries, the two boys Balwant Ram and Devi Lal with spades only could hit back at the six determined and heavily armed assailants. It appears that the number of assailants is being exaggerated as well as it is further being suppressed that the injuries on the appellants Brij Lal and Lalu Ram were apparently inflicted first and then in retaliation the fatal injuries were caused by the appellants. Equally unlikely is the prosecution story that Brij Lal appellant was armed with his licensed gun who twice fired with the same. No empty cartridge was recovered from the spot and this was most likely because the gun used is a single barrel gun. The prosecution had sent the gun of Brij Lal to the Ballistic Expert for the opinion whether it had been fired in the incident but it chose to withhold the evidence of B. R. Sharma, Director of Forensic Science Laboratory, Chandigarh, who was given up as an unnecessary witness. No circumstantial or expert evidence, therefore, has been brought on record to show that this licensed gun was ever used in the incident. The learned trial Court also seems to have doubted this part of the prosecution story and has acquitted Brij Lal, appellant, on the charge under Section 27 of the Arms Act. It is otherwise wholly improbable that whilst being armed with a gun, this appellant suffered an injury on his back allegedly with a spade and also at no stage used the same against either the deceased or the prosecution witnesses. We are con-

strained to hold that this part of the prosecution story regarding the gun held by Brij Lal is a fabrication.

22. On the finding that Brij Lal, appellant, was not armed with a gun, the prosecution version that they had at the relevant time retreated from the spot to the path of village Sardarpura is seriously jeopardised. On this point, the prosecution evidence first was that Brij Lal had fired the gun and directed that if anybody moved from the spot, he would be shot at which held the complainants to the spot. This is subsequently sought to be changed to the version that on seeing the gun-fire the complainants retreated out of fear from the spot on to the path. Once it is held that Brij Lal was not armed with a gun and the same was not fired, the version of retreat on to the path becomes implausible. It is noticeable that the version of retreating on to the path of village Sardarpura does not find any mention whatsoever in the version given in the first information report by Balwant Ram P. W. Devi Lal P. W. had to concede in cross-examination that before the committing Court he had stated that all of them had kept standing by the watercourse and did not move on hearing the threat from Brij Lal. Unable to get away from this crucial admission, he at the trial wanted to show that he had stated so by mistake before the committing Court. This evidence also clearly shows that the story of withdrawal to the pathway is an afterthought. Equally noticeable is the fact that in the visual plan P. 30 made by the Investigating Officer, the place of assault is shown at point 'H' which is squarely in the field of the appellants and clearly away from the path. Nor is there any reliable evidence regarding the recovery of the bloodstained earth from the path leading to Sardarpura. P. W. 13 Sohan Lal had to concede that he is a relation of the deceased persons. No reason has been given as to why independent witnesses like Soni Ram Sarpanch and another Sohan Lal a former Sarpanch, who were at the spot, were not joined in the recovery and attestation of the bloodstained earth from the spot. The interestedness of Sohan Lal P. W. is also otherwise patent from the fact that he had accompanied Balwant Ram in the very first instance for lodging the report against the appellants. For these reasons we are of the view that the prosecution has been wholly unable to bring any credible evidence regarding its version that the complainants had withdrawn from the land of the appellants and that they were chased to the path and injured there. In fact all indications and possible inferences from the evidence point to the contrary.

23. On the above finding, therefore it follows that the deceased and the prosecution witnesses had gone upon the land of the appellants without any right whatsoever. In such a situation they would perforce go armed as they knew that the habitat of the appellants was not far distant and they could

certainly expect opposition for their act. The medical witness has opined that the injuries on Lalu Ram and Brij Lal appellants could be the result of gandasi blows as has been pleaded by the defence. We are disinclined to accept the prosecution story that the injuries on these two appellants were caused by the spade or that they were caused after the infliction of fatal injuries on Shiv Lal and Gopi Ram. The probabilities in fact clearly are that the injuries on these two appellants were inflicted first. In this context if the appellants were resisted in their lawful right to evict the complainants from the land and the offenders were armed with dangerous weapons, the appellants would clearly be within their rights to use adequate force in retaliation. The injuries on Lalu Ram was a near fatal injury as the medical witness had opined that substance resembling grey matter of the brain was flowing from there. The infliction of such an injury and even an apprehension thereof clearly gave the appellants the right of private defence of person as well. In such a situation, as observed by the Supreme Court a person cannot modulate his defence step by step and the blows which he inflicts are not to be weighed in the proverbial "golden scales". The appellants could clearly apprehend an assault likely to cause death or grievous hurt which was in fact caused and thus were within their rights to inflict fatal injuries. In our opinion they had not exceeded that right. Their act being protected, no offence has been brought home against them and the conviction cannot be sustained. We would, therefore, allow this appeal and acquit all the appellants of the charges levelled against them. In consequence, the reference for the confirmation of death sentences of Het Ram and Banwari Lal is declined.

24. GURDEV SINGH J.: I agree.

Appeal allowed.

AIR 1970 PUNJAB AND HARYANA 93
(V 57 C 15)

FULL BENCH

MEHAR SINGH, C. J., HARBANS SINGH
AND D. K. MAHAJAN, JJ.

Ajit Singh, Appellant v. Smt. Subaghan
and others, Respondents.

Letters Patent Appeal No. 354 of 1965,
D/-19-3-1969, decided by Full Bench on
Order of Reference made by D. Falshaw
C. J. and D. K. Mahajan, J., D/- 24-3-1966.

(A) Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), Ss. 16-A, 2 (a), (b), 36, 42 and 14 (1) — Consolidation proceedings — Question of title arising in — Question cannot be decided by officer under the Act — Parties to be referred to a civil court under S. 117(1) of Land Revenue Act

FM/GM/C425/69/TVN/P

— (Tenancy Laws — Punjab Land Revenue Act (17 of 1887), S. 117 (1)).

An officer under the provisions of East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, not being a revenue officer, cannot be deemed to be so and thus has no power or jurisdiction to convert himself into a civil Court while deciding a question of title in the course of a dispute with regard to partition of land in consolidation of holdings. The parties in such a case must be referred to a civil Court to have the question decided according to sub-section (1) of Sec. 117 of the Punjab Land Revenue Act. (Para 4)

Section 16-A of the East Punjab Act 50 of 1948 lays down that the whole of Chapter IX of the Punjab Land Revenue Act except Sec. 117 thereof is not to apply to any matter of partition during consolidation of holdings after a notification under Section 14 (1) of the East Punjab Act 50 of 1948. Sub-section (2) of Sec. 117 of the Land Revenue Act deals with the matter of procedure and sub-section (1) provides that when there is a question of title in any of the property of which partition is sought, the Revenue Officer may decline to grant it until the question has been decided by a competent Court, or he may himself proceed to determine the question as though he were such a Court. There is no such officer in East Punjab Act 50 of 1948 as a 'revenue officer.' The only officers who appear in this Act are the Consolidation Officer and the Settlement Officer, both expressions defined respectively in clauses (a) and (h) of Section 2 of that Act. It is not necessary that Revenue Officers alone are to be appointed as officers under the East Punjab Act. Any other person properly qualified can be appointed to those offices to answer the definition of those expressions in the above provisions of the Act. Therefore as there are no revenue officers under the provisions of East Punjab Act 50 of 1948, under sub-section (1) of Sec. 117 of Punjab Land Revenue Act, a Consolidation Officer or a Settlement Officer cannot convert himself into a civil Court to try any question of title that he considers arises in relation to any partition of holding or holdings that becomes necessary to be provided in the scheme of consolidation. So, the second alternative in sub-section (1) of Section 117 of that Act cannot become operative while applying Section 16-A of East Punjab Act 50 of 1948, to a particular scheme of consolidation. The only possible course open in such a contingency, when a Consolidation Officer while dealing under Section 36 or a Settlement Officer on Appeal or the Authority exercising powers under Section 42 of East Punjab Act 50 of 1948 reaches a decision that a question of title arises in a particular case, is to refer the parties to a civil Court to have such question decided according to sub-sec. (1) of Sec. 117 of Punjab Act 17 of 1887. (Para 4)

(B) Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A (1) and (2) — Dispute as to title — (Tenancy Laws — Punjab Land Revenue Act (17 of 1887), S. 117).

Even if a party suffers a decision by the Consolidation Officers about the non-existence of any question of title to the property sought to be partitioned during consolidation proceedings and a partition is completed on that basis, the party can still go before a civil Court and obtain a decision on the question of title as claimed by him. He would be doing so under Section 117 of Punjab Land Revenue Act, which is an exception kept alive by Section 16-A of East Punjab Act 50 of 1948, and the operation of sub-section (2) of Section 16-A of East Punjab Act 50 of 1948 will be subject to the decision of the Civil Court. (Para 6)

If a right-holder endeavours to raise what he considers is a question of title at the time of the framing of the scheme of consolidation and objects to a provision in that scheme for partition so far as his holding is concerned, then, if the officers under East Punjab Act 50 of 1948 reach a conclusion that a question of title is involved, they must stay their hands and leave the question of title to be decided in civil Court, but if, on the contrary, they come to the conclusion that a question of title does not arise before them for the matter of framing the scheme of consolidation, then an aggrieved right-holder has one of the two courses open, (a) to go immediately to a civil Court and obtain a decision on the question of title claimed by him, or, (b) if he does not pursue the first course, to go before a civil Court after the completion of the partition and obtain a decision on the question of title as claimed by him. In either of the two cases, as above the operation of sub-section (2) of Sec. 16-A of the East Punjab Act 50 of 1948 will be subject to the decision of the civil Court. (Para 6)

When sub-section (2) of Section 16-A says that its provisions are to prevail 'notwithstanding anything to the contrary contained in any law for the time being in force', these words do not exclude sub-section (1) of the very section of which sub-section (2) is a part, that is to say, sub-section (1) of S. 16-A of East Punjab Act 50 of 1948. So the provisions of both sub-section (1) and sub-sec. (2) of Section 16-A of that Act are subject to a decision of the question of title by a civil Court under Section 117 of Punjab Land Revenue Act. AIR 1937 Lah 315 and 61 Pun. Re. 1897 (FB), Foll; Civil Writ No. 538 of 1962, D/-13-12-1962 (Punj) and 1965-67 Pun LR 1102 and 1966 Cur LJ (Punj) 134 and Civil Writ No. 439 of 1965, D/-19-5-1966 (Punj), Rel. on. (Para 5)

(C) Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A —

Punjab Land Revenue Act (17 of 1887), Section 117 — Question of title to property sought to be partitioned in consolidation proceedings — Controversy over existence of, not allowed to be raised in writ proceedings — It is a matter to be agitated according to Sec. 117 of Land Revenue Act — (Tenancy Laws — Punjab Land Revenue Act (17 of 1887), S. 117).

A controversy regarding the existence or non-existence of a question of title to property sought to be partitioned in consolidation proceedings under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act is a matter to be agitated according to the provisions of Sec. 117 of the Punjab Land Revenue Act and the same cannot be allowed to be raised in writ proceedings. In the first instance it is the jurisdiction of the consolidation officers under the provisions of East Punjab Act 50 of 1948 to decide whether or not a provision for partition of joint holdings be made in a scheme of consolidation in the wake of Section 16-A of that Act. If they come to the conclusion that no question of title arises, they may proceed to make such a provision, but, if on the contrary, their conclusion is that a question of title does arise, they must hold their hands and leave the aggrieved party to have recourse to Section 117 of Punjab Land Revenue Act.

(Para 8)

(D) Tenancy Laws—East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), Ss. 16-A, 36 and 42 — Order of Settlement Officer under S. 36 — Interference by Director of Consolidation under Sec. 42 — Interference possible only on the two grounds mentioned in Sec. 42 — AIR 1942 Mad 622 (FB), Diss. (Limitation Act (1963), Arts. 63, 64 — Cosharers — Adverse possession — Claim by transferee of a cosharer — Principles)—(T. P. Act (1882), S. 47).

The order passed by a Settlement Officer under Section 36 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act could be interfered with in appeal under Sec. 42 of the Act by the Consolidation Officer only in terms of the said S. 42 on two grounds, (a) for the purpose of seeing its legality, or (b) for the purpose of seeing its propriety.

(Para 9)

Ranjit Singh and his mother Smt. Subaghan jointly owned certain lands in equal shares. Ranjit Singh sold as his share of the land all the land of best quality to Ajit Singh and excluded the inferior land, in the consolidation proceedings that had by then commenced. Ajit Singh claimed that he had improved the area sold to him. Smt. Subaghan applied for partition of the joint khewat. Ajit Singh contested the application and opposed it on the ground that since he had purchased specific survey numbers from the joint khewat, the partition would affect him adversely. But the Settlement Officer decided to partition the land. Then on grounds that a question of

title was involved and that he would be put to much loss because he had made substantial improvements on the lands he purchased from Ranjit Singh, Ajit Singh sought amendment of the scheme under Sec. 36 of the Act. The Settlement Officer dismissed the application saying that he found no reason to differ from his previous order, pointing out that Ajit Singh, appellant, had purchased land from a joint khata and his vendor, Ranjit Singh, was not competent to alienate specific survey numbers. He, however, directed that the possession of the vendee will be respected during partition only to the extent of his share in a particular kind of land. Against the above order, Ajit Singh applied to the Director of Consolidation under S. 42 of the Act. The Director of Consolidation set aside the order of the Settlement Officer and directed the Department to keep the khewat joint on the only ground that Ajit Singh had made improvements on the area purchased by him and that he claimed compensation for the same.

Held, that the order of the Settlement Officer under Sec. 36 of the Act could neither be said to be illegal or improper under the circumstances of the case and the interference by the Director of Consolidation under S. 42 of the Act was without jurisdiction and was therefore liable to be set aside. (Para 9)

In a case where a co-sharer sells as his share defined portions of the land to a vendee and when the other co-sharer seeks partition and separate possession of his portion, the vendee seeks to keep for himself that portion of the land specifically purchased by him, inter alia, on the ground of adverse possession, the following principles should be kept in view in deciding the question:

1. In law uninterrupted sole possession of one cosharer of a part of the joint property cannot, by itself and without more, amount to ouster of the others. In such circumstances, the possession of one co-owner is presumed to be the possession of all and it is only when a cosharer in assertion of a hostile title does a hostile overt act that the statute begins to run against the other cosharer.

2. This statement of law may not hold good in every case a transferee from a cosharer and other cosharers. If the transferring cosharer, claiming to be the exclusive owner, purports to transfer the property as belonging to him alone, this will certainly be a overt act hostile to the other cosharers and if the transferee continues in sole possession for more than the statutory period, without admitting the joint character of the property, he will of course, acquire a prescriptive title.

3. But if the transfer purports to be of a part of the joint property and there is no denial of the title of other cosharers, the transferee steps into the shoes of the transferring cosharer and his sole possession for whatever length of time will not be adverse against the other cosharers. Therefore, having regard to proposition (3) above stated, the order of the Settlement Officer could not be said to be illegal. The fact that Ajit Singh

claimed compensation for the improvements said to have been made by him could not affect the propriety of the order of the Settlement Officer in that it was a matter that could be taken cognizance of in the matter of partition and enquiry, unless perhaps Smt. Subaghan totally refused to associate herself with an enquiry regarding the above question, which situation did not arise before the Settlement Officer. Hence the interference by the Director of Consolidation under Section 42 of the Act was one without jurisdiction. AIR 1941 Lah 307 and (1912) AC 230 and AIR 1918 PC 1, Foll; AIR 1942 Mad 622 (FB), Diss.; AIR 1931 Lah 654 and 39 Pun Re 1892 and AIR 1935 Lah 175 and 4 Pun Re 1908 and 70 Pun LR 1902 p. 289, Dist.; 3 Pun Re 1886 (Rev) Ref.; Order in Civil Writ No. 994 of 1964, D/-23-11-1965 (Punj) by Jindra Lal, J. affirmed on a different reasoning. (Paras 8 and 9)

Cases Referred: Chronological Paras

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J. N. Kaushal, Ashok Bhan, Bahal Singh Malik, S. P. Goyal, for Appellant; Puran Chand and N. L. Dhingra with him, for Respondents.

MEHAR SINGH, C. J.: On the death of Harnam Das, his land, situate in village Barod, in Tehsil Jind of Sangrur District, was mutated one-half in the name of his widow Subhagan, respondent 1, and the other half in the name of his son, Ranjit Singh. The total area of the land was 142 Bighas and 17 Biswas. So half of that, that is to say, a few Biswas over 71 Bighas was mutated in the name of Ranjit Singh. No partition had taken place between the mother and the son. On February 16, 1949, Ranjit Singh sold 65 Bighas and 8 Biswas of land, out of the total holding of 142 Bighas and 17 Biswas, to Ajit Singh appellant by a registered sale deed. The area sold was both irrigated, whether by canal or well, and unirrigated. Ranjit Singh said in the sale deed that he was the sole owner of the whole land, but because of the Ruler's circular in the former Jind State with regard to the rights of widows in Hindu families, half of the land from the inheritance of his father had been mutated in the name of his mother as a widow. He further said that his half share was mortgaged with the Jind Co-operative Bank. He claimed to be in possession of the total area. Specific survey numbers were sold to Ajit Singh appellant.

2. Sometime in 1961 proceedings for consolidation of holdings started in village Barod in consequence of a notification under Section 14 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (East Punjab Act 50 of 1948). In the course of the preparation of the scheme of consolidation on February 5, 1964, the Mukhtar or attorney of respondent 1 raised an objection that joint khewat of respondent 1 be directed to be partitioned, obviously asking the Settlement Officer to make a provision in that behalf in the scheme. In paragraph 5 of the petition under Article 226 of the Constitution by respondent 1 it is clearly stated that the Settlement Officer gave notice of that objection to Ajit Singh appellant and, after hearing both the parties, ordered that the joint khewat of respondent 1 be partitioned and her share in the land be separated. At that stage Ajit Singh appellant said that respondent 1 was dead and her Mukhtar or attorney had no right or status to have the joint khata partitioned, whereupon the Settlement Officer ordered the Mukhtar or attorney of respondent 1 to produce respondent 1 within ten days before the Consolidation Officer. In paragraph 6 of the petition it is stated that respondent 1 duly appeared before the Consolidation Officer on February 18, 1964, and her statement was recorded by him, when she clearly said that she wanted her joint khata to be partitioned.

No return to the petition of Res. 1 was filed by Ajit Singh appellant, but a return

to it was filed on behalf of respondents 2 to 5, namely, the State of Punjab, the Director of Consolidation of Holdings, the Settlement Officer, Jind, and the Consolidation Officer, Jind. In that return the facts given as above from paragraphs 5 and 6 of the petition of respondent 1 are not denied. In paragraph 5 of that return it is said that Ajit Singh appellant moved an application under Section 36 of East Punjab Act 50 of 1948 before the Settlement Officer praying for keeping the khewat joint by amending the scheme. On February 20, 1964, the application of Ajit Singh appellant was dismissed by the Settlement Officer, copy of whose order is Annexure 'A' to respondent 1's petition. It is pointed out in that order that when the Settlement Officer visited the village on February 5, 1964, in connection with the confirmation of the scheme of consolidation, Ajit Singh appellant raised two objections, (a) that respondent 1 was dead and her attorney was not competent to ask for partition of land, and (b) that since he had purchased specific survey numbers from the joint khewat, the partition will affect him adversely. He, therefore, prayed that application of respondent 1 for partition of the land be disallowed.

The Settlement Officer found that respondent 1 being a widow and a weaker party had been deprived of her legitimate share in the land and the best part of the land had been sold by her son Ranjit Singh to Ajit Singh appellant. The Settlement Officer also found that respondent 1 was not residing in the village. He ordered respondent 1's attorney to produce her before the Consolidation Officer and she was duly produced before the said officer on February 18, 1964, when her statement was taken by that officer to the effect that she wanted her land partitioned. The Settlement Officer pointed out that according to the order in regard to confirmation of the scheme under Section 19 (2) of East Punjab Act 50 of 1948 the joint khewat was to be partitioned. He then referred to the application of Ajit Singh appellant and pointed out that what this appellant at that stage urged was (i) that a question of title was involved and so the partition should not be allowed, and (ii) that he would be put to much loss because he had made substantial improvements on the land he had purchased from Ranjit Singh co-sharer. He, therefore, sought amendment of the scheme under Section 36 of East Punjab Act 50 of 1948. The Settlement Officer then proceeded to say that he found no reason to differ from his previous order, pointing out that Ajit Singh appellant had purchased land from a joint khata and his vendor, Ranjit Singh, was not competent to alienate specific survey numbers. He, however, directed that 'the possession of the vendee will be respected during partition only to the extent of his share in a particular kind of land.' He also pointed out that Ajit Singh appellant should have known that the khewat was joint and

according to law the other co-sharers could claim partition of land at any time. So he dismissed Ajit Singh appellant's application under Section 36 of East Punjab Act 50 of 1948.

Against that order there was an application under Section 42 of that Act by Ajit Singh appellant to the Director of Consolidation of Holdings, respondent 3. After referring to the co-ownership of respondent 1 and her son Ranjit Singh in the total area of the land and the area sold by Ranjit Singh to Ajit Singh appellant from the joint holding, with specific survey numbers, respondent 3 pointed out that on evaluation of the lands with respondent 1 and Ajit Singh appellant in the course of consolidation of holdings the value of the area with respondent 1 came to 42.4 standard kanals and that with Ajit Singh appellant to 178.19 standard kanals. The disparity is immediately apparent. Respondent 1 wanted the joint holding to be divided according to shares, obviously the shares shown in the revenue papers where she was shown as half owner of the land with her son Ranjit Singh vendor. Ajit Singh appellant claimed to have improved the land since the date of the sale in his favour on February 16, 1949, and urged that the benefit of the improvement should not go to respondent 1. Respondent 3 then proceeded to make this order, which is the operative part of his order, dated March 23, 1964, copy Annexure 'B' to respondent 1's petition, 'obviously this is a correct demand and we cannot allow Shrimati Subhagan (respondent 1) to have share from the value enhanced by Ajit Singh (appellant) during the period after the date of sale. (The improvement, however, has been denied by the Mukhtar of Shrimati Subhagan.) Therefore, in such a case the Consolidation Department should keep khewats Nos. 10, 42 and 46 (the joint land of Ajit Singh appellant and respondent 1) joint and I, therefore, order accordingly and set aside the order dated 20-2-1964 passed by the Settlement Officer, Consolidation of Holdings, Sangrur.'

This is the only ground on the basis of which respondent 3 interfered with the order of the Settlement Officer, respondent 4. There is a copy, at pages 40-42 of the paper-book, of the grounds in his application under Section 42 of East Punjab Act 50 of 1948 by Ajit Singh appellant before respondent 3. No return was filed to respondent 1's petition by Ajit Singh appellant. It may be that a copy of those grounds was filed with the return by respondents 2 to 5, that is to say, the Punjab State and the Consolidation Officers. In the course of arguments the learned counsel for the appellant has referred to grounds 6 and 7, out of those grounds, which read —

"6. That the petitioner (Ajit Singh appellant) has acquired such rights in the whole land that no one is entitled to get any part of it partitioned. A question of title is involved. According to Section 16-A of the

Consolidation Act, the consolidation authorities have no jurisdiction to partition such a khewat 7. That specific khasra numbers have been sold to the petitioner (Ajit Singh appellant) and since then the petitioner is the exclusive owner and in possession of these khasra numbers. The question of being joint with anybody does not arise at all. In this way also there is involved a question of title concerning the said khewat."

A copy of respondent 3's order, Annexure 'B' to respondent 1's petition, of March 28, 1964, shows that the Mukhtar or attorney of Ajit Singh appellant with counsel appeared before respondent 3. So the case of Ajit Singh appellant was argued and urged before respondent 3 by his counsel. There is not one single word in the order of respondent 3 on any of the grounds urged before him except the one on the basis of which he proceeded to make the order, that ground being the claim of Ajit Singh appellant with regard to the improvements made by him on the land purchased from Ranjit Singh since the date of the purchase on February 16, 1949. It was after that that on May 12, 1964, respondent 1 filed her petition under Article 226, challenging the legality and validity of respondent 3's order made on March 28, 1964, copy Annexure 'B' to her petition. Only the State of Punjab and the three officers under the provisions of East Punjab Act 50 of 1948 made a return to that petition, but not Ajit Singh appellant. Respondent 1 urged in her petition that in the jamabandi or record-of-rights she was shown co-sharer of the land with Ajit Singh appellant and was entitled to partition of the same, to which the reply on the side of respondents 2 to 5 was that she could get her khewat partitioned if there was no question of title.

Another ground taken by respondent 1 was that respondent 3 had not given any reason to set aside the order of the Settlement Officer and even the previous order of February 5, 1964, had not been set aside, and to this the return of respondents 2 to 5 said that respondent 3 had given reasons in his order and it was merely accidental slip that an incorrect date was mentioned regarding the order of the Settlement Officer, respondent 4, which respondent 3 was setting aside. It was pointed out that in fact he was setting aside Settlement Officer's order of February 5, 1964. To another ground on the side of respondent 1 that the order of respondent 4, the Settlement Officer, Jind, of February 5, 1964, was perfectly legal and there was no appeal or revision against that order, the reply rendered in the return of respondents 2 to 5 was that 'the propriety and legality of the order was examined by the Director, Consolidation of Holdings, Punjab, and a decision on merits was made.' The return emphasised that question of title in this case was involved and that could not be adjudicated upon by the consolidation authorities under the provisions of East Punjab

Act 50 of 1948. Respondent 1, according to them, should seek her remedies in a civil Court.

On November 23, 1965, a learned Single Judge accepted the petition of respondent 1 and quashing the order of respondent 3 restored that of respondent 4, the Settlement Officer. The learned Judge pointed out that no co-sharer can take possession of a specific portion of land adversely affecting his co-sharer, that in partition co-sharers are to have equal areas of land, quality-wise, and that a co-sharer's right to have joint land partitioned or a provision with regard to partition made in the scheme of consolidation under Section 16-A of East Punjab Act 50 of 1948 cannot be defeated by mere contention that the other co-sharer is in possession of a specific portion of land which he has improved, the exception to this being a case where question of title is involved as was held in *Ram Gopal v. State of Punjab*, 1965-67 Pun LR 1102. The learned Judge then proceeded to rely on *Pat Ram v. State of Punjab*, Civil Writ No. 1641 of 1960, D/-18-10-1963 (Punj), where it has been held that the consolidation authorities had to effect partition in accordance with the entries in the jamabandis and, consequently, an order directing that the partition should not take place of the joint khata was neither legal nor bona fide and had to be quashed. The learned Judge pointed out that "the decision in *Pat Ram's* case, Civil Writ No. 1641 of 1960, D/-18-10-1963 (Punj), entirely covers the present petition and in this view it is clear that the Director of Consolidation had no jurisdiction to upset the order of the Settlement Officer directing the partition of the khewats inasmuch as in the present case "no question of title is involved." It is against the judgment and order of the learned Judge that Ajit Singh appellant has come up in appeal under Clause 10 of the Letters Patent and so also respondents 2 to 5 in his appeal. The appeal of Ajit Singh appellant is Letters Patent Appeal No. 354 of 1965 and that of respondents 2 to 5 in that appeal is Letters Patent Appeal No. 85 of 1966.

3. These appeals came for hearing before *Falshaw, C. J.*, and my learned brother *Mahajan, J.*, on March 24, 1966, when the same were referred to a larger Bench with this order, — "In the present case we were at first inclined to uphold the decision of the learned Single Judge on the ground that no question of title arose, but it is clear that there is a dispute which in a sense can be called a question of title, and as has been pointed out by the learned Advocate-General appearing on behalf of the State if the order of the Settlement Officer for the partitioning of the joint holdings according to the shares in revenue entries is upheld, Ajit Singh might be left with no remedy at all or no recourse to a civil Court in the light of the provisions of sub-section (2) of Section 16-A.

The question of whether one or more of joint owners of the holding of land have in some manner or other acquired rights which go beyond their rights as recorded in the revenue records is one which is constantly arising and the question is whether the Consolidation Officers should be deemed to have the powers of the revenue Court under Section 117 of the Land Revenue Act to determine such questions as if they were civil Courts or should in every case leave the parties to have their rights determined by competent civil Court, and there is also the question whether where once a decision of this kind has been made by a Consolidation Officer a party would have the right to establish his rights in civil Court in spite of the provisions of Section 16-A (2)? This is how these appeals come before this Bench.

4. In East Punjab Act 50 of 1948, Section 32 provides that "after a notification under sub-section (1) of Section 14 has issued, no proceedings under Chapter IX of the Punjab Land Revenue Act, 1887, in respect of any estate or sub-division of an estate effected by scheme of consolidation shall, subject to the provisions of Sec. 16-A, be commenced, and where such proceedings were commenced before the issue of the notification they shall remain in abeyance during the pendency of the consolidation proceedings." It is in Section 16-A that the matter of partition of joint lands during the consolidation of holdings has been dealt with and that section reads—

"16-A (1):—Notwithstanding anything contained in Chapter IX of the Punjab Land Revenue Act, 1887, except Section 117 thereof, the scheme prepared by the Consolidation Officer may provide for partition of land between joint-owners of land or between joint-tenants of a tenancy in which a right of occupancy subsists, in accordance with the share of each owner or tenant in the land or tenancy, as the case may be, if—

(a) such share is recorded under Chapter IV of that Act as belonging to him, or

(b) the right of such owner or tenant to such share has been established by a decree which is still subsisting at the time of preparing the scheme, or

(c) a written acknowledgment of such right has been executed by all persons interested in the admission or denial thereof.

(2) When the scheme is confirmed under Section 20, the land so partitioned shall, notwithstanding anything to the contrary contained in any law for the time being in force, be held by each such owner or tenant in full right of ownership or tenancy, as the case may be, and the rights of other joint-owners or joint-tenants, in the land shall be deemed to be extinguished."

The whole of Chapter IX of the Punjab Land Revenue Act, 1887 (Punjab Act 17 of 1887), is not to apply to any matter of parti-

tion during the consolidation of holdings after a notification under sub-section (1) of Section 14 of East Punjab Act 50 of 1948, but to that the exception is Section 117 of the first-mentioned Act, of which sub-section (2) deals with the matter of procedure, and sub-section (1) provides: "When there is a question as to title in any of the property of which partition is sought, the Revenue Officer may decline to grant the application for partition until the question has been determined by a competent Court, or he may himself proceed to determine the question as though he were such a Court." On a question of partition of land arising, it is the initial jurisdiction of the Revenue Officer under sub-section (1) of Section 117 of Punjab Act 17 of 1887 to first decide whether 'a question as to title in any of the property of which partition is sought,' is or is not involved. This is what he has to decide first. On his decision in this respect, further consequences arise. If he decides that no question of title arises, he proceeds to take proceedings for partition of the land, but if he decides that a question of title arises, then one of the two courses is open to him, either to refer the parties to an ordinary civil Court or to convert himself into a civil Court for the purpose of decision of such question of title.

Section 16-A, sub-section (1), of East Punjab Act 50 of 1948, only excepts Section 117 of Punjab Act 17 of 1887, taking away all other provisions relating to partition of land in Chapter IX of the Land Revenue Act from application to consolidation proceedings. There is no such officer in East Punjab Act 50 of 1948 as a 'revenue officer'. The only officers who appear in this Act are the Consolidation Officer and the Settlement Officer, both expressions defined respectively in clauses (a) and (h) of Section 2 of that Act. It may be that a revenue officer may be appointed to those offices, but East Punjab Act 50 of 1948 does not make that a necessity. Any other person properly qualified can be appointed to those offices to answer the definition of those expressions as in clauses (a) and (h) of Section 2 of that Act. As there are no revenue officers under the provisions of East Punjab Act 50 of 1948, under sub-section (1) of Section 117 of Punjab Act 17 of 1887 a Consolidation Officer or a Settlement Officer cannot convert himself into a civil Court to try any question of title that he considers arises in relation to any partition of a holding or holdings that becomes necessary to be provided in the scheme of consolidation. So, the second alternative in sub-section (1) of Section 117 of that Act cannot become operative while applying Section 16-A of East Punjab Act 50 of 1948 to a particular scheme of consolidation. The only possible course open in such a contingency, when a Consolidation Officer or a Settlement Officer on Appeal or the authority exercising powers under Section 42 of East Punjab Act 50 of

1948 reaches a decision that a question of title arises in a particular case, is to refer the parties to a civil Court to have such question decided according to sub-section (1) of Section 117 of Punjab Act 17 of 1887. The second question of law in the reference order is thus answered in this manner that an officer under the provisions of East Punjab Act 50 of 1948, not being a revenue officer, cannot be deemed to be so and thus he has no power or jurisdiction to convert himself into a civil Court while deciding a question of title in the course of a dispute with regard to partition of land in consolidation of holdings.

5. In so far as the first question of law in the reference order is concerned, the whole of Section 16-A of East Punjab Act 50 of 1948 has already been reproduced above. What is stated in sub-section (2) of that section, is consequent upon partition that takes place in pursuance of sub-section (1) of that section. Now, sub-section (1) of Section 16-A is clear that matters of partition of land during the consolidation of holdings the provisions of Chapter IX of Punjab Act 17 of 1887 do not apply, to which the exception is Section 117 of that Act. So the matter of partition in consolidation of holdings is subject to the provisions of Section 117 of that Act; it follows that whatever is the consequence stated in sub-section (2) of Section 16-A is subject also to the provisions of Section 117 of Punjab Act 17 of 1887. No doubt according to sub-section (2) of Section 16-A of East Punjab Act 50 of 1948, notwithstanding anything to the contrary contained in any law for the time being in force, when land has been partitioned pursuant to a scheme confirmed under Section 20 of that Act, it is to be held by each owner or tenant, to whom it has been allotted, in full right of ownership or tenancy, as the case may be, and the rights of other joint-owners or joint-tenants in the land are deemed to be extinguished. When this sub-section says that its provisions are to prevail 'notwithstanding anything to the contrary contained in any law for the time being in force,' these words do not exclude sub-section (1) of the very section of which sub-section (2) is a part, that is to say, sub-section (1) of Section 16-A of East Punjab Act 50 of 1948. So the provisions of both sub-section (1) and sub-section (2) of Section 16-A of that Act are subject to a decision of the question of title by a civil Court under Section 117 of Punjab Act 17 of 1887.

6. It has been held in Jit Singh v. State of Punjab, Civil Writ No. 538 of 1962, D/-18-11-1962 (Punj) (P. C. Pandit, J.), 1965-67 Pun LR 1102 (Grover and Jindra Lal JJ.), Beg Raj v. Additional Director, Consolidation of Holdings, 1966 Cur LJ (Punj) 134 (Shamsher Bahadur, J.) and Bhajan Lal v. Punjab State, Civil Writ No. 439 of 1965, D/-19-5-1966 (Punj) (P. C. Pandit, J.), that

when a question of title arises at the time of making provision for partition of joint holdings in a scheme of consolidation, then such a provision is not to be made until the question of title is disposed of by a civil Court according to Section 117 of Punjab Act 17 of 1887. This deals with a situation when consolidation proceedings are still in progress and obviously when the officers under East Punjab Act 50 of 1948 come to the decision that a question of title is involved which needs decision by a civil Court under Section 117 of Punjab Act 17 of 1887. Obviously if they come to a decision to the contrary, no such situation can possibly arise and they then proceed according to the terms of Section 16-A of East Punjab Act 50 of 1948. It is conceivable that even when those officers come to a conclusion that no question of title arises and make a provision for partition of joint holdings in the scheme of partition, a rightholder affected by such provision in the scheme and feeling aggrieved may go straight to a civil Court and obtain an ad interim order from it not giving effect to the scheme in this respect until the decision of the question of title by a civil Court. However, no such case has been brought to the notice of this Bench during the hearing of these appeals. It is settled under the provisions of Section 117 of Punjab Act 17 of 1887 that even when a question of title is raised before a Revenue Officer in partition, but, on his direction to a party to have it settled by a civil Court, the party does not go to a civil Court, and the partition proceeds, the party can still, after completion of the partition, approach a civil Court and obtain a decision on the question of title. It has been so decided in Bachan Singh v. Madhan Singh, 61 Pun Re 1897, (FB), in which the learned Judges held that when in partition proceedings before a Revenue Officer a question of title is raised, the Revenue Officer is bound, under Sec. 117 of the Land Revenue Act, 1887, to refuse partition until such question is decided by the civil Court, or to decide it himself, and if such officer completes the partition proceedings without the question of title raised before him being settled in one of the two ways provided in the said section, the mere fact that the partition has been completed cannot oust the jurisdiction of the civil Court to entertain a subsequent suit regarding such question of title. In Ghulam Mohammad Shah v. Said Hussain Shah, AIR 1937 Lah 315, this last-mentioned case was followed and the approach prevailed.

So even when an officer under East Punjab Act 50 of 1948 decides that no question of title arises before him and proceeds to make a provision for partition in a scheme of consolidation of holdings and during the course of consolidation of holdings no step is taken by a person aggrieved to file a suit to establish his title as claimed by him, he may do so, in view of Section 117 of Punjab Act 17 of 1887, even afterwards and the

civil Court will have jurisdiction to hear and decide the question of title. The result then is that if a rightholder endeavours to raise what he considers is a question of title at the time of the framing of the scheme of consolidation and objects to a provision in that scheme for partition so far as his holding is concerned, then, if the officers under East Punjab Act 50 of 1948 reach a conclusion that a question of title is involved, they must stay their hands and leave the question of title to be decided in a civil Court, but if, on the contrary, they come to the conclusion that a question of title does not arise before them for the matter of framing the scheme of consolidation, then an aggrieved rightholder has one of the two courses open, (a) to go immediately to a civil Court and obtain a decision on the question of title claimed by him, or, (b) if he does not pursue the first course, to go before a civil Court after the completion of the partition and obtain a decision on the question of title as claimed by him. He would be doing so under Section 117 of Punjab Act 17 of 1887, which is an exception kept alive by Section 16-A of East Punjab Act 50 of 1948, and in either of the two cases, as above, the operation of sub-section (2) of Section 16-A of East Punjab Act 50 of 1948 will be subject to the decision of the civil Court.

7. The arguments in these appeals on the side of the appellants have, in my opinion, proceeded on an entirely wrong basis as if these are appeals from a decree of a civil Court made pursuant to a suit under and in view of Section 117 of Punjab Act 17 of 1887. This approach is, to my mind, basically wrong, for obviously the proceedings out of which these appeals have arisen are not proceedings in the nature of an appeal from any decree of a civil Court under or in view of the provisions of Section 117 of Punjab Act 17 of 1887. These appeals have arisen in writ proceedings under Article 226 of the Constitution and it is settled beyond the pale of controversy that such proceedings are not in the nature of an appeal from the order or orders of authorities below. The learned counsel for the appellants has urged that a question of title arises in these appeals in this manner. His first contention is that respondent 1 had abandoned her holding in the particular village, but this was never the case of Ajit Singh appellant before any of the consolidation authorities under the provisions of East Punjab Act 50 of 1948 and not even before the learned Single Judge. Abandonment is apparently a question of fact and a question like this cannot possibly be raised in appeals of the present type under Clause 10 of the Letters Patent.

It has next been urged by the learned counsel that Ajit Singh appellant having, since the purchase of land by him, made improvements in the land purchased, his claim to compensation for improvements is a ques-

tion of title. Of the cases on which the learned counsel has relied to support this approach, *Dewa Singh v. Mst. Jawali*, 39 Pun Re 1892 and *Mohammada v. Jhanda*, AIR 1931 Lah 654, were cases in which claim to compensation was based upon a contract, and no such thing appears anywhere in regard to the facts of the present case. In *Muzaffar Ali v. Ghazanfar Ali*, AIR 1935 Lah 175, the dispute between the brothers was whether the garden came by inheritance to both or whether it had been planted only by one, and it is obvious that no such or similar matter arises in the present appeals. In *Devi Dial v. Ahmad Khan*, 4 Pun Re 1908, the question was whether according to the *Wajib-ul-arz* a garden planted by a person was in partition to be allotted to him or not and the learned Judges held that this did not raise a question of title. The last case in this respect on which reliance is placed by the learned counsel for the appellants is *Ilahi v. Dadu*, 70 Pun LR 1902 p. 289, but in that case the Revenue Extra Assistant Commissioner in partition proceedings made an order that a particular party will be entitled to compensation for improvements and further said that they will have to make a separate application for it. So the persons concerned brought a suit for recovery of a defined sum as compensation in the Revenue Courts and the suit was treated by the Revenue Courts as if it was a suit for rent. The learned Financial Commissioner held that the suit was not one for rent and a suit for such a claim would lie in a Civil Court. Apparently, if a claim is filed for a sum of money as compensation due, such a suit is to be tried by a Civil Court. No such question arises in the present case. Thus not one of the cases upon which reliance has been placed by the learned counsel for the appellants supports the proposition urged by him that when compensation for improvements is claimed during partition proceedings, that raises a question of title which is triable by a Civil Court alone.

A decision of the Financial Commissioner reported as *Salig Ram v. Badhawa Mal*, 3 Pun Re 1886 (Rev), is rather to the contrary and the learned Financial Commissioner held that unless in partition proceedings the party making application for partition agrees to pay fair compensation for improvements to other parties who had made improvements, it was open to a Revenue Officer to refuse partition. The learned Financial Commissioner directed an enquiry into the cost of improvements claimed, with a further direction that the party making the application should pay the cost of improvements and on his doing so he shall be entitled to obtain partition of his share. This case clearly decides that such a question is a question for the authorities carrying out partition consequent upon an application for partition by a co-sharer.

8. The last aspect of the matter that has been urged by the learned counsel for the

appellants is that Ajit Singh appellant claims title to the land purchased by him by reason of adverse possession. The learned counsel has stressed that he was a stranger, he purchased defined survey numbers from a co-sharer, namely, Ranjit Singh, and ever since the purchase of the same he has been in exclusive possession of the land. In this way the learned counsel has urged that Ajit Singh appellant has acquired title to the land in his possession by prescription. He has relied upon *T. P. R. Palania Pillai v. Amjath Ibrahim Rowther*, AIR 1942 Mad 622 (FB) in which at page 625, the learned Chief Justice observed that "when one of several co-sharers lets into possession a stranger who proceeds to cultivate the land for his own benefit the other co-sharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests they must take the consequences." The learned counsel has stressed that the learned Judges, after review of cases on the subject made the observation, as has been reproduced above, and on the basis of that observation Ajit Singh appellant has completed his title by adverse possession for prescribed time so far as the land purchased by him is concerned.

The facts in *Ghulam Nabi v. Umar Bakhsh*, AIR 1941 Lah 307 were somewhat exactly similar to the present case. A co-sharer had sold defined survey numbers to the vendee, who then claimed title to those survey numbers excluding the other co-sharers on the basis of adverse possession. *Tek Chand, J.* who delivered the judgment of the Division Bench, observed thus:

A. "In law uninterrupted sole possession of one co-sharer of a part of the joint property cannot, by itself and without more, amount to ouster of the others: (1912) AC 230 and 64 Pun Re 1918 = (AIR 1918 PC 1). In such circumstances the possession of one co-owner is presumed to be the possession of all and it is only when a co-sharer in assertion of a hostile title does a hostile overt act that the statute begins to run against the other co-sharer.

B. Counsel for the plaintiffs-respondents admitted that this is so, but he contends that this rule does not hold good as between the transferee from a co-sharer and the other co-sharer. This statement of the law, however, is not true in every case. If the transferring co-sharer claiming to be the exclusive owner, purports to transfer the property as belonging to him alone, this will certainly be an overt act hostile to the other co-sharers and if the transferee continues in sole possession for more than the statutory period, without admitting the joint character of the property, he will, of course, acquire a prescriptive title.

C. But if the transfer purports to be of a part of the joint property and there is denial of the title of other co-sharers, the transferee steps into the shoes of the transferring co-sharer and his sole possession for

whatever length of time will not be adverse against the other co-sharers'.

The distinction thus drawn by the learned Judge in the three situations, as detailed above, has not been kept in view in the *Madras Full Bench* case and *Ghulam Nabi's* case, AIR 1941 Lah 307 has held the field in this Court throughout. It states the position of law on the subject correctly and accurately and the observations of the learned Judges in *Ghulam Nabi's* case, AIR 1941 Lah 307 are endorsed.

The reply on the side of respondent 1 is that it is proposition C as in *Ghulam Nabi's* case, AIR 1941 Lah 307 that applies to the facts of the present case. *Ranjit Singh* sold less than his half share of the joint holding to Ajit Singh appellant. He sold specific survey numbers and delivered possession of the same to this appellant. So he sold a part of his share in the joint holding. The learned counsel has further stressed with reference to the recitals in the sale-deed already reproduced above, that *Ranjit Singh* did not claim exclusive ownership of what he was selling, rather he explained in detail that according to the circular of the Ruler of former *Jind State* with regard to the rights of inheritance of widows, the inheritance of his father had half been mutated in the name of respondent 1. So, according to the learned counsel, instead of asserting exclusive ownership, *Ranjit Singh* admitted and pointedly admitted that his mother was a co-sharer with him of the land he was selling, though he was in separate possession of that land. The learned counsel has thus stressed that on the facts the case is covered by proposition C in *Ghulam Nabi's* case, AIR 1941 Lah 307 and no question of title arises in the present case.

The learned counsel for the appellants has also relied on the observations of the learned Judges in the referring order that they were of the opinion that on the facts of the present case in a way a question of title arises, but the learned Judges referred the whole of the case to a larger Bench and not only the two questions of law which were stated at the end of that order. Now, if the argument of the learned counsel for the appellants, to the effect that on the facts of the present appeals a question of title arises was to be accepted and a decision in this respect given, the effect of that would be to by-pass the provisions of Section 117 of *Punjab Act 17 of 1887*. It would mean that a party can ignore the provisions of law in that Section and, without approaching a Civil Court for decision of a question of title, it can obtain decision on the same question in a petition under Article 226 of the Constitution. It has, however, not been explained why this novelty should be permitted to be introduced and why the parties be not required to proceed according to law, that is to say, according to Section 117 of *Punjab Act 17 of 1887*. If the contention of the learned counsel for the appellants is accepted and a decision on the question of title is given here, even on the question whether or not such

a question arises, then the party in whose favour that decision is not cannot have recourse to Section 117 of Punjab Act 17 of 1887. If in spite of such a decision it does have recourse to that provision, it would be prejudiced in the trial of its suit. So, in my opinion these are not proper proceedings in which matters that are to be agitated according to Section 117 of Punjab Act 17 of 1887 should be permitted to be raised. The statute has provided a specific forum for dealing with specific questions and there is no reason why the parties should not have recourse to that forum. If they do so, the case may any how come to this Court in first or second appeal, when it will be considered from an entirely different angle. So no decision can be given in these appeals, arising as they do out of writ proceedings, whether on the facts of the case a question of title does or does not arise.

It has already been stated that in the first instance it is the jurisdiction of the consolidation officers under the provisions of East Punjab Act 50 of 1948 to decide whether or not a provision for partition of joint holdings be made in a scheme of consolidation in the wake of Section 16-A of that Act. If they come to the conclusion that no question of title arises, they may proceed to make such a provision, but, if on the contrary, their conclusion is that a question of title does arise, they must hold their hands and leave the aggrieved party to have recourse to Section 117 of Punjab Act 17 of 1887. The initial decision lies with them. It is apparent that such a decision is not a final decision, for it is subject to the decision of a Civil Court according to Section 117 of the said Act. Even though it is not a final decision, it still is a decision by the officers under the provisions of East Punjab Act 50 of 1948 so as to decide initially the question of jurisdiction with them to make a provision with regard to partition of joint holding in the scheme of consolidation or not. In proceedings under Article 226 what is to be seen is whether the orders made by the authorities under the provisions of East Punjab Act 50 of 1948 were within jurisdiction and according to law. There is, as already pointed out, no appeal to this Court from those orders under Article 226. Consequently in these appeals what is to be seen is whether the order made by respondent 3, the Director of Consolidation of Holdings, Annexure 'B' to the petition of respondent 1, of March 28, 1964, can be interfered with under Article 226.

9. The order of respondent 4, the Settlement Officer, Annexure 'A' to respondent 1's petition, of February 20, 1964, was obviously an order made under Section 36 of East Punjab Act 50 of 1948. It has been so stated in the return of respondents 2 to 5. It was an order made within jurisdiction. Respondent 3 could only interfere with that order of respondent 4 in the terms of S. 42

of that Act on two grounds, (a) for the purpose of seeing its legality, or (b) for the purpose of seeing its propriety. Now, so far as legality of the order of respondent 4 is concerned, having regard to proposition C, as reproduced above from Ghulam Nabi's case, AIR 1941 Lah 307 there was no possible want of legality in his order. Respondent 3 has not pointed out in his own order any illegality or anything contrary to law in the order of respondent 4. So, as a matter of fact, respondent 3 has not interfered with the order of respondent 4 on the ground of some question of legality or otherwise in that order.

The only matter that remains for consideration is the propriety of his interference with the order of respondent 4. Of course, as has been shown above, in the express words of Section 42, respondent 3 had jurisdiction to look into the propriety of the order of respondent 4, copy Annexure 'A' to respondent 1's petition. What has then respondent 3 done in this respect? All that he has done is to say that because of improvements claimed by Ajit Singh appellant in the land purchased by him from Ranjit Singh co-sharer, partition cannot be permitted. But this cannot, in view of the decision in Salig Ram's case, 3 Pun Re 1886 (Rev) be said to be contrary to propriety so far as the order of respondent 4 is concerned, when that order allowed partition of the joint holding between respondent 1 and Ajit Singh appellant, maintaining possession of Ajit Singh appellant as far as the law and equity of partition of land permitted.

The only impropriety or the only thing contrary to propriety, which respondent 3 relied upon so far as the order of respondent 4 is concerned, is the matter of compensation claimed by Ajit Singh appellant for alleged improvements made by him on the land purchased from Ranjit Singh co-sharer. But, as pointed out in Salig Ram's case 3 Pun Re 1886 (Rev) that is a matter which could have been taken cognizance of in the matter of partition and enquiry made with regard to the value or cost of improvements so as to compensate Ajit Singh appellant for the same. This was not a reason on the basis of which outright partition could be refused, unless perhaps in the event of respondent 1 totally refusing to associate herself with an enquiry in regard to the existence of any improvements and, if there were any improvements, with regard to the cost or value of the same. But no such situation arose either before respondent 4 or before respondent 3. There was, therefore, nothing contrary to propriety, upon the basis of which respondent 3 proceeded to interfere with the order of respondent 4. This means that respondent 3 interfered with the order of respondent 4 without regard to legality or propriety of the same as is required by Section 42 of East Punjab Act 50 of 1948, and in doing so he made an order

beyond his power and jurisdiction under that Section. It is this approach which justifies interference of this Court under Article 226 with the order, copy Annexure 'B' to respondent 1's petition, of respondent 3, and to proceed to set aside the same, leaving the order of respondent 4 operative, which order, as has already been stated, is still subject to litigation between the parties in the terms of and in accordance with Section 117 of Punjab Act 17 of 1887. In this approach, and in my opinion this is the only approach that can be made to a case like the present in these appeals, there is no possible room for interference with the order of the learned Single Judge, though it proceeds on a somewhat different basis.

10. So these appeals are dismissed with costs, counsel's fee in each appeal being Rs. 100.

11. HARBANS SINGH, J.: I agree.

12. D. K. MAHAJAN, J.: I agree.
Appeals dismissed.

AIR 1970 PUNJAB AND HARYANA 104 (V 57 C 16)

FULL BENCH

D. K. MAHAJAN, SHAMSHER
BAHADUR AND R. S. NARULA, JJ.

Jagan Nath Piare Lal, Defendant Appellant v. Mittar Sain and others, Respondents.
Second Appeal No. 1 of 1967, D/-13-3-1969.

Transfer of Property Act (1882), S. 76 (a) and (c) — Tenant of mortgagor, unless his tenancy is determined at the time of mortgage, necessarily attorns to mortgagee — After redemption he is again relegated as tenant of the mortgagor.

In case of mortgage of property under tenancy the following propositions apply—

(1) A tenant of a mortgagor, after the mortgage, necessarily attorns to the mortgagee and thereby becomes a tenant of the mortgagee, unless his tenancy has been put an end to by the mortgagor at the time of effecting the mortgage. On the redemption of the mortgage, he again is relegated to his position of a tenant of the mortgagor;

(2) The mere execution of a rent-note by the tenant of the mortgagor in favour of the mortgagee, after the mortgage has been effected, does not create a fresh tenancy in favour of the mortgagee. But there is nothing to prevent the tenant to surrender his earlier tenancy and enter into a fresh contract of tenancy with the mortgagee; and in each case, it will have to be determined on evidence, whether a tenant of the mortgagor did surrender his tenancy and obtained a fresh tenancy from the mortgagee after the mortgage came into being;

(3) A tenant inducted by the mortgagee remains a tenant during the continuance of

the mortgage and on the redemption of the mortgage, the tenancy comes to an end;

(4) In the case of agricultural tenancies, the above proposition No. (3) does not absolutely hold good. There is an exception to it, namely, that the tenant of a mortgagee of agricultural land will continue to be its tenant even after redemption provided he has been inducted bona fide and in the like manner as a prudent owner would have done for the proper management of the land. Even in such a case, the operation of the lease cannot extend beyond the period for which it was granted. No lease can be granted if there is an express prohibition in the mortgage deed.

The onus to prove the exception is on the tenant and unless a clear case is made out in favour of the exception, the general rule will prevail.

(5) That it is open to a mortgagor to permit the mortgagee to induct tenants even beyond the terms of the mortgage; and if the mortgagee does so, on redemption, they will continue to be the tenants of the mortgagor. AIR 1952 SC 205 and AIR 1956 SC 305 and AIR 1958 SC 183 and AIR 1966 SC 1721; Civil Revn. No. 332 of 1961, D/-2-3-1962 (Punj), Second Appeal No. 494 of 1963, D/-8-8-1963 (Punj) and AIR 1939 Cal 692 and AIR 1964 Punj 210, Rel. on.

(Para 12)

| Cases Referred: | Chronological | Paras |
|--|---------------|-------|
| (1968) 1968-70 Pun LR 1115, Puran Chand v. Bakshi Gopi Chand | | 9 |
| (1966) AIR 1966 SC 1721 (V 53) = (1966) 3 SCR 676, Prabhu v. Ram Deo | | 4 |
| (1964) AIR 1964 Punj 210 (V 51) = ILR (1963) 2 Punj 1, Gian Chand Sham Chand v. Rattan Lal Krishan Kumar | | 6 |
| (1964) AIR 1964 Punj 346 (V 51) = 1964 Cur LJ 192, Dr. Gian Singh Karam Singh v. Mohanlal | | 1, 8 |
| (1963) Second Appeal No. 494 of 1963, D/- 8-8-1963 (Punj) Ujagar Ram v. Hussan Lal | | 6 |
| (1962) Civil Revn. No. 332 of 1961, D/- 2-3-1962 (Punj), Mam Raj v. Basheshar Parshad | | 1, 5 |
| (1961) 1961 MPLJ 66 = ILR (1961) Madh Pra 357, Motilal Govindram v. Gopikrishan | | 7 |
| (1961) LPA No. 221 of 1961, D/-26-12-1961 (Punj), Sardari Lal v. Ram Lal | | 7 |
| (1958) AIR 1958 SC 183 (V 45) = 1958 SCR 986, Asa Ram v. Mt. Ram Kali | | 1, 4 |
| (1957) AIR 1957 All 346 (V 44), Abdul Ghafoor v. Kunj Beharilal | | 11 |
| (1957) AIR 1957 Andh Pra 619 (V 44) = 1956 Andh WR 1093, Venkayya v. Venkata Subbarao | | 6 |
| (1956) AIR 1956 SC 305 (V 43) = 1956 SCR 1, Harihar Prasad Singh v. Deonarain Prasad | | 4 |

(1952) AIR 1952 SC 205 (V 39) =
 1952 SCR 775, Mahabir Gope v.
 Harbans Narain Singh 4
 (1939) AIR 1939 Cal 692 (V 26) =
 ILR (1939) 2 Cal 551, Suraj Chandra
 v. Beharilal Mondal 6

P. S. Jain with N. C. Jain, for Appellant;
 H. L. Sarin Senior Advocate with H. S.
 Awasthy and A. L. Bahal, for Respondents.

D. K. MAHAJAN J.: This case was referred to a Full Bench by my Lord, the Chief Justice, in pursuance of my referring order dated March 16, 1967. The reference was necessitated because of the following observations of Dua J. in *Dr. Gian Singh Karam Singh v. Mohan Lal*, AIR 1964 Punj 346:

"....It has been emphasised that it is only if the mortgagee had himself created a tenancy that one could hold the tenancy not to enure beyond the period of the mortgage. Whether the observations in the judgment in *Mam Raj's* case, that execution of a fresh rent-note made no difference on the facts and circumstances of that case is right or wrong does not directly concern us, for, we are not sitting on appeal against that judgment. The ratio of the Supreme Court decision, however, which was also binding on the learned Judge deciding *Mam Raj's* case (*Mam Raj v. Basheshar Parshad*), Civil Revn. No. 332 of 1961, decided on the 2nd of March, 1962 (Punj), is clear."

The facts of *Mam Raj's* case, Civil Revn. No. 332 of 1961, D/-2-3-1962 (Punj), were, that a shop in dispute belonging to Rameshwar Dass had been let out by him to Mam Raj. During the currency of the tenancy, the Patiala and East Punjab States Union Urban Rent Restriction Ordinance, 2006 BK (Ordinance No. 8 of 2006 BK) came into force. This Ordinance ultimately yielded place to the East Punjab Urban Rent Restriction Act, after the merger of Pepsu in Punjab. This fact gave certain protections to the tenants; and one of them was that a tenant could only be evicted under Section 13 of that Ordinance. On December 12, 1949, Rameshwar Dass mortgaged the shop to Munshi Ram with possession. On that very day, Mam Raj executed a rent note in favour of Munshi Ram, mortgagee. Even otherwise Munshi Ram would be the landlord of Mam Raj in view of the definition of 'landlord' in Section 2 (c) of the Ordinance. On January 2, 1959, Basheshar Parshad purchased the equity of redemption from Rameshwar Dass; and before November, 1959, he redeemed the shop from Munshi Ram, mortgagee. On July 17, 1959, an application was made by Mam Raj against Basheshar Parshad for fixation of fair rent under the Rent Act.

Basheshar Parshad took the plea that there was no relationship of landlord and tenant between the parties and, therefore, the application was not competent. The Rent Controller found that Mam Raj was a tenant of Basheshar Parshad. On appeal by Basheshar

Parshad, the decision of the Rent Controller was set aside and it was held by the Appellate Authority that Mam Raj was not the tenant of Basheshar Parshad. The reason for this conclusion was that Mam Raj was held to be the tenant of the mortgagee and with the redemption of the mortgage, the tenancy of Mam Raj came to an end. Against this decision, a petition for revision was filed in this Court; and the same was decided by Mehar Singh J. The learned Judge referred to the decision of the Supreme Court in *Asa Ram v. Mst. Ram Kali*, AIR 1958 SC 183. The learned Judge held that:

"....Approach of the Appellate Authority was not correct. The execution of a fresh rent-note by him in favour of Munshi Ram, mortgagee, on the date of the mortgage deed made no difference in substance, for it practically amounted to an attornment by him to Munshi Ram as landlord. The tenancy has been continuous since before 1949; and had remained so up to the date of the application by Mam Raj for the fixation of fair rent. In the circumstances, it was not correct that mortgagee, Munshi Ram, had created a tenancy in favour of Mam Raj which tenancy would come to an end with the cessation of the mortgage on redemption."

As a slight doubt seems to have lurked in the minds of the learned Judges deciding *Dr. Gian Singh's* case, AIR 1964 Punj 346, I thought it desirable to refer this case to a larger Bench; and that is how the case has been placed before us.

2. The facts of the present case may now be stated: Ram Chander, defendant No. 3, was the owner of the shop in dispute. This shop is situate in Sohana district Gurgaon. It was under the tenancy of Jagan Nath, defendant No. 2. Ram Chander mortgaged it to Hira Lal, defendant No. 1, with possession. Later on, Ram Chander sold the equity of redemption to Mittar Sain on the 21st of June, 1961. On the 14th of June, 1962, Mittar Sain filed a suit for redemption of the mortgage against Hira Lal. Both Jagan Nath and Ram Chander were impleaded in this suit. The stand taken up by Jagan Nath was that Mittar Sain was only entitled to symbolical possession of the premises on redemption. He was not entitled to their actual possession as they were under his tenancy; and in view of the Urban Rent Restriction Act, he could only be evicted by recourse to its provisions. The trial Court found that Jagan Nath was not the tenant of Ram Chander and that he was merely the tenant of the mortgagee. Therefore, on redemption of the mortgage, his tenancy came to an end. On appeal preferred by Jagan Nath, the lower appellate Court held that he was the tenant of Ram Chander; but by reason of his having executed a rent note in favour of the mortgagee, Hira Lal, Jagan Nath had relinquished his tenancy under Ram Chander and was a tenant of the mortgagee. On redemption of the mortgage, his tenancy came to an end. Against this deci-

sion, the present second appeal has been preferred.

3. The short question, that requires determination in this appeal, is, whether Jagan Nath was the tenant of the mortgagor, Ram Chander; and after the mortgage of the shop, he having attorned to the mortgagee and having executed a rent note in his favour, he ceased to be the tenant of Ram Chander and became the tenant of the mortgagee?

4. So far as the legal position of the tenant of a mortgagee is concerned, it is now well settled that a tenant of the mortgagee ceases to be a tenant on the redemption of the mortgage and does not become the tenant of the mortgagor. See in this connection the decisions of the Supreme Court in:

(1) Mahabir Gope v. Harbans Narain Singh, AIR 1952 SC 205;

(2) Harihar Prasad Singh v. Deonarain Prasad, AIR 1956 SC 305;

(3) AIR 1958 SC 183; and

(4) Prabhu v. Ramdeo, AIR 1966 SC 1721. The reason for this rule, as stated by T. L. Venkatarama Aiyar, J. in Asa Ram's case, AIR 1958 SC 183 is as follows:

"The law undoubtedly is that no person can transfer property so as to confer on the transferee a title better than what he possesses. Therefore, any transfer of the property mortgaged, by the mortgagee must cease, when the mortgage is redeemed."

However, there are certain exceptions to this general rule; and they are:

(1) If in the mortgage deed, it is provided that the mortgagee could induct a tenant beyond the term of the mortgage and if such a tenant is inducted, on redemption, his tenancy will not come to an end. As a necessary corollary, after redemption, he will be the tenant of the mortgagor; and the mortgagor will be only entitled to symbolical possession on redemption;

(2) That the tenant of the mortgagor, prior to the mortgage, continues to be his tenant even after the redemption of the mortgage, if during the currency of the mortgage, he attorns to the mortgagee, or, in other words, continues to be a tenant under the mortgagee. Though ceasing to be a tenant of the mortgagor during the currency of the mortgage, he, after redemption, becomes a tenant of the mortgagor, provided he does not give up his tenancy. In such a case, his tenancy under the mortgagor remains in abeyance during the currency of the mortgage;

(3) That in the case of tenants of agricultural land, a tenant inducted by the mortgagee would be the tenant of the mortgagor even after the redemption of the mortgage, provided he has been inducted bona fide and in like manner as a prudent owner of land would have done in the usual course of management. Even in such a case, the operation of the lease cannot extend beyond the period for which it was granted.

5. I also find ample support for these propositions from the decisions of this Court.

I have already dealt with the decision of Mehar Singh J. (as he then was), in Mam Raj's case, (Civil Revn. No. 332 of 1961 (Punj)).

6. The next case in point is the decision in Ujagar Ram v. Hussan Lal, Second Appeal No. 494 of 1963, D/-8-8-1963 (Punj), the facts of which are almost identical with the facts of the present case, it was held by Harbans Singh J., that the tenancy did not come to an end on the redemption of the mortgage because the tenant was on the premises before the mortgage was created and the mere fact, that he attorned to the mortgagee after the creation of the mortgage will not put an end to his tenancy on the redemption of the mortgage. The only difference in the case decided by Harbans Singh J. and the present case is that by the tenant there has been an increase in the rent payable to the mortgagee to the extent of 50 Naye Paise; otherwise there is no difference. Harbans Singh J., repelled the argument that by execution of a fresh rent note by the tenant in favour of the mortgagee, the tenancy under the mortgagor had come to an end and a new tenancy had come into being under the mortgagee, in the following terms:

"...As a general proposition of law, that merely because the tenant executes a rent deed in favour of a mortgagee, it would automatically result in the surrender of the lease taken from the mortgagor, it cannot be accepted. It has also to be noted that section 111 of the Transfer of Property Act as such is not applicable to Punjab and that implied surrender shall have to be inferred on the basis of general principles that if a subsequent agreement is inconsistent with the previous one, the earlier one must be taken to have been intended by the parties to have been cancelled. In this respect, reference may be made to Venkayya v. Venkata Subbarao, AIR 1957 Andh Pra 619. The relevant portion of head-note (e) is as follows:

"In India, if a landlord and tenant by mutual agreement do any act or enter into any transaction which is inconsistent with the continuance of the existing lease or tenancy there would be an implied surrender. This is merely an application of the general principle of law that in respect of the same subject-matter parties cannot stand to each other in two inconsistent and incompatible relationships."

It will, therefore, depend on the facts of each case whether the second agreement is inconsistent and incompatible with the existing one and whether it must be implied that the tenant intended to surrender or cancel the first lease. While dealing with clause (d) of Section 111, the observations made by the Calcutta High Court in Suraj Chandra v. Beharilal Mondal, AIR 1939 Cal 692 at p. 696, were quoted with approval by a Bench of this Court in a Letters Patent Appeal Gian Chand Sham Chand v. Rattan Lal

Krishan Kumar, ILR (1963) 2 Punj 1 = (AIR 1964 Punj 210), as follows :

"If the general principle of merger apart from Section 111 (d), Transfer of Property Act, is sought to be applied to the present case other difficulties would arise. It would then be primarily a question of intention and we have no materials to decide that the defendant intended to merge the two interests. * * * A man is presumed to intend that which is for his benefit and judged by that test it would obviously be to the advantage of the defendant to keep the two interests separate. His interest as a lessor is affected by the mortgage and if he allows his lessee's interest to be merged in the superior one, he would be hit by the mortgage decree and the sale, and his rights would be extinguished. * * *"

In the present case, it is obvious that there could not be any intention on the part of the tenants to surrender their rights under the lease already taken by them from the landlord and to take a lease from the mortgagee, who obviously had only a transitory interest which could come to an end at any time the mortgage was redeemed. Apart from this, it is clear that a lease in favour of the mortgagee cannot be treated to be inconsistent with the pre-existing lease from the mortgagor. When Hussan Lal created the tenancy rights in favour of the appellants, he was a full owner of the property. Later he created an intermediary estate i.e. mortgagee rights with possession. Under the law, mortgagee with possession became entitled to the rent that was payable by the appellants to the mortgagor. Even if there had been no writing executed by them in favour of the mortgagee, he became entitled to recover the rent from them in view of the interest created in him. The tenants would not have been justified in making the payment of the rent to the landlord in view of the intimation given to them by the landlord of the creation of this interest but the mere fact that they entered into an agreement to pay the same rent to the mortgagee, would, in no way, be inconsistent with the previous lease which, for the period of the existence of the mortgage, would only remain in suspense. As soon as the intermediary estate created by the owner came to be vested in him, and once again, he became the full owner, the previous lease would revive and come into full operation. * * *"

7. The next case is Letters Patent Appeal No. 221 of 1961, Sardari Lal v. Ram Lal, decided by Falslaw, Chief Justice and Grover J. on the 26th of December, 1961 (Punj). The facts of this case were, that a shop belonged to Uttam Chand. It was under the tenancy of Sardari Lal. Uttam Chand mortgaged it to Sardari Lal. The mortgage was to subsist for one year, after which Uttam Chand was entitled to redeem it. If he failed to do so, the mortgagee was entitled to recover the mortgage amount in

the usual manner. Sardari Lal was to retain possession of the shop and Uttam Chand had no right to recover rent and Sardari Lal had no right to recover interest on the mortgage amount. On Uttam Chand's death in the end of December, 1959, his heirs sold the equity of redemption to Ram Lal, who instituted a suit for redemption in February, 1960. The question, which arose in the litigation, related to the position of Sardari Lal on redemption of the shop. The trial Court granted a decree for redemption; but only symbolical possession was ordered to be delivered to the plaintiff, Ram Lal. On appeal, the learned District Judge accepted the plaintiff's contention holding that by entering into mortgage and coming into possession as mortgagee, Sardari Lal had allowed the tenancy in his favour to terminate and that he could not be restored back to his position as a tenant on the redemption of the mortgage. This decision was affirmed in second appeal by a learned Single Judge of this Court on a Letters Patent Appeal, it was observed as follows :

"The plaintiff's case at the outset appears to have been that the tenancy was terminated under Section 111 (d) of the Transfer of Property Act which reads—

"111. A lease of immovable property determines—

- (a)
- (b)
- (c)

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;"

but obviously this is not applicable and the possession of the property in dispute as a mortgagee did not necessarily end the right to possession as a tenant. Indeed before us on behalf of the plaintiff, recourse was had to Section 111 (f) it being argued that the tenancy ended by implied surrender.

It seems to me that whether any particular mortgage of this kind by a landlord in favour of his tenant implies a complete surrender of the rights of the tenant in the tenancy on the redemption of the mortgage is a question of fact to be decided according to the terms of the contract between the parties in each case. In this case, the contract is completely silent as to what was to happen if and when the mortgage was redeemed, and it seems quite possible that no trouble at all would have arisen if the original mortgagor had not died and his heirs had not promptly sold the equity of redemption to a third party. It is, however, to be borne in mind that at the time of the mortgage in 1955, the East Punjab Urban Rent Restriction Act of 1949 had long been in force, and this Act imposes severe restrictions on the right of a landlord to eject his tenant which can only be done on certain grounds contained in Section 13 of the Act. In the circumstances I should have ... if the parties to the mortgage

the tenancy should be finally terminated by the mortgage, and that the owner would be entitled to immediate possession on the redemption of the mortgage, this would have been bound to be specified in the mortgage contract and there would in the agreement have been an express surrender by the mortgagee of the rights secured by him as a tenant under the Act. In the absence of any such specific provision in the contract of mortgage I am of the opinion that the tenant did not surrender his rights, and that the intention of the parties to the mortgage must be interpreted as being that on the redemption of the mortgage by the landlord the tenant would still retain his rights as a tenant. In this I am fortified by the decision of H. R. Krishnan, J. in *Motilal Govindram v. Gopikrishan*, 1961 MPLJ 66, which relates to a case in which a usufructuary mortgage was created by the owner of a house in favour of the tenant and it was even recited in the mortgage deed that the mortgagor is giving up his possession and that on redemption he would take back possession. In a suit brought by the mortgagor for redemption and possession of the house it was held that the lessee's right and the mortgagee's right are not mutually inter-related, but derived by independent routes from the right of proprietorship and the lessee's right and mortgagee's right can co-exist. Hence where usufructuary mortgage is created in favour of the lessee, there is no merger of the lessee's right into the mortgagee's right. It was held further that there was no implied surrender of the lease by operation of law by the lessee at the time he took the mortgage, because there was no impossibility in a person being a mortgagee in possession and a lessee at the same time. There was no surrender by the terms of the agreement and it was only intended that on redemption, the mortgagee should give back the symbolic possession. On redemption, the mortgagee reverted to his position as a lessee, subject to all the terms and incidents that were in force at that time.

8. I now proceed to deal with Dr. Gian Singh's case, AIR 1964 Punj 346, a reference to which has already been made above. The facts of this case were, that a residential shop owned by Shri Siri Ram was mortgaged by him with possession with Chanan Ram, defendant, some time in 1959. Dr. Gian Singh was a tenant of the premises since 1956, obviously under Siri Ram. Siri Ram sold the equity of redemption to Mohan Lal and Om Parkash, in September, 1960. Mohan Lal and Om Parkash instituted a suit for possession of the shop by redemption and Dr. Gian Singh was impleaded as a defendant. The stand taken up by Dr. Gian Singh, with which the learned Judges were concerned, was that actual possession of the shop could not be delivered to Mohan Lal and Om Parkash, plaintiffs. The trial Court came to the conclusion that on the extinction of the mortgage by redemption, the

tenancy rights of Dr. Gian Singh were extinguished and he was liable to deliver possession of the same to the owner. It was also held that Dr. Gian Singh was proved to be the tenant of Siri Ram, before he mortgaged the property to Chanan Ram and others, and that, after the execution of the mortgage deed, Dr. Gian Singh became a tenant under the mortgagees. On appeal by Dr. Gian Singh to this Court, it was held that Dr. Gian Singh did not cease to be tenant on the redemption of the mortgage. In arriving at this conclusion, it was observed that:

"...he had already been on the premises as a tenant of the mortgagor and continued to pay rent to the mortgagee and without showing that he continued to be the mortgagee's tenant under a fresh agreement of lease which is improvident or is shown not to be bona fide or is otherwise likely to damage the property and, therefore, violative of Section 76 (a) or (e) of the Transfer of Property Act."

9. The last case in point is the decision in *Puran Chand v. Bakshi Gopi Chand*, 1968-70 Pun LR 1115. In this case, Sodhi J. observed as follows:

"The execution of a fresh rent-note by a tenant in favour of the mortgagee when he was already in possession of the building as tenant under the mortgagor does not amount to creation of fresh tenancy by the mortgagee, and the tenant cannot be said to have been inducted by the mortgagee, and such a tenant cannot be dispossessed when the property is got redeemed by the mortgagor. The tenant holds the property as a tenant of the mortgagor and enjoys the protection given by the East Punjab Urban Rent Restriction Act.

A mere reduction in rent cannot, by itself, amount to surrender of old lease and creation of a fresh one. No inference of surrender can be drawn if the tenant in recognition of the transfer of an interest in the demised property by the mortgagor in favour of the mortgagee executes a fresh rent note in favour of the latter and may be at a reduced rent. By executing a fresh rent-note in favour of the mortgagee, the tenant does not normally get a new interest in the property surrendering his rights existing hitherto when he was holding as a tenant under the mortgagor. All that is intended is that he attorns to the mortgagee and the execution of a fresh rent-note in such circumstances, in the absence of any conditions showing an intention to the contrary, is only an attornment in favour of the mortgagee."

10. No case of this Court, taking a contrary view, has been brought to our notice. The learned counsel for the respondents made a reference to certain decisions which I have not noticed, for the simple reason that those are cases where a tenant was inducted by the mortgagee himself. The rule is firmly settled that the tenancy of a tenant

inducted by a mortgagee comes to an end on the extinction of the mortgage. The only exception to this rule is in the case of agricultural land where a mortgagee inducts a tenant bona fide like a prudent owner of land in the usual course of management.

11. The only case cited for the contrary view is *Abdul Ghafoor v. Lala Kunj Bihari Lal*, AIR 1957 All 346. This case, in fact, proceeds on its own peculiar facts. In any case, if it is taken to have laid down that merely because a tenant executes a rent deed in favour of the mortgagee, it would automatically result in the surrender of the lease taken from the mortgagor, it cannot be held to lay down a correct proposition of law; and I agree with the observations of Harbans Singh J., regarding this case made in *Ujjagar Ram's case*.

12. After giving the matter my careful consideration, I have come to the conclusion that:

(1) A tenant of a mortgagor, after the mortgage, necessarily attorns to the mortgagee and thereby becomes a tenant of the mortgagee, unless his tenancy has been put an end to by the mortgagor at the time of effecting the mortgage. On the redemption of the mortgage, he again is relegated to his position of a tenant of the mortgagor;

(2) The mere execution of a rent-note by the tenant of the mortgagor in favour of the mortgagee, after the mortgage has been effected, does not create a fresh tenancy in favour of the mortgagee. But there is nothing to prevent the tenant from surrendering his earlier tenancy and entering into a fresh contract of mortgage with the mortgagee; and in each case, it will have to be determined on evidence, whether a tenant of the mortgagor did surrender his tenancy and obtain a fresh tenancy from the mortgagee after the mortgage came into being;

(3) That a tenant inducted by the mortgagee remains a tenant during the continuance of the mortgage and on the redemption of the mortgage, the tenancy comes to an end;

(4) That in the case of agricultural tenancies, proposition No. (3) does not absolutely hold good. There is an exception to it, namely, that the tenant of a mortgagee of agricultural land will continue to be its tenant even after redemption provided he has been inducted bona fide and in the like manner as a prudent owner would have done for the proper management of the land. Even in such a case, the operation of the lease cannot extend beyond the period for which it was granted. No lease can be granted if there is an express prohibition in the mortgage deed.

The onus to prove the exception is on the tenant and unless a clear case is made out in favour of the exception, the general rule will prevail.

(5) That it is open to a mortgagor to permit the mortgagee to induct tenants even

beyond the terms of the mortgage; and if the mortgagee does so, on redemption, they will continue to be the tenants of the mortgagor.

13. So far as the facts of the present case are concerned, the tenant was the tenant of the mortgagor. After the mortgage, he continued to be the tenant of the mortgagee. There was no surrender by him of the tenancy he held under the mortgagor. All that happened was that he executed a fresh rent-note and agreed to pay 50 Naye Paise per mensem over and above the rent he was paying to the mortgagor. There is no other evidence on the record which will indicate that he gave up the tenancy under the mortgagor and took up a new tenancy under the mortgagee. In this situation, it is not possible to hold that there was a surrender by the tenant of his tenancy under the mortgagor. In order to hold that a tenant has surrendered his existing lease, it must be shown that the earlier tenancy was put an end to and a new tenancy was created. The mere fact, that the same tenant has continued as a tenant of the property and has only executed the fresh rent-note in favour of the mortgagee, will not automatically amount to surrender.

14. As already observed, in the present case, no surrender can be spelt out from the execution of a fresh rent-note by the mortgagor's tenant in favour of the mortgagee. Therefore, on the redemption of the mortgage, the tenancy of the tenant under the mortgagor will revive; and the relationship of landlord and tenant will not come to an end merely because the mortgage has been redeemed.

15. For the reasons recorded above, this appeal must succeed. I accordingly allow the same and set aside the judgments and decrees of Courts below and maintaining the decree for redemption, direct that the mortgagor will only be put in symbolical possession of the mortgaged property, the actual possession of the same remaining with the appellant, tenant of the mortgagor. In the circumstances of the case, there will be no order as to costs.

16. SHAMSHER BAHADUR J.: I agree.

17. R. S. NARULA, J.: I also agree.
Appeal allowed.

AIR 1970 PUNJAB AND HARYANA 109
(V 57 C 17)

FULL BENCH

D. K. MAHAJAN, SHAMSHER BAHADUR
AND R. S. NARULA JJ.

Dhani Ram Janki Dass, Plaintiff-Appellant
v. Deep Chand Basant Lal and another, Defendants-Respondents.

Second Appeal No. 274 of 1968, D/- 13-3-1969 from decree of Addl. Dist. J., Karnal
D/- 26-10-1967.

FM/FM/C443/69/BNP/M

Transfer of Property Act (1882), Ss. 60 and 111. — Mortgage of shop — Suit for redemption of — Tenant of mortgagee cannot resist — Tenant ceases to be tenant of property on redemption — Rule that mortgagee's tenant continues to be tenant of mortgagor on redemption relates to agricultural leases only. AIR 1970 Punj and Har 104, Rel. on; AIR 1952 SC 205, Disting.

(Para 6)

Cases Referred: Chronological Paras
(1952) AIR 1952 SC 205 (V 39) =

1952 SCR 775, Mahabir Gope v.

Harbans Narain Singh 4

(1970) AIR 1970 Punj and Har 104
(V 57) = S. A. No. 1 of 1967

D/- 13-3-69, Jagan Nath v. Mittar Sain 6

P. S. Jain, with N. C. Jain, for Appellant;
G. P. Jain, G. C. Garg and S. P. Jain, for Respondents.

D. K. MAHAJAN J.: This second appeal is directed against the decision of the Additional District Judge, Karnal, reversing, on appeal, the decision of the trial Court, decreeing the plaintiffs' suit for possession of the shop in dispute.

2. The shop in dispute was mortgaged with possession by Bal Kishan to Tara Chand under a registered deed of mortgage dated 26th of August, 1952, to secure a sum of Rs. 2500. The mortgage amount was to carry interest at the rate of one per cent per annum and the income from the shop was to be adjusted towards interest during the continuance of the mortgage. The mortgagee was entitled to get the shop himself or give it on rent to some one else. On the same day, Bal Kishan executed a rent-note in favour of the mortgagee undertaking to pay Rs. 200 per annum as rent. Bal Kishan sold equity of redemption to Dhani Ram, plaintiff, for Rs. 4,000 under a registered deed of sale dated 26th of February, 1965. Out of the sale consideration, a sum of Rs. 2,500 was left with the vendees for payment to the mortgagee.

3. The present suit was filed by the plaintiff for redemption of the shop on payment of Rs. 2500 to Tara Chand. Deep Chand was impleaded as defendant No. 2 on the allegation that he was a tenant of defendant No. 1 since 1-4-1964. The suit was resisted by defendant No. 2 on the ground that he cannot be dispossessed except in accordance with the provisions of East Punjab Urban Rent Restriction Act, as he was the tenant of the mortgagor, before the mortgage. The trial Court found that defendant No. 2 was not in possession of the shop at the time of the mortgage or prior to the mortgage and that he became a tenant of the shop somewhere in the year 1954; and that he took the property on rent from the mortgagee. In this view of the matter, the trial Court came to the conclusion that defendant No. 2 being the tenant of the mortgagee, his tenancy would come to an end with the redemption of the mortgage. Thus the

plaintiffs' suit was decreed for possession of the shop in dispute.

4. Against this decision, an appeal was preferred by defendant No. 2, the tenant in the Court of the district Judge, Karnal. The appeal was heard by the Additional District Judge, Karnal; and the learned Additional District Judge, while affirming the finding of the trial Court, that Deep Chand was a tenant inducted by the mortgagee, reversed the decision of the trial Court on the ground that in view of the decision of the Supreme Court in Mahabir Gope v. Harbans Narain Singh, AIR 1952 SC 205 the mortgagee's tenant continued to be a tenant of the mortgagor on redemption.

5. Against this decision, the present second appeal has been preferred by the mortgagor.

6. It is not now disputed that in view of our decision in Jagan Nath v. Mittar Sain. Second Appeal No. 1 of 1967 decided to day, = (AIR 1970 Punj and Har 104) this appeal must succeed. We have held that the tenant of a mortgagee ceases to be a tenant of the property on redemption of the mortgage. The Additional District Judge lost sight of the fact that the rule, he applied to decide the case against the mortgagor, was a rule relating to agricultural leases.

7. For the reasons recorded above, this appeal must succeed. The appeal is accordingly allowed; the judgment and decree of the lower appellate Court is set aside and that of the trial Court is restored; but there will be no order as to costs.

8. SHAMSHER BAHADUR J.: I agree.

9. R. S. NARULA J.: I too.

Appeal allowed.

AIR 1970 PUNJAB AND HARYANA 110
(V 57 C 18)

FULL BENCH

**MEHAR SINGH C. J., HARBANS SINGH,
D. K. MAHAJAN, R. S. SARKARIA AND
B. R. TULL, JJ.**

Bhagat Ram Patanga, Applicant v. State of Punjab, Respondent.

Supreme Court Appln. No. 172 of 1969, D/- 29-5-1969 for leave to appeal to Supreme Court in LPA No. 70 of 1964 D/- 10-4-1969 reported in AIR 1970 Punj and Har 9 (FB).

(A) Constitution of India, Art. 133(1)(c) — Certificate of fitness — Substantial question of law — Finding that unruly conduct of applicants in meeting of Municipal Committee amounted to flagrant abuse of their position as municipal commissioners — Decision is on a matter of fact and no question of law is involved — (Punjab Municipal Act (3 of 1911), S. 16). (Para 2)

(B) Constitution of India, Art. 133(1)(c) — Applications under — Removal of applicants from membership of municipality — Question whether State Government has

FM/GM/C682/69/LGC/M

given reason for its order — High Court looking into executive file of the case to find what exactly was the order and as a fact finding it to be correct that it was supported by reasons — It is a conclusion of fact — No question of law is involved — Applications dismissed. 1967 MPLJ 868 (SC), Disting — (Punjab Municipal Act (3 of 1911) S. 16). (Para 3)

Cases Referred: Chronological Paras
(1967) Civil Appeal No. 657 (N) of 1967
D/- 17-8-1967 = 1967 MPLJ 868 (SC),
Pragdas Umar Vaishya v. Union of
India

R. S. Mittal, for Appellant.

ORDER: This will dispose of two Supreme Court Applications Nos. 172 and 173 of 1969 from our judgment, dated April 10, 1969, which was given in two separate appeals under Clause (10) of the Letters Patent by two separate applicants Bhagat Ram Patanga and Om Parkash Agnihotri.

2. The applicants conducted themselves in an unruly manner in a meeting of the Municipal Committee of Phagwara and on that account a show cause notice was given to either under the proviso to Section 16 (1) of the Punjab Municipal Act, 1911 (Punjab Act 3 of 1911), why either be not removed from the membership of the Municipality for having flagrantly abused his position as a member of it. The applicants gave their replies to the show-cause notices. After that the State Government proceeded to remove them from the membership of the Municipality and to impose a disqualification in the terms of Section 16 of the Act from contesting Municipal elections for a stated period. In the writ petitions by the applicants a learned Single Judge was of the opinion that their conduct taken as such did not amount to flagrant abuse of their position as Municipal Commissioners. So the writ petitions were accepted and the orders of the State Government were quashed. On appeals by the State Government against the order of the learned Single Judge, a Special Bench came to the conclusion that the unruly conduct of the applicants did amount to flagrant abuse of his position by either as a municipal commissioner of the municipality. This we consider is a question of fact and no question of law is involved.

On a further argument on the side of the applicants that the State Government's orders removing the applicants from the membership of the municipality did not give reasons for the decision of the State Government, the file of the case was looked into and it was found that the State Government had actually given reasons for its order, and, such an order having been made in each case, a notification was issued in the terms of Section 16 of the Act removing each applicant from the membership of the municipality. So the appeals of the State Gov-

ernment were accepted, and the petitions of the applicants under Article 226 of the Constitution were dismissed. These are two applications for a certificate of fitness for appeal to the Supreme Court by the applicants under Article 133 (1) (c) of the Constitution. The judgment is one of reversal, but no question of valuation in a case like this is involved. So what has to be seen is whether there is a substantial question of law involved on the basis of which the certificate as prayed for can be given to each one of the applicants. Two arguments have been urged by the learned counsel for the applicants. One argument is whether the unruly conduct of the type, about which at this stage there is no dispute, amounts to flagrant abuse by either applicant of his position as a member of the municipality, and the Bench has come to the conclusion that it does, which, as stated, is a decision on a matter of fact and no question of law is involved.

3. The only other argument urged by the learned counsel for the applicants is that we could not look into the executive file of the State Government to discover reasons for its decision. In this respect reliance is placed on Pragdas Umar Vaishya v. Union of India, Civil Appeal No. 657 (N) of 1967, decided by the Supreme Court on August 17, 1967, (SC) but that was a case under the Mineral Concession Rules, 1960, in which their Lordships held that a speaking order was necessary because an appeal was provided against that order. There is no such appeal provided against the orders that were questioned in the petitions of the present applicants. On the facts, the case is no parallel. It was not that the executive file was looked into to reconstruct reasons in support of the orders of the State Government. The executive file was seen to find what exactly was the order of the State Government and whether it was supported by reasons, and this we found as a fact to be correct. In each case the order was there and in each case the reasons were given this again is a conclusion of fact. So no question of law is involved.

4. On the consideration as above the two applications have to be dismissed but today two miscellaneous applications C. M. Nos. 1587-C & 1588-C of 1969 have been listed and the learned counsel for the applicants says that the main applications should also be disposed of and that is why the main applications have been considered and arguments with regard to the same have been heard. The two Supreme Court Applications Nos. 172 and 173 of 1969 for the reasons already stated, stand dismissed and with that the two miscellaneous applications also come to be dismissed. There is, however, no order in regard to costs.

Applications dismissed.

AIR 1970 PUNJAB AND HARYANA 112
(V 57 C 19)

FULL BENCH

S. B. CAPOOR, R. S. NARULA AND
H. R. SODHI, JJ.

Dr. Kartar Singh Rai, Petitioner v. State
of Punjab and another, Respondents.

Civil Writ No. 1981 of 1966, D/- 4-11-1968.

(A) Constitution of India, Arts. 309, 310 — Financial sanction for the post upto certain date — Post stands abolished on that date — No sanction of council of Ministers is required for abolition.

Where the sanction of the financial authority for a certain post was only upto certain date, and the incumbent had already vacated that post before that date, the post stands automatically abolished on the expiry of the date upto which it was sanctioned and it cannot be said that sanction of the Council of Ministers is required for the abolition. (Para 20)

(B) Constitution of India, Article 309 — Punjab Services (Appointment by Promotion) Rules (1962), Cl. 2—Scheduled post—Post of Additional Director, Health Services, though not mentioned in Schedule is a Scheduled post — Since it was super-time scale post it is not to go on the basis of seniority but on the basis of merit — Seniority would be considered only where merits are equal — Method of selection indicated — Held that in the instance case method adopted was proper — AIR 1967 SC 1910, Ref. (Punjab Civil Medical Service Class I (Recruitment and Conditions of Service) Rules (1940), Rule 9.2); (Paras 21, 22, 26)

(C) Constitution of India, Arts. 226, 311 — Representation by the petitioner officer against appointment of respondent another officer to the post in preference to petitioner, addressed to Chief Minister, Punjab — President's Rule in Punjab when office notes were put up before Secretary of the Department — Representation ordered to be filed by Secretary — It cannot be said that Secretary had mala fide intention in withholding representation from the Chief Minister. (Para 32)

(D) Constitution of India, Arts. 15, 16 — Scope and applicability — Temporary appointment to special post — Appointment of person already in service — Rule of seniority not observed. — No rules for appointment framed — Post not advertised — Article 16 held not contravened.

Per Majority (Narula J. contra).

Where the temporary post of Additional Director of Health Services was created to provide an under-study to the Director of Health services, and the officer appointed to the post was eventually to take over from the Director of Health Services, the fact that no rules were framed or the fact that the post of Additional Director of Health

Services was not advertised would not contravene Article 15 or 16. AIR 1966 SC 1942 and AIR 1962 SC 602, Distinguished. (Paras 29, 31)

Per Narula, J. (Contra.)

In the matter of appointment, what Article 16(1) guarantees is an equal opportunity to all citizens to apply for appointment under the State, and to be considered for that appointment. The word "appointment" in Article 16 includes promotion to higher posts. Selection for appointment in Government service has got to be on a competitive basis and those whose past service is free from blemish can certainly be said to be better qualified for Government service than those whose record was not free from any blemish. The State can either by appropriate legislation under Article 309 of the Constitution or by statutory rules framed under the proviso to that Article restrict the eligibility of citizens for appointment to any particular post by prescribing the essential qualifications and possible disqualifications etc. So long, however, as neither any qualifications or disqualifications are laid down for a post by any enactment or statutory rules nor (in the absence of any statute or statutory rules) have the same been laid down by the executive order of the appropriate authority, every citizen, who is prima facie qualified for any post or public service is entitled to his fundamental right under Article 16(1) of the Constitution which may in this respect be said to consist of two distinct legal rights, viz.:

(i) the right to make an application for any post under the Government; and

(ii) the right to be considered on the merits for the post for which an application has been made.

"Equal opportunity" in Art. 16 does not mean getting the particular post for which a number of persons may have been considered, and so long as the aggrieved person was given consideration along with others, and had been given his chance, it cannot be said that he had not had equal opportunity along with others who may have been selected in preference to him. The fact that the Government may make its choice in a particular way cannot be said to amount to discrimination against the applicant who was duly considered but not appointed. Similarly mere seniority does not confer a right for selection for a higher post. The fundamental right guaranteed by the Constitution is not only to make an application for a post under the Government, but the further right to be considered on merits for the post for which an application has been made. Of course, the right does not extend to being actually appointed to the post for which an application may have been made. Supreme Court case law Referred to. (Para 42)

Held that what happened in the instant case was that the petitioner had exercised half of his fundamental right under Article 16(1) by submitting his application for ap-

pointment to the post but the Government had infringed the second part of the petitioner's fundamental right "to be considered on merits for the post for which" he had applied. AIR 1966 SC 1942 (p. 1945, Para 7), Rel. on. (Para 42)

The executive has the power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Article 309; and by so doing the guarantee under Articles 15 and 16 would not be breached. If selection and appointment to a post is made in accordance with the rules framed under Article 309, no question of violation of Article 15 or Article 16 would arise. Even if no such rules are framed, the guarantee of Article 16 of the Constitution would not be infringed if the Government advertises the post and the conditions of service for appointment thereto and then makes a selection out of all the eligible persons who have submitted their applications for the post. (Para 42)

Though no reason was given for not considering the petitioner at the relevant time, the main reason for the State which had been given, i.e. about the petitioner having been far junior to respondent, was wholly irrelevant for purposes of Article 16 of the Constitution, particularly when the post was not meant or intended to be filled in exclusively from the medical side and the said post was a new post. (Para 42)

The question of seniority comes in the matter of selection to a post only if two candidates for the post are otherwise found to be equal. Seniority cannot be used as a lever for creating inequality between two eligible candidates for a selection post. AIR 1967 SC 1910, Rel. on. (Para 42)

The fundamental right under Article 16 of the Constitution would become wholly illusory and would be reduced to a mockery if the Government could be permitted to say that in a particular case they had made up their mind to appoint a particular person to a newly created post for any reason whatsoever, and that, therefore, they refused to consider the written application of another duly qualified and eligible person merely because he was at one time junior to the person sought to be appointed though he may be better qualified and may have had a cleaner service record. Article 16, does not confer a right on any one to be appointed to any particular post. The only rights of a citizen are: (i) to apply and (ii) to be considered on merits. The latter part of the petitioner's fundamental right has been clearly infringed in this case. (Para 44)

(E) Constitution of India, Articles 162, 311, 16 — Scope — Right of Govt. in matter of appointment and promotion of officers, extent of, indicated.

Per Sodhi, J.: The State Government in the exercise of its executive power under Article 162 has a right to make appointments to various offices and grant promotions from time to

time as it might think proper. A Government servant holds his office during the pleasure of the President or the Governor of the State, as the case may be, and the only limitations laid down on the exercise of that power of the Government are as given in Article 311 or Article 16. No Government servant holding a civil service post under the Union or the State can be dismissed or removed or reduced in rank except by the authority by which he was appointed and that too after an enquiry in which he has been given a reasonable opportunity of being heard in respect of the charges against him and when it is proposed to take some action on the basis of that enquiry he has been given a further opportunity to make a representation against the proposed penalty. Article 16 forms part of the same code of constitutional guarantees as given in Articles 14 and 15 of the Constitution of India and supplements them. It is only one of the instances of the application of the general rule of equality so far as services under the State or the Union are concerned. This guarantee of equality in the absence of any statutory rules relating to selection to a post by departmental promotion is violated only where the appointing authority brings in arbitrariness in the exercise of its executive power and denies to any individual officer in the same class and similarly situated his right to be considered for that post. AIR 1960 SC 384, Rel. on.

It is a prerogative of the competent authority to give an officer promotion or refuse the same provided it does not act in the exercise of its executive power in an arbitrary manner. This guarantee of equality under Articles 14, 15 and 16 of the Constitution, does not take away the right of the Government to pick and choose proper persons when it is intended to fill up a civil post from out of a member of officers. It is a mistaken approach to think that in case of every appointment or recruitment to a service or promotion, the State should first invite applications. AIR 1956 SC 520, Rel. on; AIR 1962 SC 602 and AIR 1962 SC 1704 and AIR 1966 SC 1942, Disting.

(Paras 59, 64)
Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1910 (V 54) =
1968-1 SCR 111, Sant Ram Sharma v.
State of Rajasthan 27, 42, 43
(1966) AIR 1966 SC 1942 (V 53) =
1966-3 SCR 682, B. N. Nagarajan v.
State of Mysore 29, 42, 63, 64
(1963) AIR 1963 SC 649 (V 50) =
(1963) Supp 1 SCR 439, M. R. Balaji
v. State of Mysore 42
(1962) AIR 1962 SC 602 (V 49) =
(1962) 3 SCR 187, Krishan
Chander Nayar v. Chairman Central
Tractor Organisation 30, 42, 62
(1962) AIR 1962 SC 1704 (V 49) =
(1963) 1 SCR 437, High Court Cal-
cutta v. Amal Kumar Roy 42, 61
(1960) AIR 1960 SC 384 (V 47) =
(1960) 2 SCR 311, All India Station

Master's and Assistant Station Master's
Association Delhi v. General Manager
Central Railways 58
(1956) AIR 1956 SC 520 (V 43) =
1956 SCR 357, Banarsidas v. State
of Uttar Pradesh 42, 59, 60

Anand Swaroop (R. S. Mittal, with him),
for Petitioner; H. L. Sibal and Abnasha
Singh, for Respondent No. 1 (The State);
J. N. Kaushal and H. L. Soni, for Respon-
dent No. 2.

CAPOOR J.: The petitioner in this writ petition under Article 226 of the Constitution of India is Dr. K. S. Rai. The petition was originally presented on 13th September, 1966, and was admitted on the 16th September, 1966. The respondents to the petition were (1) State of Punjab and (2) Dr. K. Moti Singh, Officiating Director Health Service, Punjab, Chandigarh. The prayer was for the issuance of an appropriate writ, direction or order quashing the orders of the Government (Respondent No. 1) dated the 1st of January, 1966, abolishing the post of Deputy Director, Research and Medical Education (hereinafter referred to as, D. D. R. M. E.) reverting the petitioner to the post of Professor, Forensic Medicine, as also the order of the Government dated the 27th/29th April, 1966, appointing Respondent No. 2 to the newly created post of Additional Director of Health Services and for a direction to the Government to consider the case of the petitioner for appointment to the latter post and for consequent promotion. On the 22nd of August, 1966, Respondent No. 2 was appointed substantively to the post of Director of Health Services, Punjab (hereinafter referred to as D. H. S.) and the petition was allowed to be amended. The amended petition dated the 3rd of October, 1966, challenged the substantive appointment of Respondent No. 2 to the post of D. H. S. also.

2. Both the respondents have submitted written statements opposing the petition and numerous affidavits by one or other of the parties have been allowed to be placed on the record from time to time with the result that the record has become quite bulky. There is, however, little dispute about the facts. The petitioner was, (see Annexure R. 2/17) appointed in officiating capacity in the Punjab Civil Medical Service II (hereinafter referred to as P. C. M. S. II) on the 15th February, 1949, and was confirmed in that Service on the 15th February, 1951. There was also Provincial Civil Medical Service I and the departmental head of both these services was the Director of Health Services. These cadres provided the personnel both for medical education and general medical services in the State. In the year 1959 for the first time a separate directorate for Research and Medical Education was created and Dr. Tulsi Dass was appointed as the first Director, Research and Medical Education in the grade of Rs. 2500-3000 p.m. The post of Deputy Director, Research

and Medical Education was created in the year 1961 and by order of the Punjab Government dated the 4th January, 1962, (Annexure R. 2/5) Dr. Dipak Bhatia, Chief Medical Officer, Chandigarh, who according to the final gradation list of P. C. M. S. Class I and II as published in the notification dated the 7th December, 1963, issued by the Integration Department (copy Annexure R. 2/4) was shown at Serial No. 1, was appointed to that post in the scale of Rs. 1500-60-1800/75-2100 plus a non-practising allowance of Rs. 400 p.m. Respondent No. 2 was at No. 9 of the Joint Seniority List mentioned above. The grade of D. H. S. was at that time only Rs. 1800-100-2000. Dr. Jagdish Singh was holding charge of the post of D. H. S. until his death on the 25th December, 1962. Respondent No. 2, who was then officiating as Deputy Director (Medical Health Services) in the scale of Rs. 1300-50-1500 was, vide Annexure R. 2/15 dated the 31st December, 1962, appointed to hold the current charge of the duties of the post of Director, Health Services, Punjab, pending filling of that vacancy on a permanent basis. Dr. Dipak Bhatia, on the 14th February, 1963, was appointed as permanent D. H. S. relieving Respondent No. 2 of the current charge. On the 29th March, 1963 (vide copy Annexure I), the teaching cadre of the medical colleges of the State was separated from the general cadre of the P. C. M. S. though P. C. M. S. officers were eligible for being appointed to the teaching cadre also. In this teaching cadre, the revised grade of the Associate Professors was Rs. 800-50-1400 and the petitioner in the year 1963 was working as Associate Professor in the Medical College, Patiala.

3. Consequent on the appointment of Dr. Bhatia as D. H. S., the post of D. D. R. M. E. fell vacant and by order of the Governor of Punjab dated the 24th August, 1963 (Annexure III) the petitioner was appointed against the vacant post as Officer on Special Duty at Chandigarh in his existing scale of pay. A copy of the Punjab Government letter (Annexure IV) shows that the petitioner was holding charge as Officer on Special Duty and the post of D. D. R. M. E. was held in abeyance. It was eventually decided to advertise the post of D. D. R. M. E. through the Punjab Public Service Commission and the advertisement in that connection is Annexure A. 1. According to the advertisement, this was a special post in Class I and was temporarily sanctioned up to 28th February, 1964, but was likely to be retained on permanent basis eventually. It was to be made pensionable if made permanent and the period of probation of the selected incumbent was to be two years. It was further stated in the advertisement that the incumbent might be considered for the post of D. R. M. E. Punjab on merits along with others in due course if and when such post fell vacant. Another condition was that the services of the incumbent could be terminated on one month's notice on either

side till the incumbent was confirmed. The pay was Rs. 1500-60-1800/75-2100 and the essential qualifications were as follows:

(i) M. B. B. S. with distinguished academic career;

(ii) Must be registered with a State/Central Medical Council;

(iii) Post-graduate qualifications e.g. M. D. or M. S. or M. R. C. P. or F. R. C. S.

(iv) 10 years administrative/Professional/teaching and Research experience;

(v) 15 years standing in the profession;

(vi) Adequate knowledge of Hindi or Punjabi.

4. The duties of the post were to assist the Director, Research and Medical Education, Punjab in the administration of his office and other Medical Institutions in the Punjab State under his control at Chandigarh. This had a special reference to the Post-graduate Medical Institute which was being set up at Chandigarh. One important condition was that the candidates serving under the Union/State Government will not be entitled to any benefits of their past service under their respective Government. Presumably on account of this discouraging rider, only three persons (including the petitioner) applied for the post and the petitioner was selected by the Public Service Commission. He actually joined as D. D. R. M. E. on 31st August, 1964, but this was in an officiating capacity and according to the memorandum dated the 31st of August, 1964, (copy Annexure A/2), the Government required that a report on his work and conduct should be submitted with his personal file immediately on completion of one year's service to enable Government to decide whether or not he may be allowed to continue to officiate in that capacity beyond one year.

5. Dr. Tulsi Dass was pressing the Government for being relieved from the post of D. R. M. E. and the petitioner's main grievance is that while the resignation of Dr. Tulsi Dass was under the consideration of the Government, the Secretary Health (who at the relevant time was Mrs. Serla Grewal, I. A. S.) evolved a scheme to deprive the petitioner of the post of D. D. R. M. E. as also of his future prospects of promotion. The grievance has been put in sub-paragraph (x) of paragraph 23 of the petition in the following words:

"the whole sequence of events and actions taken by the Administrative Department since the submission of proposal by the Secretary, Health for amalgamation of the two Directorates, shows that the Administrative Department was acting with ulterior motive namely to remove the petitioner from his rightful place in order to pave the way for bringing Dr. K. Moti Singh to the position of Director, Health Services, which he could not have attained in the ordinary way. The impugned orders are thus mala fide."

6. As stated in the petition, the salient features of the proposal, which the Secretary,

Health submitted in her note dated the 11th November, 1965, with a view to amalgamate the directorate of Health Services and the directorate of Research and Medical Education, were as follows:

(i) Abolition of the post of D. R. M. E.;

(ii) Replacement of the post of D. R. M. E. by a new post of Joint Director Medical Education in the grade of 1800-2000 (Regular grade of D. H. S.) plus non-practising allowance as allowed to all senior posts in Medical Colleges;

(iii) reduction of the post of D. D. R. M. E.;

(iv) filling up of the vacant post of Assistant Director (Training);

(v) establishing a convention that when the D. H. S. is from the General Cadre, the Joint Director will be from the College Cadre and vice-versa.

7. It was further stated in the petition that on 15th December, 1965, the Health Minister *Shrimati Om Prabha Jain* did not agree with the proposal submitted by the Secretary, Health in toto but she ordered that —

(i) a post of Additional Director be created in the grade of 1800-2000 plus non-practising allowance;

(ii) the Additional Director should be held exclusively responsible for administrative matters to the Administrative Department,

(iii) the post of D. R. M. E., and D. D. R. M. E. should not be abolished completely;

(iv) the Finance Department should be approached for sanctioning the post of Additional Director with an assurance that at one time only one of the three posts viz. D. R. M. E., D. D. R. M. E. or Additional Director Medical Education will be filled.

8. The next day, that is, on the 16th December, 1965, the Health Minister discussed the case with the Chief Minister who agreed with the arrangement suggested by her but even before the post of Additional Director Medical Education was sanctioned by the Finance Department and against the specific orders of the Chief Minister the Administrative Department abolished the post of D. D. R. M. E. and on the 1st January, 1966, (vide Annexure D) passed an order to the following effect:—

(i) Upgrading of the post of Associate Professor of Forensic Medicine Government Medical College Patiala, to that of the Professor, Forensic Medicine in the scale of Rs. 1000-75-1600 plus Non-Practising Allowance with effect from 1st January, 1966.

(ii) Transfer of the post of the Professor, Forensic Medicine, Medical College, Patiala, to the P. G. I. Chandigarh, w.e.f. 1st January, 1966.

(iii) Appointment and posting of Dr. Rai (the petitioner) to the post mentioned at (ii) above w.e.f. 1st January, 1966, at Rs. 1560 per mensem i.e. Rs. 1525 per mensem as pay plus Rs. 35 personal pay (inclusive of Non-Practising Allowance) to be absorbed in the next annual increment when it falls due; and

(iv) the holding of the additional charge of the post of Deputy Medical Superintendent P. G. I. to be vacated by Dr. Kashyap, by Dr. Rai w. e. f. 1st January, 1966, without additional remuneration.

9. On 17th December, 1965, a news-item appeared in the Press that the posts of D. R. M. E. and D. D. R. M. E. are to be abolished and are to be replaced by a new post of Additional Director Health Services or work pertaining to Medical Education. The petitioner then wrote on the 20th December, 1965, a letter (copy Annexure 'E' to the petition) in which he pressed his claim for appointment as Additional Director Health Services (Medical Education). However, when the post of Additional Director, Health Services, was eventually sanctioned for a period of six months by the Government's orders dated the 27th/29th April, 1966, (copy Annexure 'F' to the petition), the petitioner's application was not even considered by the Government but Respondent No. 2 was appointed to that post.

The petitioner made a representation (copy Annexure 'G') against that appointment to the Chief Minister on the 11th May, 1966, and the Chief Minister called for the comments of the Administrative Department. These comments did not reach him till he relinquished his office on the 5th July, 1966. The petitioner then made another representation dated the 12th/14th July, 1966, (copy Annexure 'H') to the Governor of the Punjab and on the 12th of August, 1966, also made a request to the Governor for a personal hearing but these representations were ignored. Dr. Dipak Bhatia on getting an appointment in the Government of India, relinquished the post of D. H. S. and Respondent No. 2 was, by notification of the Punjab Government, dated the 22nd of August, 1966, appointed substantively to the post of D. H. S. The main grounds, on which the appointment of Respondent No. 2 to the post of A. D. H. S. and his promotion as D. H. S. is challenged, are as follows:

(i) The proposals of the Secretary, Health for the abolition of the post of D. D. R. M. E. and for the creation of the post of A. D. H. S. were not, as required by the Rules of Business of the Punjab Government Part II, brought for consideration of the Council of Ministers.

(ii) The post of A.D.H.S. was created to look after Medical Education for which there is a separate cadre and this post had to be filled by someone belonging to Medical Education cadre and Respondent No. 2 who was in general cadre was not eligible for this post.

(iii) The petitioner, on selection by the Public Service Commission for appointment as D.D.R.M.E. in the grade of 1500-2100, became senior to Respondent No. 2 who at that time was in the grade of 1300-1600.

(iv) Since the new post of A.D.H.S. was intended to replace D.R.M.E. & D.D.R.M.E. the essential qualifications laid down for the

post of D.D.R.M.E. should be deemed to be essential qualifications for the post of A.D. H.S. and Respondent No. 2 did not possess those qualifications.

(v) While advertising the post of D.D.R. M.E. the Public Service Commission gave an assurance that the incumbent of the post may be considered for the post of D.R.M.E. on merits along with others and so the appointment of Respondent No. 2 to the post of Additional Director Health Services (Medical Education) was a breach of this assurance.

(vi) There were serious allegations reflecting on the moral character of Respondent No. 2 vide D. O. letter No. 4200-IHBI-62/19157, dated the 1st/4th May, 1962, written by Secretary to Government, Punjab, Medical to Respondent No. 2.

(vii) The impugned actions of Government promoting Respondent No. 2 as A.D.H.S. and subsequently appointing him as D.H.S. were not only mala fide but by not considering the claim of the petitioner to these posts, the guarantee of equal opportunity granted under Article 16 of the Constitution of India had been violated.

10. The written statements of the two respondents opposing the petition were on similar lines. It was pointed out that after the amalgamation of Medical Department and Punjab Health Department in the year 1948, there was only one department namely Punjab Health Department, the Head of the Department of which was known as Director, Health Services. P.C.M.S. cadre consisted of P.C.M.S. Class I and Class II and incumbents on the post of Professors were not P.C.M.S. Class I although they were Class I officers. The petitioner's contention that only the Professors of Medical Colleges were appointed as D.H.S. was denied and two instances—that of Dr. P. C. Dutta and Dr. Jagdish Singh who were both Civil Surgeons and who were respectively appointed as D. H. S. on 18th February, 1950, and 1st of November, 1956, respectively were cited. It was stated that Dr. Dipak Bhatia was appointed to the post of D.H.S. with effect from 15th March, 1963, by selection in view of his being the senior-most Officer on the cadre of P.C.M.S.I. For appointment to the post of D.H.S., no qualifications/experience were laid down. The doctors both on general side and teaching side were considered for this post and the best suitable man was selected.

It was stressed that when the petitioner was appointed as Associate Professor of Forensic Medicine with effect from 5th September, 1960 in a temporary post he continued to hold his lien in P.C.M.S. II and since he had not so far been confirmed against any of the posts in the teaching cadre he continued to hold his lien in P.C.M.S. II cadre though he was given pro forma promotion with effect from 25th/26th April, 1964, in P.C.M.S. Class I in an officiating capacity. The post of Professor against which he was

appointed from 1st January, 1966, was also temporary and hence the petitioner did not hold any lien in the teaching cadre.

Respondent No. 2 on the other hand had been promoted to P.C.M.S. I with effect from 5th July, 1949, and was confirmed in P.C.M.S. I with effect from 5th July, 1950, had been promoted to selection grade at Rs. 1300 with effect from 4th February, 1962, and promoted as Deputy Director (Medical) with effect from 24th May, 1962 in the scale of Rs. 1350—50—1600. He was confirmed as Deputy Director (Medical) with effect from 14th October, 1963. Apart from holding the current charge of the duties of D.H.S. from 25th December, 1962, to 14th February, 1963, Respondent No. 2 also officiated as D.H.S. Punjab from 13th January, 1964, to 31st March, 1964 in the scale of Rs. 1800-2000 while Dr. Dipak Bhatia was away on study tour abroad. During the latter period, another post of Additional D.H.S. in the scale of Rs. 1800-2000 was created for Respondent No. 2. Respondent No. 2 was, after the appointment of Dr. Dipak Bhatia to a post in the Government of India, the senior-most officer in P.C.M.S.I. A reference was made to the P.C.M.S. Class 1 (Recruitment and Conditions of Service) Rules, 1940, according to Clause 8 of which, the seniority of the members of the service was to be determined by the dates of their confirmation in the service and on the basis of the comparative records of service of the petitioner and Respondent No. 2, it was asserted that Respondent No. 2 was indisputably senior. In fact it was pointed out that the petitioner was in the seniority list of P.C.M.S. officers 58 steps below Respondent No. 2.

11. In the return by Respondent No. 1, it was admitted that no specific order for the abolition of the post of D.D.R.M.E. had been issued by the Government. It was, however, denied that the approval to the creation of the post of A.D.H.S. had to be obtained from the Council of Ministers. This was not necessary when the post of A.D.H.S. was created for a period of six months only. This post was created for all the administrative work of the department and not for looking after the medical education side only. Though there was no requirement that this post was to be filled from the teaching side only, nevertheless, senior teachers were considered for the post but none of them was willing to accept it. The petitioner was not considered because he was very junior in the list of professors.

So far as the allegations regarding the immoral character of Respondent No. 2 are concerned it was stated that they were refuted by Respondent No. 2 in his letter of the 13th May, 1962, and not only no further action was taken against Respondent No. 2 on the basis of these allegations, but only a few days later he was promoted as Deputy Director (Medical). So far as the allegations of mala fide are considered, they were controverted and on the other hand it was stated

that Government had always been giving favourable treatment to the petitioner.

12. As regards the various representations made by the petitioner against the impugned promotions of Respondent No. 2, it was stated that these representations were in due course considered and rejected.

13. The petitioner's allegations of mala fide against the Secretary, Health may first be considered.

His contention is that he was pressurised or duped by the Secretary to accept the appointment as Professor of Forensic Medicine with additional charge of Deputy Medical Superintendent of the Post-graduate Institute, Chandigarh (hereinafter referred to as the P.G.I.), the Secretary's hidden object being to give undue promotion to Respondent No. 2 at the expense of the petitioner's claim to be appointed as A.D.H.S. Since, according to the petitioner's claim, the mischief started with Secretary's note dated the 11th November, 1965 (copy Annexure VII) that note requires to be reproduced in its entirety :

"This case related to the application of Dr. Tulsi Das asking Government to accept his resignation. H.M. is aware that several times Dr. Tulsi Das over the last year and a half has put in his request for quitting Government service and we have been persuading him to defer his desire from time to time. I invite H.M.'s kind attention to her note dated 27-8-1965. Thereafter, Dr. Tulsi Das was called by C.M. and it appears from the noting of the Special Secretary to C.M. that Dr. Tulsi Das had agreed to stay on. The P.U.C. indicates, however, that he did so on account of the emergency and now that a Cease Fire has been announced he wishes to quit service. The work done by Dr. Tulsi Das in the field of medical education has been outstanding and it is due to his efforts that the P.G.I. which we see it in the form today has come about. Keeping (in mind) the valuable services he has rendered, we have from time to time been strongly insisting that he should not go away. But Dr. Tulsi Das appears to be adamant and under no circumstances wishes to stay. I have had occasion to talk to him several times and till now was just treating the matter casually and thought he could be brought round. My final talk with him has given me the impression that he does not want to stay any longer in Government service and would like to be relieved. Though we value Dr. Tulsi Das's worth and would not like him to go away yet it is not good to keep an unwilling worker especially when a man of Dr. Tulsi Das's calibre has spent the major portion of his life in work and now wants to retire for taking up professional work of his own. Under these circumstances I would suggest that in the interest of work it is high time we take a decision and I would say that we should now accept his resignation and allow him to go away. The question of posting a substitute, in my opinion, does not arise as Dr. Tulsi Das was brought in solely for the

purpose of creating the P.G.I. and organizing medical education in the State. Formerly, the medical colleges and the field jobs were under the control of one officer i.e. Director Health Services. With the P.G.I. now having been properly set up and a full time senior officer (senior than the present D.H.S.) is holding charge of the Director of the P.G.I. in the scale of Rs. 2500—100—3000; getting the maximum of the scale with a special pay of Rs. 500 i.e. Rs. 3500 in all, I feel, therefore, that we can do away with the job of D.R.M.E. and declare the Director, P.G.I. as Head of the Department as that he could address communications to Government direct. This will remove the Director's grievance of delay taking place at certain levels when he could correspond direct with Government. In view of the emergency when we have been called upon to surrender so many posts and the Legislature as well as the public being highly critical of the top heavy administration, I think we may abolish the post of D.R.M.E. and in its place create a post of Joint Director Medical Education in the grade of Rs. 1800-2000 plus N.P.A. as private practice/N.P.A. is allowed to all posts in Medical Colleges (the regular grade of D.H.S.) and make him in conjunction with D.H.S. The post of Deputy Director Research and Medical Education (1500-2100 scale) can, therefore, also be reduced as there will be no longer any need to have a separate office to deal with the work of the P.G.I. The clerical staff of the D.R.M.E. already sits in the office of the Director, P.G.I. and can put up the papers now to the Director of P.G.I. The Joint Director, Medical Education can supervise the training programmes of para-medical staff as well as look after the medical education in the colleges and to assist him we are already filling the post of Assistant Director (Training) for this purpose. The convention can be established that when the D.H.S. is from the General Cadre, the Joint Director will be from the College Cadre and vice versa. In the past the Director of Health Services has been incharge of medical education as well as general medicine and in all other parts of the country there is no such post of D.R.M.E. We will be going back to normalcy if this proposal is accepted. However, the post of Joint Director, Medical Education is justified on the ground of expansion having taken place in the field of medical education i.e. the increase in the number of medical colleges as well as the huge step up in the training programmes of medical education. At the time of the laying of the foundation stone of the P.G.I., Dr. Nayar emphatically urged the State Government to amalgamate the offices of the Director Research and Medical Education and the Director Health Services, as she felt to separate teaching from general practice was a great hindrance to the turnout of medical graduates for field work. Our recent experience has shown that medical graduates had been reluctant to going out in the field and

they went to seek jobs as they are not given suitable training and orientation for field work. Recently, under the direction of H.M. I have already requested the Medical Faculty of Punjab University to introduce necessary amendments for making the teaching of preventive and social medicines as an examination subject at the University level. The amalgamation of the office of the D.R.M.E. and D.H.S. would further strengthen the relations of the experts in the field as well as in the medical institutions the need for turning out medical graduates for the rural areas. Once there is one Director incharge of both wings there will be no difficulty in getting the programmes orientated to the needs of the field as well as to the colleges and a proper balance will then be maintained. I have informally discussed this with H.M. and my views indicated above are based upon my discussions with the technical people. The details of this scheme can be worked out after a decision to retire Dr. Tulsi Das is taken and H.M. can call me as well as D.H.S. to give her the detailed outlines. I would like to bring to H.M.'s notice that when the late Dr. Jagdish Singh died while working as D.H.S. the question arose as to what should be the set up of Health Services in the State. At that time the decision was that both the Directorates should be merged but the matter was deferred to a later date and it was felt that the amalgamation should come about when the P.G.I. has been properly set up. In my opinion, the stage has now been reached when the P.G.I. can be suitably and effectively handled by the Director of the P.G.I. himself with his term of senior colleagues, we could dispense with the post of D.R.M.E. as well as D.D.R.M.E. and in its place as indicated above have a Joint Director Medical Education and an Assistant Director (Training) in the scales of Rs. 1800-2000 and Rs. 750-1250, respectively. The latter post already exists."

14. The Health Minister Shrimati Om Prabha Jain in her note of 13th November, 1965, felt inclined to agree with the Secretary's proposal but wished to consider the matter further. These notes were seen by the Chief Minister and the Health Minister on the 29th of November, 1965, directed that Dr. Tulsi Das's resignation may be accepted. The next note by the Secretary Health dated the 1st of December, 1965, is Annexure VIII and so far as it is relevant, omitting the eulogistic reference to Dr. Tulsi Das, is as follows:

"I have subsequently discussed with H.M. the proposed set up after the retirement of Dr. Tulsi Das and she has been pleased to accept my proposals. She informally discussed the matter in my presence with D.H.S. also. It was generally agreed that the Joint Director Medical Education would be declared independent of the D.H.S. for the day to day administration of medical colleges but would be responsible to the Director, Health Ser-

vices in his overall capacity for carrying and formulating of medical policy of the State. If H.M. approves then we may formally move the F. D. for the creation of the post of Joint Director Medical Education in the scale of Rs. 1800-2000 plus N.P.A. as it is admissible to doctors in the medical colleges in case they are not indulging in private practise as any one who will come from the Medical College will be deprived of the practice and he should, therefore, be compensated as we are doing in the case of C.M.Os. on the general side. Once this is done we can also at the same time abolish the post of D.R.M.E. and D.D.R.M.E. The D.D.R.M.E. who belongs to the general cadre would be posted by D.H.S. suitably in some district. Government will have to issue a notification amalgamating the office of D.R.M.E. and that of D.H.S. I understand that D.R.M.E. had borrowed 3-4 members of the staff of the P.G.I. for carrying on the administration relating to this institute. In the order we shall indicate that this staff stands reverted to the Director, P.G.I. who would also by a separate notification be declared as Head of the Department and would function directly under the Government. I place below the personal files of the 7 senior officers in the Medical Colleges who can be considered for appointment as Joint Director Medical Education. They are as under :—

1. Dr. Amarjit Singh, Principal Medical College, Patiala.
2. Dr. Y. Sachdeva, Principal, Medical College, Amritsar.
3. Dr. Inderjit Dewan, Principal, Medical College, Rohtak.
4. Dr. Ram Parkash Malhotra, Professor of Medicine, Medical College, Amritsar.
5. Dr. Man Singh Nirankari, Professor of Ophthalmology, Medical College, Amritsar.
6. Dr. Ramji Das, Professor of Anatomy, Medical College, Patiala.

7. Dr. M. S. Grewal, Professor of Pharmacology, Medical College, Patiala.

As regards Dr. Amarjit Singh, since he is retiring in a year's time we may not consider him. In the case of the others we may make a formal request and find out whether any of them is willing to come to the Directorate on the job of Joint Director."

14-A. Since the decision had been taken to abolish the post of D.D.R.M.E., a question arose as to what would happen to the petitioner. In the ordinary course he would revert to the post of Associate Professor of Forensic Medicine, Patiala, which he had held before he was brought to Chandigarh as Officer on Special Duty to discharge the duties of D.D.R.M.E. but such a course would have meant a substantial monetary loss to him. The notes on the files abundantly establish that far from trying to put the petitioner down, the Secretary, Health and others concerned in the matter were anxious that he should not revert to the lower appointment at Patiala and that his pay should

be protected. The petitioner's representation dated the 20th December, 1965, for being considered for the post of A.D.H.S. reached the Secretary Health on 22nd December, 1965, but earlier to this viz., on the 20th December, 1965, the petitioner was called by the Secretary Health to her office (vide the petitioner's additional affidavit dated the 20th April, 1967) and was told of the impending abolition of the post of D.D.R.M.E. It appears that during those days the post of Deputy Medical Superintendent of the P.G.I. Hospital at Chandigarh was vacant and on account of certain financial implications that post was to be filled on or before the 1st of January 1966. The way found to protect the pay of the petitioner as well as to keep him at Chandigarh was that the post of Associate Professor of Forensic Medicine was up-graded to that of Professor of Forensic Medicine with grade of Rs. 1000-1600 instead of Associate Professor in the grade of Rs. 800-1400 and the incumbent along with the post be transferred temporarily to Chandigarh and made to work at Chandigarh for organising the proposed Medical College to be set up there and also discharging the duties of Deputy Medical Superintendent. This position was put personally by Dr. P. N. Chuttani, Dean of the P.G.I. to the petitioner on the 21st December, 1965, and he then gave his letter of acceptance personally to Dr. Chuttani who, as would be clear from the letter (copy Annexure IX), gave the petitioner's letter to Mrs. Grewal and she marked the case on the same day viz., 21st of December, 1965 to her Deputy Secretary Shri B. S. Ojha. Mrs. Grewal was to proceed on tour and the Deputy Secretary submitted his note (copy Annexure X) direct to the Health Minister. This note displays the anxiety of the Department to help the petitioner. It is as follows :

"H.M. may kindly peruse copy of SMW's note dated 23-12-1965 at pages 47-48 ante recorded by her in pursuance of the former's instructions on the file relating to the appointment of D.M.S. at P.G.I. S.H.B.I.'s note at pages 49-51 ante gives the background about Dr. Rai's case. A decision having been taken to keep the post of D.D.R.M.E. in abeyance and the intention being to abolish it, Dr. Rai is naturally feeling considerably upset. He would be losing the post carrying a scale of Rs. 1500-2100 although he has been doing good work. But his grievance notwithstanding, the decision has been taken to amalgamate the two Directorates in the larger interests of the department. Improved institutional arrangements must claim preference to individual cases for betterment. As such D.D.R.M.E.'s post cannot be retained.

2. As pointed out by SHBI, the correct technical position is that Dr. Rai having exercised his final option to revert to the general cadre in 1963 holds a lien on PCMS II post. He was given pro forma promotion to PCMS I last year and now his salary there would be Rs. 800 in the scale of Rs. 750-1250. If Dr. Rai has to be adjusted,

he can correctly speaking be adjusted only in PCMS I at Rs. 800 p. m. However, he has put in his request placed below at flag 'F' for giving him the grade of Rs. 1000-1600, i.e. a Professor's grade on the ground that if he had continued as Associate Professor in Forensic Medicine he would have become Professor by now. When in 1963, the proposal for making him Professor in Forensic Medicine was mooted, it was revealed that he was short of about ten months prescribed experience and after that he has done teaching only for about two months. So technically again he is not qualified to hold the post of Professor in Forensic Medicine. However, in view of the fact that Dr. Rai has done good work and earned good reports during his term as D.D.R.M.E. and that post is being abolished in the interest of the department, Dr. Rai's request deserves a sympathetic consideration. He became D.D. R.M.E. after competing for the post through P.S.C. He has a certain merit. So there is considerable justification for appointing him as Professor in Forensic Medicine. The precedents of Doctors Ohri, Chug and Dhillon are available who were made Professors by relaxing the conditions of teaching experience (they were given the designation immediately and pay of the post on their completing the teaching experience). Strictly speaking Dr. Rai should also be treated like-wise. But as I have mentioned earlier his request deserves special sympathetic consideration. We may agree to appoint him as Professor in Forensic Medicine at Medical College, Patiala, by upgrading the existing post of Associate Professor Forensic Medicine in the grade of Rs. 800-1400 to Rs. 1000-1600 the case for relaxing the condition of teaching experience can be got regularised through the Special Selection Committee which is being separately reconstituted under H.M.'s orders for three months pending the reversion of the posts in medical colleges to the purview of the P.S.C.

3. We have to start an Under-Graduate College attached to P.G.I., Chandigarh, and Dr. Rai's administrative experience will come in handy in starting it. Therefore, the proposal as verbally approved by SMWPHM/CM is that Dr. Rai on being appointed as Professor in Medical College Patiala may be transferred along with his post temporarily to Chandigarh and made to work in the P.G.I. on organizing the Under-Graduate College and also discharging the duties of Deputy Medical Superintendent. This would result in economising the post of D.M.S. carrying a pay scale of Rs. 1000-1400. Dr. Rai is quite willing to accept this arrangement.

4. In his application at flag 'F' Dr. Rai has requested that his present pay be protected. He is drawing Rs. 1560 in the grade of Rs. 1500-2100. As his present pay is in an officiating capacity, A.D. is not competent to protect it. Perhaps this can be protected with a special relaxation given by F.D. It may be ordered if it is desired to protect

his pay, F.D.'s concurrence may be sought for fixing his pay at Rs. 1560 inclusive of N.P.A. in the grade of Rs. 1000-1600.

5. S.M.W. has personally desired the undersigned to put up the case to H.M. straightway as C.M. has spoken to her on a couple of occasions about this case, the last being on 22-12-65 and H.M. has also ordered that we should finalise this arrangement quickly so that Dr. Rai is able to start looking after the duties of D.M.S., P.G.I. in addition with effect from 1-1-1966. As pointed out by S.H.B.I. the post to be created carries a scale higher than Rs. 800 and C.M.'s formal concurrence is necessary, but as C.M. has himself desired that this should be processed quickly, we may at this stage presume his approval and obtain ex post facto formal approval later on."

15. The Health Minister in her note of 24th December, 1965, also observed that they had to be sympathetic towards the petitioner who should not be put to any substantial financial loss and recommended that Finance Department should accept the proposals made by the Deputy Secretary. The Finance Minister discussed the case with the Health Minister, her Secretary and Director Medical and in his order of the 27th December, 1965, referred it to the Finance Department. The Deputy Secretary, Finance in his U. O. No. 14063-FDI-65, dated the 31st December, 1965, (copy of which also forms part of Annexure VIII) agreed to the proposal for abolition of the post of D.R.M.E. and D.D.R.M.E. and the creation of the post of A.D.H.S. in the grade of Rs. 1800-2000 and in that connection agreed to the following arrangement:

(i) Upgrading the post of the Assistant Professor, Forensic, Medicine, Government Medical College, Patiala to the post of the Professor, Forensic Medicine (Rs. 1000-1600 plus NPA) w. e. f. 1-1-66.

(ii) Transfer of the post of the Professor, Forensic Medicine, Medical College, Patiala to the P.G.I. Chandigarh w. e. f. 1-1-1966;

(iii) appointment and posting of Dr. Rai to the post mentioned at (ii) above w. e. f. 1-1-1966 at Rs. 1560 p. m. i. e. Rs. 1525 p. m. as pay plus Rs. 35 personal pay (inclusive of NPA) to be absorbed in the next annual increment when it falls due; and

(iv) the holding of the additional charge of the post of the Deputy Medical Superintendent, P.G.I. to be vacated by Dr. Kashyap, by Dr. Rai w. e. f. 1-1-66; without additional remuneration."

16. It was under these circumstances that the order of the 1st of January, 1966 (copy Annexure 'D'), whereby the sanction of the Governor of Punjab to the above arrangement approved by the Finance Department, was issued. The notings and the sequence of events as given above establish beyond shadow of doubt that the Secretary Health, the Health Minister and the Finance Department of the Punjab Government were anxious that the petitioner should be kept at Chandigarh without any financial loss to

him and it is a travesty of facts to say, as urged by the petitioner, that the Secretary or the other officers of the Health Department were out to harm him and damage his chances of promotion. Keeping in view the comparatively low position as regards the seniority which the petitioner held in the P.C.M.S., all his legitimate aspirations should have been satisfied by the order of 1st of January, 1966, though not the overweening ambitions of the petitioner.

17. It is important to remember in this connection that it was four months later that the post of A. D. H. S. was created and filled and it would be twisting the facts to argue that with a view to by-pass the petitioner's supposed claims for appointment as A. D. H. S. he was deceived into accepting the post of Professor of Forensic Medicine with additional charge of the duties of Deputy Medical Superintendent of the P. G. I. Hospital at Chandigarh.

17A. We have, therefore, no hesitation in rejecting the allegations of mala fide as altogether baseless.

18. Mr. Anand Sarup, the petitioner's learned counsel then argued that the mere fact that the petitioner's application of the 20th December, 1965 (copy Annexure 'C') was not considered when the appointment of Respondent No. 2 to the post of A. D. H. S. was made would make that appointment bad as it involved denial to the petitioner of the equal opportunity guaranteed under Article 16 of the Constitution of India.

The position taken up in the written statement is that the petitioner was too junior to be considered for that appointment. While in the gradation list of P. C. M. S. I. as on the 16th August, 1966 (copy Annexure R. 2/18), as pointed out on behalf of the respondents, the petitioner's position was at No. 58, it is stated that according to the gradation list of the teaching staff of the Medical Colleges as stood on 1st March, 1966 (Annexure R. 2/12), the petitioner was at No. 56. On the question of seniority the contention by the petitioner's learned counsel is that he was no longer in P. C. M. S. and by the notification of 1st January, 1956, he was a permanent professor in the teaching cadre.

Both the submissions are incorrect. Though the petitioner was serving on the teaching side he had not lost his lien in the substantive post in the P. C. M. S. This is apparent from the pro forma supplied by the petitioner himself to the D. R. M. E. (copy Annexure X) the heading of which is Recruitment to P. C. M. S. I. In this he gives the date of his entry in P. C. M. S. II as 15th February, 1949, and confirmation in that service on the 15th August, 1950. Against the question "Whether opts for retention in the teaching cadre or would like to revert to P. C. M. S. General I Cadre?" the petitioner's reply is "would like to revert to general cadre, unless promoted as Professor with effect from 5-9-62, the date on which I have become eligible for such a promotion and thus my

inter se seniority in college cadre restored, which has been upset by recent promotion of Assistant Professors as Professors." The request to revert to P. C. M. S. General Cadre was repeated in petitioner's letter dated the 30th April, 1963 (Annexure REP/19) in case he was not to be appointed as Professor. In the letter dated August 7, 1963 from D. R. M. E. to Secretary Health (at page 371 of the Paper Book), a proposal was made for appointing the petitioner as Officer on Special Duty. In this letter, it was observed that since the post of D. D. R. M. E. had been vacated by Dr. D. Bhatia, D. R. M. E. had been on the look out of a suitable officer for appointment against this post. It was further observed that the request of the petitioner to relinquish the charge of the Associate Professor of Forensic Medicine at Patiala had been accepted by the Government and he would prove useful as D. D. R. M. E., but since he was not senior enough to claim scale of that pay, the Government may consider him for appointment as officer on Special Duty in that post for a period of six months in the first instance. This shows the special circumstances in which the petitioner got the promotion on which he mainly bases his claim for appointment as A. D. H. S. and eventually promotion as D. H. S. The Chief Minister's note approving the D. R. M. E.'s proposal is dated the 16th August, 1963, and also mentions that the petitioner had opted for reversion to the general line. In fact the petitioner himself, as late as the year 1967, gave himself out as an officer in the P. C. M. S. This is clear from the particulars furnished by him in his application to the Union Public Service Commission for the post of Superintendent, Central Hospital, Asansol. One of the columns in the application form is 11-A "If you have, at any time been employed, give details including those of present employment if any". Under this column, the petitioner describes himself "P. C. M. S. II, P. C. M. S. I." Under the column "Full reasons for leaving the previous service, his reply is "still continuing". Thus, the plea advanced by the learned counsel as to his having somehow got out of the P. C. M. S. appears to be only for the purpose of this case.

19. In this connection it was also submitted that the petitioner's appointment as Professor of Forensic Medicine was in a permanent capacity but this submission is equally unwarranted. Reliance was placed on letter No. 8095-IHBIV-65/49048 dated the 17th December, 1965, from the Secretary to Government, Punjab Medical and Health Department to the Director, Research and Medical Education Punjab. The subject is "Continuance of the posts for the department of Forensic Medicine at the Government Medical College Patiala for the year 1966-67 (technically new scheme other than plan).

It was argued that according to Rule 2.46 of the Civil Service Rules, a permanent post is defined as one sanctioned without limit of time and hence the post of Professor in

the department of Forensic Medicine was to be treated as permanent post.

Annexure VII at page 361 of the Paper Book is enclosure of Annexure REP/10 at page 219 of the Paper Book and there is no post of Professor of Forensic Medicine according to that enclosure. There is only a post of Associate Professor of Forensic Medicine in Government Medical College, Patiala, for the year 1966. Annexure REP/11-A in fact shows that the post of Professor of Forensic Medicine in Patiala Medical College was made permanent as late as in October 1966, which is after the filing of the writ petition. Thus, the position taken up by the respondents that when the impugned appointment was made, the substantive post of the petitioner was on the general side in the P. C. M. S. II and not on the teaching side and that he had not even been confirmed in P. C. M. S. I., is correct. It cannot be gainsaid that the petitioner was far junior in the P. C. M. S. to respondent No. 2 who at the time of the impugned appointment was at No. 1 of the gradation list of the P. C. M. S. while the petitioner was at No. 59.

20. Mr. Anand Sarup in the alternative argued that the petitioner must at the time of the impugned appointment be deemed to be holding the post of D. D. R. M. E. because, as admitted in the return, specific orders for the abolition of that post had not been passed by the Government until the writ petition was filed. It is said that this post could not be abolished without obtaining the orders of the Council of Ministers.

The argument is misconceived. Admittedly, financial sanction for the post of D. D. R. M. E. was only up to 28th of February, 1966. The petitioner had vacated the post of the D. D. R. M. E. when on 1st of January, 1966, he accepted the appointment of Professor of Forensic Medicine. This appointment, as the note from the Finance Department shows, was consequential to the abolition of the posts of D. R. M. E. and D. D. R. M. E. So in effect and for all practical purposes, the posts of D. R. M. E. and D. D. R. M. E. stood abolished.

21. It was then submitted by Mr. Anand Sarup that the post of A. D. H. is admittedly super time-scale of the P. C. M. S. and selection had to be made on the basis of merit and not of seniority. He referred to notification dated the 20th January, 1962, of the Punjab Government (copy Annexure R. 2/6) whereby Punjab Services (Appointment by Promotion) Rules, 1962, were published. They were made by the Governor of Punjab in exercise of the powers conferred by Article 309 of the Constitution of India. Scheduled Post, according to the definition given in clause 2 meant a post specified in the Schedule appended to these rules. Clause 3 provided that when appointment to any Scheduled Post was required under the Service Rules to be made by promotion, then, notwithstanding anything to the contrary contained in such rules, the appointment by promotion to such post shall be

made by selection on merit and no person shall be entitled to claim as of right promotion to such post on the basis of seniority. One of the posts in the Schedule is that of Director, Health Services, Punjab and there are also two posts of Deputy Director, Health Services. Even though the post of Additional Director, Health Services is not mentioned in the Schedule, it may be taken that since it was a super time-scale post it was not to go on the basis of seniority alone but merit was guiding factor.

22. In the P. C. M. S. Class I (Recruitment and Conditions of Service) Rules, 1940, (Annexure R. 2/2), also it is stated in Rule 9.2 that promotion to the selection grade shall be made strictly by selection and no member of the service shall be entitled as of right to such promotion. It would, therefore, be correct to say that promotion to the post of A. D. H. S. which was above the selection grade would also be by selection.

The method of selection is indicated in the instructions issued by the Punjab Government in the year 1956 (copy Annexure V) according to which when the question of promotion to selection posts arises, a list of officers should be drawn up and selection will be confined to first three candidates for the vacancy and if the selection has been made that does not mean that the other two become unsuitable. For the next vacancy another slab of three will be formed and the two who were not selected for the first vacancy will necessarily have to be included in that slab. We have now to see what method was adopted in making the promotion to the post of D. H. S. previous to the appointment of Respondent No. 2 as D. H. S. The then Chief Secretary Shri Kahlon in his note dated the 4th February, 1963, dealt with the case for appointment of a new Director of Health Services in succession to late Dr. Jagdish Singh. Four doctors from the directorate and four from the medical education side were considered as being eligible in order of seniority for the appointment. The Chief Secretary noted that the doctors on the educational/research side were unwilling to come over to the directorate for executive and administrative jobs and it would, therefore, be correct and justified to select a Director of Health Services from among the people on the directorate side who are used to and are well in, in practice, with the working of this side. He recommended Col. D. Bhatia for the appointment, inter alia noting that he had also worked as D. D. R. M. E. That appointment was approved by the Finance Minister in his note dated the 7th February, 1963.

23. The method adopted for selection to the post of A. D. H. S. was, as the note dated the 22nd April, 1966, by the Secretary, Health (copy Annexure XI) indicates, in accordance with past precedents and quite fair. That note is as follows:

"As desired by HM and in view of the fact that we have agreed to release Dr. Bhatia for going to the Government of India,

it has become imperative to fill up the post of Add. Director of Health Services which since the amalgamation of the offices of DRME and DHS we had kept pending. This post of Addl. Director of Health Services which is in the scale of Rs. 1800-2000 plus NPA at the rate of 25 per cent of pay subject to a maximum of Rs. 400 p.m., HM will remember was earmarked for an officer from the medical college side. Accordingly the first seven doctors in order of seniority were addressed to find out whether they would be keen for this job. Replies at PUC I-VII will indicate that none of them is keen for this post. However, when later on Dr. Bhatia's release came up for consideration then I informally talked to Dr. Yudhvir, the seniormost doctor from the medical college side as well as Dr. Inderjit Dewan, whether either of them would be willing to come as DHS. Both of them have refused. Dr. Yudhvir refused because he does not find this job to his liking as his interest is in the field of Surgery. I even held out the lure to him of getting the same scale of pay as we had given to Dr. Bhatia i.e. Rs. 2500-3000 but he totally refused. Dr. Inderjit Dewan with whom I had discussed the matter refused to come as DHS on the scale of Rs. 1800-2000 plus NPA but said that he would be prepared to consider if he were given Rs. 2500-3000. This in my opinion would not be acceptable to FD as Dr. Dewan's own line is not so profitable as to enable him to earn the amount which he asks for in his own line even. The case of Dr. Yudhvir is different as he is already enjoying a private practice of Rs. 5000 p.m. Similarly Dr. Bhatia who was given this special pay scale was given the same for consideration of his excellent performance in his own profession and to compensate him for his private practice he was given this personal grade. Further, in view of all these difficulties, we may give up the idea of posting any one from the college side as Additional DHS. The question now arises as to whom we should post as the person who will be posted on this job, will ultimately have to take over from Dr. Bhatia when the two new States are formed and at that time we will have to consider the posting again of an Additional DHS because the two new States will be each having a separate Head of the Department and it would be easier then to allot the DHS designate as well as the Additional DHS to each of the two respective States. In the meantime, however in order of seniority Dr. Moti Singh is the seniormost Deputy Director to be considered for the post of Additional DHS. I place below his personal file at flag 'D' which HM may kindly glance through herself. It contains both good as well as bad remarks. However, to be fair to Dr. Moti Singh, since his posting as Deputy Director from 1962-63 onwards he has earned very good reports and even the reports of one or two years earlier speak very highly of him. Taking into consideration the considerable field

experience of Dr. Moti Singh as well as the grasp of office working at the Directorate under the present circumstances, I feel we should try him out as Additional DHS and see how he fares in the next 3-4 months by which time we should be in a position to decide whether he would take over as DHS from Dr. Bhatia. In my opinion he will be able to do his job well as he officiated as DHS in the absence of Dr. Bhatia on two occasions during my tenure and I found his work quite satisfactory. It will be noticed that the grade of Additional DHS is Rs. 1800-2000 plus NPA while originally the grade of Director is Rs. 1800-2000. It would be very anomalous to post the Additional DHS and give him NPA and not give him the same when he becomes the DHS. In all fairness, therefore, we may get NPA sanctioned for the post of DHS in the grade of Rs. 1800-2000 also specially in view of the fact that all Directorate Officers now both Assistant Directors/Deputy Directors are in receipt of NPA. If this is decided then we may post Dr. Moti Singh as Additional DHS as under-study to Dr. Bhatia with immediate effect in the pay-scale of Rs. 1800-2000 plus NPA and move the case for attaching NPA to the original grade of DHS also. It appears now that the jobs at the Directorate are no longer attractive to the doctors on the Medical education side. The coordination at the Directorate level so far as Medical education is concerned is very vital and essential and it was with that end in view that we amalgamated the two wings and created a separate post of Addl. DHS in the office of the DHS. With none of the doctors from the college side willing to come over, we have not been able to achieve that coordination. As has been discussed in my earlier note, extracts of which are available at pages 3-4 ante, I feel that the medical colleges being big institutions should function to a large extent on an independent basis but to effect coordination in the matter of policy as well as in recruitment of doctors and training of other para-medical personnel, some coordination at the Directorate level is called for. It was with this end in view that I suggested the formation of a State Level Committee comprising of Secretary, Health as Chairman and the DHS and the three Principals of the Colleges as members to function to sort out the important policy matters. This Committee will still continue to function. As to how we should get coordination in the matter of training programmes of colleges linked up at the Directorate level, I feel that we may designate one of the Principals as Adviser on Medical Education whose role should be to advise the DHS as well as the Government on problems relating to medical education and how the work could be coordinated at the Directorate level. This Adviser could address Government as well as the DHS and effect coordination in the execution of policy matters concerning the medical colleges. To

my mind, I feel that the seniormost man though is Dr. Amarjit Singh, yet more progressive one is the next senior person Dr. Yudhvir who could act as a Medical Adviser. In the Ministry of Health, Government of India, also there is the institution of an Adviser on Medical Education and I think the purpose would be served if we designate Dr. Yudhvir as Adviser on Medical Education and give him some suitable honorarium for this job. This will ensure the same purpose as was envisaged by having a separate post of Additional DHS. We can see how this arrangement functions and if it functions well, we can abolish the post of Additional DHS which was originally meant only for a college side doctor. In view of the impending re-organization, considerable economy will have to be effected and I think this arrangement will be more suitable as by so doing we will be giving up the post of Additional DHS and only giving him some honorarium for acting as Adviser. The number of colleges would be reduced also in the respective States and there the Medical Adviser would not have any difficulty in advising both the Government as well as the DHS on problems relating to medical education. I may here like to emphasise that it will be improper for us to have the post of Additional DHS to continue to exist in the Directorate without getting someone from the college side to man this post. Therefore, the above arrangement has to be thought out as it will be irregular, in my opinion, to post someone from the general side as Additional DHS. The arrangement which I have suggested above will be only a stop-gap as shortly with re-organization and Dr. Bhatia going away we will be able to abandon the post of Additional DHS and will have only one post of DHS in the scale of Rs. 1800-2000 plus NPA."

24. Dr. K. Moti Singh was already in the field of choice as the Chief Secretary's note of 4th February, 1963, would show and the promotion of senior-most Deputy Director to the post of A. D. H. S. was obviously in the natural and normal course. In fact, if the Secretary, Health Department was actuated by any motive to favour Respondent No. 2 at the expense of the petitioner she would not have referred to the unfavourable remarks in the personal file of respondent No. 2 prior to the year 1962.

25. In the note of 22nd April, 1966, the Health Minister Shrimati Om Prabha Jain on the same day ordered the promotion of respondent No. 2 as A. D. H. S. and observed that the question of retaining the post of Additional Director (Medical Education) may be left over to the respective State Governments and that post need not be filled up when respondent No. 2 became D. H. S.

26. It is, therefore, established that the Secretary Health Department in her note of 22nd April, 1966, had considered the claims of those in the field of choice. It will also show the circumstances in which preference

in making the appointment was given to an officer from the general side rather than that from the education side. There is, therefore, no force in the submission made on behalf of the petitioner that the appointment should have been restricted to a doctor from the college side. Since the post of D. R. M. E. as well as D. D. R. M. E. were no longer in existence when the appointment of respondent No. 2 as A. D. H. S. was made, the petitioner cannot derive any support from the observations made by the Public Service Commission while advertising the post of D. D. R. M. E. that the incumbent of the post may be considered for the post of D. R. M. E. on merits along with others.

Respondent No. 2 who had worked in the post of Deputy Director Health Services for a number of years and had even been confirmed in that post had obviously the qualifications to be appointed as A. D. H. S. and as already observed Government had attached no importance to the unsubstantiated allegations about immoral character of respondent No. 2. It would also be futile to argue that the petitioner who was in the gradation list at No. 59 on the general side and at No. 56 on the teaching side, was in the possible field of choice. This disposes of the various grounds on which the petitioner challenged the appointment of Respondent No. 2 to the post of A. D. H. S. and his subsequent appointment as D. H. S. which have been summarised in the earlier part of the judgment.

27. Mr. Anand Sarup, learned counsel for the petitioner urged that in making the appointment to a selection post, merit alone should be the criterion and seniority should be ignored and in support of his contention cited *Sant Ram Sharma v. State of Rajasthan*, AIR 1967 SC 1910 but nothing in that judgment supports the extreme position taken up by him. A reference has, in particular, been made to the following observations at page 1916:

"The question of a proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem, therefore, is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the

public interest in having posts filled by the most able man?"

28. In that connection, certain observations of Leonard D. White in "Introduction to the Study of Public Administration, 4th Edn., pp. 380, 383" have been quoted and then it was observed that as a matter of long administrative practice promotion to selection grade posts in the Indian Police Service had been based on merit and seniority had been taken into consideration only when merit of the candidates was otherwise equal. Their Lordships nowhere laid down that when making promotion to selection posts it was incumbent on the authority concerned to review the respective merits of all the officers in the cadre, and having regard to the existing instructions of the Punjab Government on the subject we can find no substance at all in the contention that when making appointments to the posts of A. D. H. S. it was incumbent on the authorities to consider, along with Deputy Directors of Health Services and the senior professors, the name of the petitioner also who had not by then been even confirmed P. C. M. S. Class I.

29. Then, it was submitted that the petitioner had already applied for being considered for the post of A. D. H. S. and it was incumbent on the Secretary of the Department and the Minister to consider that application. The judgment of the Supreme Court in B. N. Nagarajan v. State of Mysore, AIR 1966 SC 1942 was relied upon for the proposition that either it was incumbent on the executive to make rules for recruitment to the post of A. D. H. S. or to invite applications for that post. What actually was held in that case, however, was that the contention that if executive is held to have power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Article 309, Articles 15 and 16 would be breached, is untenable. It was also observed that rules usually take a long time to make, various authorities have to be consulted and it could not have been the intention to halt the working of the public departments till rules were framed. It has already been shown that the object of the creation of the post of A. D. H. S. was to provide an under-study to Dr. Bhatia and the officer so appointed would eventually take over from Dr. Bhatia. The appointment was, therefore, only for comparatively a short period and in the circumstances no rules were made. Accordingly, the counsel for the petitioner cannot derive any help from the observations in paragraph 7 of Nagarajan's case, AIR 1966 SC 1942 (supra) that if the Government advertises the appointments and the conditions of service of the appointments and makes a selection after advertisement there would be no breach of Article 15 or 16 of the Constitution because everybody who is eligible in view of the conditions of service would be entitled to be considered by the State.

There is no requirement in the rules of the P. C. M. S. that when appointment of D. H. S. (and ipso facto to that of A. D. H. S. when that post is created) is made, the Government must advertise that post. Normally, the senior-most Professors or the Deputy Directors of Health Services would be the persons eligible for such an appointment and there would be frustration in the service if some outsider is brought over their heads.

30. Mr. Anand Sarup in support of his submission that if rules for appointment to a particular post are not made by the Government, it must advertise that post, relied on Krishan Chander Nayar v. Chairman Central Tractor Organisation, AIR 1962 SC 602 but the facts of that case were entirely different. The services of the petitioner in that case were terminated by reason of his antecedents in accordance with Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, and a ban was imposed by the Government against him in the matter of his employment under the Government. The petitioner approached the Supreme Court under Article 32 of the Constitution of India for a direction to remove the ban. The affidavit filed on behalf of the Government did not indicate the nature of the ban and the justification therefor.

It was held that the petitioner had been deprived of his constitutional right contained in Article 16 (1) of the Constitution. So long as the ban subsisted, any application made by the petitioner for employment under the State was bound to be treated as waste paper. The fundamental right guaranteed by the Constitution was not only to make an application for a post under the Government but the further right to be considered on merits for the post for which an application had been made. The principle laid down in this case would only apply if Government invited applications for any post under it and in that event it would be bound to consider the applications made by persons who had minimum qualification laid down in the advertisement. No such situation arose in the case before us.

31. I would hold therefore, that there is no force in the submission on behalf of the petitioner that when appointment to the post of A. D. H. S. was made, it was incumbent on the Government to consider his application.

32. The petitioner has also made a grievance of the fact that subsequent to the appointment of Respondent No. 2 as A. D. H. S., his representations against that appointment were ignored by the Secretary.

His first representation is of 11th May, 1966 (copy Annexure 'G') which was addressed to the Chief Minister, Punjab. It was dealt with in the Office and when the Office notes were put up before the Secretary, Health Department on the 11th of August, 1966, President's rule had come in the Punjab and the representation was ordered to be filed by the Secretary. So it is not correct to say that

the Secretary had mala fide intentions in withholding the representation from the Chief Minister. The second representation by the petitioner is dated the 12th July, 1966. It was addressed to the Governor, Punjab. It was submitted through the Director of the P. G. I. We have verified from the file that though Dr. Santokh Singh forwarded the representation on 19th July, 1966, to the Secretary, Health, but the endorsement from the office of the P. G. I. forwarding the representation is dated the 6th September, 1966, by which time Respondent No. 2 had already been appointed as Director of Health Services.

33. The conclusion, therefore, is that the petitioner's challenge to the impugned appointment is baseless and I would dismiss the writ petition with costs which, inasmuch as there are two respondents, are assessed at Rs. 300.

34. NARULA J.: I agree with my Lord Capoor, J., that none of the orders impugned in this case by the petitioner is in any manner vitiated by the mala fides of either the Health Department as such (referred to as "the Administrative Department" in the writ petition) or of the then Secretary to the Punjab Government in that Department. It appears that mere inferential allegations of mala fides levelled by the petitioner against the Government were possibly based on some misapprehension caused by the ultimate situation in which the petitioner found himself as a result of all that actually happened between November 11, 1965, and April 29, 1966, which was somehow wholly inconsistent with the hopes created in the mind of the petitioner by the contents of the notice issued by the Punjab Public Service Commission (Annexure A-1 to the writ petition) while inviting applications for the post of D. D. R. M. E.

At the same time it does not appear to be improbable that once the Health Department had arrived at the decision to virtually abolish the post of D. D. R. M. E., substantial efforts were made by all concerned to save the petitioner from economic loss, which he would indeed have suffered if the Government had not upgraded the post of the Assistant Professor of Forensic Medicine in the Medical College, Patiala, to that of a Professor, and then transferred the said post along with its incumbent to the Post Graduate Institute at Chandigarh and if Government had not given the petitioner a personal or special pay to enable him to draw the emoluments which he was actually receiving as D. D. R. M. E. to which he would not have been entitled on the abolition of that post and on his reversion to the P. C. M. S. The charge of mala fides, therefore fails.

35. I also agree (except for the last point relating to the constitutional guarantee under Article 16 of the Constitution) that the petitioner has not made out any case for interference by this Court under Article 226 of the Constitution with any of the impugned

orders on the other grounds urged by him. With the greatest respect to my learned Brother Capoor, J., I have not, however, been able to persuade myself to agree with the view that Article 16 of the Constitution has not been infringed in this case, inasmuch as the State Government has admittedly refused to consider the application of the petitioner for the post of A. D. H. S. for which he had applied in writing and for appointment to which he was, as already stated, not disqualified in any manner.

36. Whatever may be the rival merits or demerits of the petitioner on the one hand and of respondent No. 2 on the other, it is apparent that no special qualifications having been definitely laid down for the post of Additional Director of Health Services either by any rules or even by any clear-cut executive instructions, respondent No. 2 was not disqualified in any manner for being appointed to that post; though it is equally clear and indeed has not been denied at any stage that even the petitioner was qualified for such appointment, and there was no legal impediment to the Government appointing him if it were to choose to do so.

37. The relevant facts of the case have been given in substantial details in my order of reference and again in the judgment prepared by my Lord Capoor, J. and need not be repeated. But it appears to be necessary to take special notice of some of the admitted or proved facts relevant for considering the grievance of the petitioner about the violation of his fundamental right enshrined in Article 16(1) of the Constitution guaranteeing to all citizens equal opportunity in matters relating to employment or appointment to any office under the State. Though the petitioner had undoubtedly put in much lesser number of years in the State Medical Service than respondent No. 2, it is the common case of both sides that whereas respondent No. 2 is only an ordinary M. B. B. S. with no post-graduate qualification, the petitioner is an F. R. C. S. The first Director of Medical Education, Dr. Tulsi Dass had been so much enamoured of the qualifications and qualities of the petitioner that he appears to have insisted on obtaining the services of the petitioner as officer on Special Duty (to carry on the work which the D. D. R. M. E. used to do) when Dr. D. Bhatia, F. R. C. S. relinquished charge of the post of D. D. R. M. E., though Dr. Tulsi Dass considered the petitioner to be too junior at that time to be appointed as D. D. R. M. E. The petitioner was appointed as "Officer on Special Duty" and brought from the Medical College, Patiala for that purpose under the order of the Governor, Punjab, dated August 24, 1964. He was to hold the post of Officer on Special Duty only till a suitable man could be selected for appointment as D. D. R. M. E. on a regular basis by the Public Service Commission. When the Public Service Commission invited applications for the said post, three persons including one senior

to the petitioner applied for the post and the petitioner was selected on merits over the head of even his senior. Counsel for the respondents tried to argue that the condition of losing previous service contained in the public notice issued by the Public Service Commission might have acted as a deterrent to the comparatively senior people applying for the temporary post. Though there is not much logic in this argument, the possibility of such a consideration having weighed with some particular person cannot be excluded. The post of D. D. R. M. E. was temporary one and so far as any permanent Government servant was concerned, he had no risk of being worse off on the abolition of the higher post as he would have reverted to his substantive post on the abolition of the post of the D. D. R. M. E. if such a situation had arisen.

It is needless to go into this matter as it cannot be disputed that respondent No. 2 did not possess even the essential qualifications for holding the post of the D. D. R. M. E. advertised by the Public Service Commission (Annexure 'A1'). Be that as it may, the fact remains that the scale of pay of the post of D. D. R. M. E. (Rs. 1500-2100 plus Rs. 400 per mensem as non-practising allowance) was higher than that of even the Deputy Director of Health Services, i.e., higher than the scale of the post which was at that time held by the second respondent. The maximum of this scale (Rs. 2100) was higher than the maximum of the grade of pay fixed for the A. D. H. S. (Rs. 2,000) vide sanction of the Governor, dated April 27/29, 1966 (Annexure 'F').

What is still more significant is that respondent No. 2 did in fact represent in writing against the appointment of the petitioner as D. D. R. M. E. with effect from August 24, 1964. The original representation sent by respondent No. 2 on October 7, 1964, was shown to us by the learned Advocate-General at the hearing of this petition. Respondent No. 2 had bitterly complained in his representation that he was senior to the petitioner and he objected to the appointment of the petitioner who was so junior to him. At that time, the representation of respondent No. 2 was turned down by the Government with the following observations:

"After careful consideration, the representation of Dr. K. Moti Singh is rejected as he had no claim automatically to be appointed as Deputy Director, Research and Medical Education."

(Paragraph 3 of petitioner's affidavit, dated April 20, 1967).

The main grievance of respondent No. 2 was that his seniority had been ignored. The rejection of his representation shows that the Government was not prepared to prefer respondent No. 2 over the petitioner for the post of D. D. R. M. E. merely on account of his seniority. The petitioner continued to serve as D. D. R. M. E. from August 31, 1964, till the post was abolished

for all practical purposes on December 31, 1965. That post was not lower than that of Deputy Director of Health Services. The grade of pay of the post of D. D. R. M. E. was higher than that of Deputy Director of Health Services. Even in his earlier report, dated January 30, 1964 (R. E. P. 5) about petitioner's work as Officer on Special Duty (in which report it was recommended that the petitioner may be appointed as D. D. R. M. E.), the then Director of Medical Education stated inter alia:

"Dr. Rai was not at all keen to take up this job. He wanted to revert to the joint cadre. It was with great difficulty that I persuaded him to take up this non-professional work. He was taken on six months' probation as Officer on Special Duty to adjudge his suitability for the appointment. I have great pleasure in recording my appreciation of the way in which he has equipped himself during this period of five months. I, therefore, request the Government to appoint Dr. Kartar Singh Rai as Deputy Director, Research and Medical Education, Punjab, with effect from April 2, 1964, the day he completes his six months of probation as Officer on Special Duty."

38. As against this, the Secretary, Health, had herself written to respondent No. 2, who was then merely C. M. O., Nanga I, on May 4, 1962 (Annexure 'J' to the writ petition), that "serious allegations" had been made against him from time to time "reflecting on his moral character" and that though "the Government were contemplating some serious action against him", it had been decided to give him a further opportunity to improve his reputation. In the demi-official letter issued by the Secretary to the Government to the Director, Health Services, on the same subject, it was stated that Government had further decided "that the conduct of Dr. Moti Singh both in his official and private capacity should be closely watched."

39. I neither mean to suggest that all the complaints received by the Government against respondent No. 2 "from time to time" could not be found to be false immediately thereafter, nor want to convey the impression that I have in any manner come to the conclusion that respondent No. 2 adopted any peculiar means to rebound with redoubled force to the brighter side within a couple of weeks after the receipt of the abovementioned stinker. Cases have been known where interested persons or those inimically inclined have managed to pile up any number of baseless complaints against absolutely innocent and well-meaning candidates for higher posts. It is indeed for the Government to look into such matters and to come to a fair, just and appropriate decision. I have mentioned these few facts merely in order to bring to the surface some out of many things which would have weighed with the Government in deciding the rival claims of the two contestants for the post of Additional Director of Health Services, if the

Government had not decided to consider no one except respondent No. 2 and if the Government had not sought to create the post merely to pave the way of respondent No. 2 to the post of Director, Health Services to which he could normally have moved up from his previous post of Deputy Director Health Services only by comparative selection from other Deputy Directors. I have stated that the appointment of respondent No. 2 to the post of A. D. H. S. was to pave his way to the post of D. H. S. as by being so posted respondent No. 2 went into a post which was almost equivalent to that of D. H. S. (though in a much lower scale) a few months before the time when the post of D. H. S. was likely to fall vacant. The upshot of this discussion is that the petitioner as well as respondent No. 2 were qualified and eligible and none of them was disqualified or ineligible for being considered for appointment to the post of A. D. H. S.

40. The constitutional issue has, therefore, to be decided in the following perspective and in the light of the undermentioned facts:

(i) The education cadre and the general cadre were separate in the Punjab Medical Service at the relevant time. The post of the Additional Director of Health Services was not in the Schedule to the Service Rules of 1962 (Annexure R. 2/6), and was, therefore, for all practical purposes, an ex-cadre post;

(ii) The petitioner though originally drawn from the P. C. M. S., was serving in the education cadre after having already served for some time in the general line. Respondent No. 2, on the other hand, had never served on the education side and was even at the relevant time serving in the general cadre;

(iii) The highest post which respondent No. 2 had ever held before April, 1966, was that of Deputy Director Health Services though he had once or twice officiated as Director, Health Services, to provide stop-gap arrangement during the temporary absence of permanent incumbents of that post. The highest post which the petitioner had on the other hand held till that time was that of D. D. R. M. E. which he would have continued to hold if it had not been decided to abolish that post with chances of further promotion to the post of Director, Research and Medical Education;

(iv) The educational qualifications of the petitioner were far higher than those of respondent No. 2. Petitioner had experience of research work which respondent No. 2 did not have;

(v) Whereas shadow had at one time been cast (in 1962) in writing over the conduct of respondent No. 2 the petitioner had unblemished and meritorious service record.

(vi) The petitioner had been selected for the post of D. D. R. M. E. by the Public Service Commission over the head of his senior and the representation of respondent

No. 2 based on his seniority against that selection was rejected by the Punjab Government;

(vii) The post of A. D. H. S. was originally intended to be filled by doctor from the education side, but it was later decided to be filled by respondent No. 2 as the three Principals of the Medical Colleges and a couple of senior-most permanent Professors had declined the offer for being considered for the temporary post of A. D. H. S. for six months, and it was thought that none of the fairly senior doctors on the education side was likely to accept the temporary post;

(viii) No rules had been framed by the Government for filling the post of A. D. H. S. and the post was ultimately created as a temporary one for six months only.

(ix) Doctors from the education side as well as from general side were eligible for the post of A. D. H. S. Indeed the noting in the Punjab Government file to which reference has already been made in the judgment prepared by my Lord Capoor, J., shows that some doctors from the education side were actually considered for appointment to the new post;

(x) The petitioner as well as respondent No. 2 were qualified to hold the post in question and none of them was disqualified for being appointed thereto;

(xi) The post had been created as a substitute for the original post of D. D. R. M. E. and an undertaking had been given by the Administrative Department to the Finance Department of the Punjab Government that at any one time either an Additional Director of Health Services would be appointed or a D. D. R. M. E. or D. R. M. E. would be appointed and that the three posts would be considered to be available for being filled in only in the alternative;

(xii) Government did not advertise the post nor issued any public invitation for applications to the post of A. D. H. S. All the same, the petitioner had admittedly specifically applied in advance for the post of A. D. H. S. and had categorically asked that he may be considered whenever the post was intended to be filled in. The petitioner had given details of his special claim to the new post in his application;

(xiii) At the time of appointment to the post of A. D. H. S., the application of the petitioner, dated December 20, 1965 (Annexure 'E' to the writ petition) was meticulously kept out of consideration without at that time assigning any reason for doing so;

(xiv) In reply to the petitioner's attack on the appointment of respondent No. 2 as A. D. H. S. on the allegation of infringement of petitioner's fundamental right under Article 16 of the Constitution, the defence of the State as also of respondent No. 2 is that the second respondent was far senior to the petitioner in the P. C. M. S.

In this context it is significant to note that though the petitioner had at one time

respondents contend that it was the Regional Transport Authority (hereinafter called the RTA) which had done so. However, the petitioner had his permit on Shahpura Behror route for vehicle No. RJL 283 whereas his Jaipur-Bikaner permit was in respect of his vehicle No. RJL 6127. The petitioner received a letter No. 8930 dated the 25th January, 1963, signed by the Assistant Regional Transport Authority and to that a copy of a complaint was annexed alleging that the vehicle RJL 6127 was found plying on the nationalised route of Shahpura without permit as reported by Brij Mohan T. I. The petitioner denied the complaint by his letter of the 23rd March, 1963. The RTA in its meeting of the 3rd and 4th October, 1963, vide its resolution No. 10 cancelled the petitioner's permit in respect of his vehicle RJL 6127 plying on Shahpura Behror route. The petitioner appealed to the Transport Appellate Tribunal (hereinafter called the TAT) inter alia complaining that the petitioner was not given any opportunity to produce his witness. The TAT by its order of the 23rd January, 1964, dismissed the petitioner's appeal but modified the resolution of the RTA by cancelling the petitioner's permit on Jaipur-Bikaner route. The petitioner has now moved this Court.

3. The petitioner's contentions are that the permit on Jaipur-Bikaner route having been granted by the STA could not be cancelled by the RTA, a subordinate authority in view of the language of Section 60 of the Motor Vehicles Act (hereinafter called "the Act"); that the principles of natural justice have been violated firstly because the charge against the petitioner was in regard to Shahpura-Behror vehicle for going on the said route without necessary documents but the petitioner's permit on Jaipur-Bikaner route has been cancelled; that the cancellation has been done on the alleged evidence of T. I. Brijmohan who was never examined and at least whose statement was never recorded; that the petitioner has been alleging that his vehicle had gone to the Kacha Banda on the out-skirts of the City of Jaipur for filling petrol and he has been persistently asking the specific place where his vehicle was caught plying but no one has ever cared to tell him this, and that the petitioner wanted to produce evidence, name the witness and wanted to produce him but no opportunity was afforded to him to do so. The allegation in the resolution that he had been given sufficient opportunity is factually erroneous.

4. The TAT and the RTA respondents in this case filed a brief reply on the 12th February, 1964, without any affidavit and when the petitioner's counsel pressed that his allegations should be accepted because they were apparently un rebutted, on the 11th February, 1969, the respondents came forward with an additional reply with some documents. The learned counsel for the petitioner seriously protested against this additional reply because

new pleas of facts are being trotted out some new pleas after the filing of the petition by him. While the respondents cannot be complimented for this leisurely behaviour, I would consider at appropriate place if necessary whether I would take into consideration these new pleas or not. The case of the respondents is that the petitioner was granted the permit by the RTA and not the STA; that the petitioner was carrying passengers beyond Shahpura; that T. I. Brijmohan reported about it; that the petitioner has suppressed the letter which accompanied the copy of the complaint; that the petitioner should have produced the witness before the RTA; that the RTA made an error in the naming of the route which was rectified by the TAT in appeal; and that the petitioner was guilty of violating a term of his permit because he plied on a nationalised route and therefore his permit was rightly cancelled.

5. From the rival contentions the following questions emerge for determination:

(1) Whether it was the STA Jaipur or the RTA Jaipur which granted the cancelled permit to the petitioner?

(2) Whether the cancellation suffers from violation of principles of natural justice and/or on account of there being an error apparent on the face of the record?

6. As the petitioner succeeds on the second question, it is not necessary to wade through the labyrinth of the first. I, therefore, propose to examine question No. 2 first.

7. This question revolves around the pivot of Section 60 of the Act, and it is therefore, proper to extract out the relevant portion of that section:

"60. (1) The Transport Authority which granted a permit may cancel the permit or may suspend it for such period as it thinks fit—

(a) on the breach of any condition specified in sub-section (3) of Section 59, or of any condition contained, in the permit; or

(b) if the holder of the permit uses or causes or allows a vehicle to be used in any manner not authorised by the permit; or

(c)

(d)

(e)

(f)

Provided that no permit shall be cancelled unless an opportunity has been given to the holder of the permit to furnish his explanation.

(1A)

(2) Where a Transport Authority cancels or suspends a permit or reduces the number of vehicles or the routes or area covered by a permit, it shall give to the holder in writing its reasons for the action taken.

(3) Where a permit is liable to be cancelled or suspended under clause (a) or clause (b) or clause (c) of sub-section (1) and the Transport Authority is of opinion that having regard to the circumstances of the case, it

would not be necessary or expedient so to cancel or suspend the permit if the holder of the permit agrees to pay a certain sum of money, then, notwithstanding anything contained in sub-section (1), the Transport Authority may, instead of cancelling or suspending the permit as the case may be, recover from the holder of the permit the sum of money agreed upon."

8. The authority which can cancel or suspend a permit is the one which granted it. The proviso which is couched in negative language lays down in a mandatory form that no permit shall be cancelled unless an opportunity has been given to the holder of the permit to furnish his explanation. Sub-section (2) further provides that the authority cancelling or suspending a permit shall give to the holder in writing his reasons for the action taken. Under Section 64(b) an appeal lies against an order of revocation or suspension of a permit. All these factors go to show that the cancellation of a permit is a penalty which may be imposed against a holder; but before it can be done, the holder has to be afforded an opportunity to furnish his explanation, he has to be told on what grounds the permit has been cancelled and he has a right of appeal. In my opinion, therefore, the order of cancellation of a permit being in the nature of a penalty, the action of the authority is of a quasi judicial nature and calls for the application of the principles of natural justice. There is ample authority for this proposition in decided cases.

9. In *Krishna Gopal v. Regional Transport Authority*, 1960 Raj LW 156 (157) which was a case of suspension of a permit, Jagat Narayan J. delivering the judgment of the Bench observed:

"On the other hand an order cancelling or suspending a permit passed under S. 60 of the Motor Vehicles Act is a quasi judicial order which is appealable under S. 64(b). An order suspending a permit under S. 60 is an order of punishment and before such an order can be passed rules of natural justice require that a hearing should be given to the party intended to be punished. It was held in *K. Balagangadharan v. C. R. Traffic Board*, AIR 1957 Trav-Co 141 that the proviso to Section 60(1) cannot apply where the permits have not been cancelled but only suspended, yet rules of natural justice require that a person should be given a fair opportunity to state his case before he is punished."

10. In *Madan Mohan v. S. T. A. Authority*, M. P., AIR 1966 Madh Pra 144 Dixit C. J. delivering the judgment of the Bench, *inter alia*, observed:

"The proviso to Section 60 (1) lays down that no permit shall be cancelled unless an opportunity has been given to the holder of the permit to furnish his explanation. The person proceeded against must first be apprised of the allegations against him falling under categories mentioned in Section

60 (1)."

In this case, AIR 1966 Madh Pra 144, this having not been done, the order of the cancellation of the permit was quashed.

11. In *S. V. M. Transport v. S. T. A. Tribunal*, AIR 1965 Mad 471, a permit was suspended because the conductor of the vehicle refused to carry a girl passenger unless she had paid for a full ticket. The R. T. A. suspended the permit on the ground that the girl was under 12 years of age and this conclusion was reached by a mere look of the girl. It was held that the order of suspension was bad because the proceedings were of a "criminal nature" and it was, therefore, essential that facts were established beyond reasonable doubt and there was no legal or proper basis for fixing age with reasonable certainty. The order of suspension was quashed.

12. The learned Deputy Government Advocate invited my attention to *Dhanmul v. Regional Transport Authority*, Salem, AIR 1959 Mad 531, where another learned Judge of the Madras High Court observed that the examination of a witness is not necessary for the suspension of the permit under S. 60 because there is no power given to the R. T. A. to summon witnesses or to enforce their attendance. The omission in the statute in this respect suggests that it was not the intention of the legislature that the authorities should examine any witnesses and all that the proviso to sub-section (1) of Sec. 60 requires is that before a permit is cancelled, the holder of the permit should be given an opportunity to furnish his explanation. Therefore, the cancellation of the permit was upheld and the writ petition was dismissed.

13. The grievance of the petitioner before me is manifold. His first submission is that he was not specifically told at what precise place was he found contravening the terms and conditions of his permit. All that he was told was that he was plying without a permit and other documents "from Shahpura" on the nationalised route; that the route on which the vehicle was found to be travelling by the R. T. A. was "Shahpura-Behror" route while the TAT found that he was plying on "Shahpura-Jaipur" route. The case now trotted out, subject to being permitted by the Court, was that he was plying between "Shahpura-Alwar" route carrying passengers. The second grievance is that though the petitioner wanted to examine a witness of his own to controvert the allegations against him, he was not given such an opportunity. It will be necessary to examine the facts closely on these questions.

14. The petitioner has alleged in paragraph 5 of his petition that he was served with a letter No. 8930 dated the 25th January, 1963, under the signatures of Shri M. L. Gupta the Assistant Regional Trans-

port Officer along with a copy of the complaint alleging that the bus No. RJL 6127 of the petitioner was found plying on the nationalised road from Shahpura without permit as complained by Shri Brij Mohan T. I. The petitioner submitted his reply to the said letter on the 23rd March, 1963, denying all the allegations.

15. The petitioner has not produced the letter No. 8930 of 25th January, 1963. The respondent has made a grievance of it that it has been suppressed. The respondent has not produced its office copy of the letter on the ground that the file of this case has been lost. As early as the 14th of February, 1964, this Court had ordered the learned Government Advocate to call for the entire record relating to this cancellation as there was some dispute regarding the recording of the statements of witnesses. The learned Government Advocate undertook to produce the said record on the 18th February, 1964, and that the record which is available with the learned Deputy Government Advocate now does not contain even the copy of the first notice served on the petitioner. The grievance of the learned Deputy Government Advocate, therefore, has no substance for the record of the case was ordered to be preserved and produced for the examination of the Court and yet it is reported to be lost.

However, this question need not detain me any further because in the first answer submitted on behalf of the respondents on the 12th February, 1964, in answer to paragraph 5 all that has been stated is that the letter mentioned by the petitioner was despatched for the Secretary of the R. T. A. and the rest of the allegations contained in para 5 of the petition were not disputed. I, therefore, take it as proved that a letter was sent from the office of the RTA and with this was enclosed a copy of the complaint made by Shri Brij Mohan Sharma T. I. who said that bus No. RJL 6127 was plying without permit and other documents from Shahpura on the nationalised route. There are a number of other complaints relating to other vehicles contained in the copy of the T. I.'s complaint where it has been stated for instance, that bus RJL 857 picked up the passengers from Dausa to Jaipur, bus RJL 1120 picked up the passengers from Jaipur to Bharatpur and Kanota; bus RJL 3026 picked up passengers from Jaipur to Madhuwala portion etc., but no such allegation is levelled against RJL 6127. The petitioner made a reply to the aforesaid allegation by his letter of the 23rd March which is Ex. 3 repudiating the complaint of Shri Brij Mohan Sharma and positively stating that the vehicle had gone to Kucha Bunda in Jaipur for taking petrol and it was there that Shri Brij Mohan Sharma challaned the vehicle, damaged its gear and forcibly obtained the signature of the conductor on the challan. Later the T. I. assured the petitioner that no action would be taken.

16. When the case came up before the R. T. A. on the 3rd/4th October 1963, the resolution which it passed is in the following language:

"Resolution No. 10
Item No. 10.

Vehicle No. RJL 6127 plying on Shahpura-Behror route was found to be plying without permit on the nationalised route on 29-10-62. Shri Devi Sahai Agrawal represented by Shri Fassiuddin Counsel was served with notice on 7-3-63, but he did not care to file any reply. They are, however, contending the notice today and wanted to produce witness Shri Hazarilal. A sufficient adjournment was given to produce this witness but he was not produced. The Inspector Shri Brij Mohan detecting the offence was examined and the case was found to be correct.

Resolved, therefore, that the permit be and is hereby cancelled.

Announced."
This is Ex. 4.

17. This resolution suffers from certain errors apparent on the face of it. The first is that to the notice served by the RTA a reply was made by the petitioner and it is erroneous to say that the petitioner did not care to file any reply. The letter of the 23rd March is there on the record and its receipt and the fact that it was sent to the RTA as alleged in para 5 of the petition have not been disputed in paragraph 5 of the reply. The meeting took place on the 3rd/4th October, 1963, and it is nobody's case that this question of cancellation of the permit was examined earlier than that day and therefore it is also incorrect to say that sufficient adjournment was given to the petitioner to produce his witnesses. It is alleged that the Inspector Shri Brij Mohan detecting the offence was examined but his statement is not before the Court. It is contended by the petitioner that Brij Mohan was not examined and his statement was not on record and it was for that purpose that this Court ordered on the 14th February, 1964, that the record of the RTA should be made available for scrutiny. The learned Deputy Government Advocate conceded before me that except the report of the T. I. there is no other statement of the T. I. Brij Mohan on the record of the RTA as available to him.

18. After this resolution Ex. 4 was passed, an appeal was taken to the TAT by the petitioner and there an application containing additional grounds of appeal was submitted in which it was specifically averred that the petitioner was not told the specific nature and the place of the offence and the permit granted to the petitioner in respect of RJL 6127 was for Jaipur-Bikaner route whereas his permit on Shahpura Behror route in respect of another vehicle could not be cancelled. It was also complained that the checking of the vehicle was done

at Kucha Banda and not at Shahpura as mentioned in Ex. 4; that the petitioner had taken his witness Hazarimal on the date of the impugned order Ex. 4 and yet he was not examined. The TAT while rejecting the appeal of the petitioner on the 23rd January 1964, said that RJL 6127 had no permit on Shahpura-Jaipur route but the going on Shahpura-Jaipur route was also in contravention of the permit granted to RJL 6127 and the vehicle therefore committed a breach of the conditions of the permit and therefore the order of the RTA was proper and need not be interfered with. The TAT therefore cancelled the permit No. 2111 on Jaipur-Bikaner route saying that it was an error on the part of the RTA to have cancelled the petitioner's permit on Shahpura-Behror route in respect of RJL 288.

19. Now before this Court it is said that the petitioner contravened the terms of the permit on Jaipur-Bikaner route in respect of RJL 6127 because it carried passengers even beyond Alwar, and the petitioner submits that this altogether new plea after five years of the writ petition should not be taken into consideration.

20. I will examine the position both without taking into account this allegation as well as after taking it into consideration.

21. The original grievance in T. I.'s report (Ex. 2) is in respect of two counts that the vehicle was plying (a) without permit and (b) other documents and from Shahpura. The RTA by its resolution Ex. 4 found that the vehicle was plying in between Shahpura and Behror which is a nationalised route and for which the vehicle had no permit. The TAT modified the resolution by cancelling the permit of Jaipur Bikaner calling this to be a mistake.

22. In *Byrne v. Kinematograph Renters Society Ltd.*, 1958-2 All ER 579 Harman J. while considering the rule of notice under the principles of natural justice observed that "the person accused should know the nature of the accusation made" and it is one of the principal rules of natural justice.

23. In *Marriott v. Minister of Health*, 1935-105 LJKB 125 Swift J. laid down that "a Tribunal must take care that the views of both the contending parties and the contentions they submit and the evidence they proffer are given proper weight."

24. In *Mukhtar Singh v. State of U. P.*, AIR 1957 All 297, it was laid down that every person whose civil rights are affected must have a reasonable notice of the case he has to meet.

The nature of the case set out in the complaint, annexure Ex. 2 is different from the finding given in the Resolution Ex. 4 and corrected in the TAT's order Ex. 5. The petitioner has been consistently and also repeatedly complaining that he should be told where his vehicle was checked but neither the RTA nor the TAT has told him the precise place notwithstanding

the fact that the petitioner has been saying that it was at Kucha-Banda Jaipur when he had gone to fill in the petrol that his vehicle RJL 6127 was checked. In view of this allegation of the petitioner it became necessary for the RTA to precisely come to a conclusion as to the place where the petitioner was found plying his vehicle RJL 6127 in contravention with the terms of his permit so that the penalty of cancellation of his permit could be imposed against him. Neither the RTA nor the TAT pinpointed the place where the vehicle contravened the terms of the permit which they cancelled.

25. Now looking at the case after including the allegations which have now been trotted out after five years that the petitioner was carrying passengers near the octroi post, Alwar, when it was checked by Brij Mohan T. I., I find that this was never a case put to the petitioner either in the first notice or in the meeting of the RTA or before the TAT and he is being condemned on the allegation of which he had had never any specific notice. It is a flagrant violation of the principles of natural justice to condemn a man without telling him what he is accused of.

26. I have taken into consideration the new plea of fact as now advocated five years after the event and even this situation does not alter the conclusion that the petitioner had had no notice of specific allegation as a result of which his permit was being cancelled. In fact, this new plea, assuming this to be true, adds to the confusion of the notice. The petitioner's vehicle was stopped and checked at Alwar of which there is no specific mention in the original complaint of T. I. Brij Mohan Lal. That his vehicle was carrying passengers is also not indicated in T. I.'s note of complaint, as it has been done about other cases. The vagueness of the original notice to the petitioner is thus heightened by inclusion of these new materials. It is, therefore, not necessary to decide whether this new plea should be permitted or not because even on its consideration the result remains the same namely that the petitioner had no precise notice of the accusation on the basis of which his permit was cancelled.

27. Let me now take up the question of evidence having been proffered by the parties. The case of the petitioner is that no evidence was recorded by the RTA and none is forthcoming. In *Y. Thirupathi v. Andhra State*, AIR 1957 Andh Pra 608, it has been observed:

"It is well settled that the Transport Authorities under the Motor Vehicles Act exercise judicial or quasi judicial functions. The Regional Transport Authority is therefore bound to record the statements of persons examined before it so as to enable the High Court as also the higher authorities, on appeal or revision to examine those statements and decide whether its conclusions are correct or not."

In this case, the RTA had passed an order suspending the petitioner's permit for a period of six months on the ground that there was overloading of passengers relying on the report of a Deputy Superintendent of Police in preference to the statements made by certain respectable witnesses made before it. The statements were, however, not reduced to writing and no reasons were given for rejecting those statements. The order of suspension was confirmed on appeal and revision by the Central Road Traffic Board and the Government respectively. It was held by the Andhra Pradesh High Court that the order of suspension should be quashed as the RTA had erred in giving its judgment merely on the report of the Deputy Superintendent of Police.

record of the alleged statement of T. I. Brij Mohan and it could not apply its mind in the absence of the specific allegation on the basis of which the permit had been cancelled. I, therefore, hold that both these resolutions namely the resolution No. 10 passed by RTA Jaipur and the order of the TAT dated the 23rd January, 1964, cancelling the petitioner's permit in regard to his vehicle RJL 6127 suffer from the aforesaid infirmities and are hereby quashed. The petitioner will get his costs of this petition.

Order quashed.

AIR 1970 RAJASTHAN 53
(V 57 C 9)

D. M. BHANDARI, C. J. AND V. P. TYAGI, J.

Tarachand and others, Judgment-Debtors — Appellants v. Misrimal and others, Decree-Holders — Respondents.

Special Appeal No. 18 of 1964 D/- 1-4-1969, against judgment of Jagat Narayan, J., in Civil Misc. Second Appeal No. 10 of 1961 D/- 9-4-64.

Civil P. C. (1908), Ss. 38, 39, 11, 16 — Judgment or decree of court not competent is not effective — But this has no application where court lacks territorial jurisdiction — Word "may" in S. 39 — Cannot be construed as "shall" or "must" — Court passing decree may itself execute it in cases falling within cls. (a) to (e) of S. 39 (1) — AIR 1947 Mad 347 (FB), Dissented from — (Words and Phrases — Word "may.")

The general principle is that the judgment or decree of a Court which was not competent to entertain the proceedings in which such judgment or order has been made is not effective. (1909) ILR 36 193 (206) Rel. on. (Para 5)

There can be no doubt that under S. 38, a decree may be executed by the Court which passed it. There is no reason to be unduly oppressed by the doctrine that lack of territorial jurisdiction makes an order or judgment a nullity (doctrine which is no doubt applicable in international law) and to hold that under Section 39 it is incumbent for the Court which passed a decree to send it for execution to another court in cases provided in clauses (a), (b) and (c) of Section 39(1) C. P. C. and thus to infer that Section 38 is dependent on Section 39 to such an extent that the Court which passed a decree cannot proceed to execute it in the circumstances mentioned in clauses (a) to (c) of Section 39(1) and if it does so, the order passed by the Court which passed the decree in taking any action in the matter provided in these clauses is to be struck down as nullity. The judgments and orders passed by a court which has no territorial jurisdiction under the provisions of the Code of Civil Procedure are not void ipso facto. AIR

28. So far as the Madras authority in AIR 1959 Mad 531 is concerned it has not been noticed in AIR 1965 Mad 471. However, in my opinion the correct position seems to be that if there is any factual controversy regarding the facts alleged for the cancellation of a permit, then the substance of what the witnesses for and against have deposed must be recorded. This is necessary because there is an appeal provided under the Motor Vehicles Act itself and no appellate authority can possibly apply its mind on the facts and assess them unless it has some sort of memoranda regarding the evidence adduced before the subordinate tribunal. It is true that there is no provision for enforcing the attendance of witnesses before the RTA even in the Rajasthan Rules but from that no inference can be deduced that witnesses cannot be or should not be examined. All that can be said is that if the parties produce their witnesses they must be heard and factual controversies should be resolved by reference to those witnesses. Cancellation of a permit, as I have already held above, is a penalty and before a person can be punished, law gives him an opportunity to be heard and that hearing would be perhaps in some cases a mere ritual if his witnesses are not heard. Therefore, with great respect, I am not prepared to agree with the decision in AIR 1959 Mad 531.

29. In the case before, me there is no notice giving more than what Brij Mohan is reported to have said. I do not know on what basis could the TAT come to the conclusion that Brij Mohan was examined by the RTA. The mere fact that Brij Mohan was examined, assuming it to be the correct position, is not enough. It is what he said really mattered and this could not be considered by the TAT unless there were some notes to show what he had actually stated. Therefore the resolution of the RTA suffers from an error apparent on the face of the record as it is inconsistent with the notice. The resolution condemns the petitioner on a ground of which he had no notice and thereby violates the principle of natural justice. The TAT was also handicapped for want of

1956 SC 87 and AIR 1962 SC 199 and AIR 1966 SC 634, Rel. on.

(Paras 8, 12, 13, 20, 22)

Section 39 (1) purposely used the word "may" and this "may" cannot be construed as "shall" or "must". Under Section 39(1)(c) it is discretionary for the court which passed a decree to send it to such other court for execution and it is not incumbent on it to do so. The word "may" which occurs in the opening part of the section cannot thus be construed as "must" in cases falling under clause (d). Section 39 has been enacted for the purpose that it will be more convenient for a court which passed a decree to get it executed by a court within local limits of whose jurisdiction the person resides or the property is situate in cases mentioned in clauses (a) to (c), but it does not debar a court which passed a decree itself to execute if the circumstances of the case so warrant or it has the means to do so. This however, does not mean that the court which passed a decree should itself embark upon executing the decree under all circumstances in cases provided in clauses (a) to (c) of Section 39(1). Normally it will send it for execution to the court within the local limits of whose jurisdiction the defendant resides or the property is situate, but it has the jurisdiction to proceed to execute it. AIR 1947 Mad 347 (FB), Dissented from. Case law discussed.

(Paras 13, 14)

In the international law, the possession of territorial jurisdiction by a court in such matters may be considered necessary for passing a legally valid order. But the same cannot be said with regard to the domestic Courts, the local limits of whose jurisdiction have been laid down by statute only for the sake of convenience and effectiveness.

(Para 11)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Ker 81 (V 54) =
ILR (1964) 2 Ker 648, Chitraru
Jathavedan v. Gopala Pillai 22
- (1966) AIR 1966 SC 634 (V 53) =
(1966) 1 SCR 461, Bahrein Petroleum
Co. Ltd. v. P. J. Pappu 12
- (1962) AIR 1962 SC 199 (V 49) =
(1962) 2 SCR 747, Hira Lal Patni v.
Kali Nath 11
- (1960) AIR 1960 Pat 285 (V 47) =
1960 BLJR 99, Dasrath Prasad Singh
v. Bajinath Prasad Singh 22
- (1956) AIR 1956 SC 87 (V 43) = 1955
2 SCR 938, Merla Ramanna v.
Nullaparaju 8, 22
- (1947) AIR 1947 Mad 347 (V 34) =
ILR (1948) Mad 18 (FB), Vasireddi
Srimanthu v. Venkatappayya 15
- (1942) AIR 1942 Cal 321 (V 29) =
ILR (1942) 1 Cal 289, Masrab Khan
v. Debnath Mali 8
- (1927) AIR 1927 Mad 627 (V 14) =
ILR 50 Mad 882, Satrucherla Siva-
kanda Raju v. Rajah of Jeypore 18
- (1926) AIR 1926 Mad 421 (V 13) =
ILR 49 Mad 746, Rajagopala
Pandarathar v. Tirupathia Pillai 19

(1925) AIR 1925 Bom 414 (V 12) =

27 Bom LR 649, Jagannath v.

Ichharam 8

(1920) AIR 1920 Mad 427 (V 7) =

ILR 42 Mad 821 (FB), Seeni

Nandan v. Muthuswamy Pillai 8

(1919) AIR 1919 PC 150 (V 6) =

ILR 42 Mad 813, Setrucharlu

Rainabhadra Raju v. Maharaja of

Jeypore 21

(1909) ILR 36 Cal 193 = 5 Cal LJ

611, Gurdeo Singh v. Chandrika

Singh 5

(1890) 19 Atlantic Rep 898, Frankel v.

Sutterfield 5

(1886) ILR 12 Cal 307, Ram Lall

Moitra v. Rama Sundari Dabia 17

Hastimal Parakh, for Appellants, S. K.

Mal Lodha, for the Respondents.

BHANDARI C. J. : This is a special appeal under Section 18 of the High Court Ordinance from the judgment dated 9th April, 1964 of Jagat Narayan J. in a case arising under Section 47 of the Code of Civil Procedure.

2. The brief facts of the case are that on 23rd December, 1955 a decree was passed in a suit for specific performance of an agreement to sell two plots of land by the Civil Judge, Pali. The decree was in favour of Misrimal and Hanwantraj and against Tarachand, Birdichand and Roopchand. This decree was not drawn up in proper form, but the substance of the decree is that the defendants shall deliver possession of two thalas (plots) mentioned in para 2 (b) of the plaint to the plaintiffs and that the defendants will execute a sale deed of these plots in favour of the plaintiffs, and that according to the agreement Ex. 1, the total sale-price of the plots in dispute is Rs. 4,000 out of which Rs. 1,000 has already been received by the defendants and Rs. 2545/7/- are due to the plaintiffs from the defendants which will be adjusted with interest at the rate of 6 per cent per annum at the time of registration of the sale deed and in case the total amount does not make up of Rs. 4,000 the defendants will be entitled to get the balance from the plaintiffs at the time of registration of the sale-deed and the defendants will get the sale-deed registered.

3. These two plots of land were situated in the town of Rani which was within the jurisdiction of Civil Judge, Pali when the decree was passed on 23rd December, 1955. Later on, the jurisdiction over the town of Rani was transferred to the Civil Judge, Sirohi. After such transfer, the decree-holders applied for execution of the decree on 19th March, 1956. The Civil Judge, Pali, did not transfer the decree so far as it related to the delivery of possession of the two plots of land for execution to the Civil Judge, Sirohi but proceeded to execute the decree. Possession over one of the plots of land was delivered by the Amin under order of the Court to the decree-holder on 26th May, 1956 without any notice to the judg-

ment-debtors. Possession over the second plot also was delivered on 22nd June, 1958. This time also no notice was issued to the judgment-debtors. Before delivery of the possession of the second plot of land, the judgment-debtors had sold the second plot to Mohanlal. Mohanlal filed application under Order 21, Rule 97 C. P. C. which was dismissed on 24th May, 1958.

An application under section 151 C. P. C. was filed again by Mohanlal on 22nd July, 1958. In this application, the judgment-debtors were also made parties and they filed a reply on 25th July, 1958 supporting the case of Mohanlal. Mohanlal's application under Section 151 C. P. C. was dismissed by the Civil Judge, Pali on 23rd August, 1958. Both Mohanlal and Tarachand filed an appeal to the District Judge, Pali which was dismissed on 13th December, 1958. Both of them filed a second appeal to this Court which was dismissed in limine on 25th February, 1959. Thereafter notices were issued to the judgment-debtors to have the sale-deed executed. In reply to this, the judgment-debtors filed another objection application on 29th September, 1959, but it was not stated therein that the executing Court had no jurisdiction to execute the decree.

The sale-deed was registered on 14th November, 1959. Thereafter the judgment-debtors filed the objection applications that the executing Court which had executed the decree for possession had no jurisdiction to execute it. This objection was dismissed by the executing Court and so also their appeal. The judgment-debtors then filed a second appeal in this Court. The learned Single Judge took the view that even if the appellate Court, Pali lacked jurisdiction in execution of the decree, the judgment-debtors were estopped from raising the question of jurisdiction of the appellate Court because they did not raise it at the earliest possible opportunity, and also because the principle of constructive res judicata applied to the case. Taking this view of the case, he dismissed the appeal of the judgment-debtors. He, however, granted permission to file an appeal to the Division Bench under Section 18 of the High Court Ordinance. This appeal has thus been filed under that provision.

4. We anticipate great difficulty in applying the principle of constructive res judicata in this case for various reasons. We have, therefore, thought it proper to decide this appeal by examining the question whether the Civil Judge, Pali had actually no jurisdiction to give possession of the two plots of land in execution of the decree and the judgment-debtors were entitled to recover back the possession.

5. The main argument that has been urged by Mr. Parakh on behalf of the judgment-debtors is that the decree so far as it relates to the delivery of the possession of the two plots of land has been executed by a Court which had no jurisdiction

to give delivery, and there being total lack of jurisdiction in that Court, the order of delivery by that Court was void in law. The general principle is that the judgment or decree of a Court which was not competent to entertain the proceedings in which such judgment or order has been made is not effective. This principle is recognised in international law and most of the domestic law is based on this principle. This principle is enunciated by Mookerjee J. in *Gurdeo Singh v. Chandrika Singh*, (1909) ILR 36 Cal 193 (206) in the following terms:

"A Court cannot adjudicate upon a subject matter, which does not fall within its province as defined or limited by law; this jurisdiction may be regarded to be essential, for jurisdiction over the subject matter is a condition precedent to the acquisition of authority over the parties, and, if a Court has no jurisdiction over the subject matter of the controversy, consent of the parties cannot confer such jurisdiction, and a judgment made without jurisdiction in such a case is absolutely null and void; it may be set aside by review or appeal, or its nullity may be established, when it is sought to be relied upon in some other proceeding: See *Hawes on Jurisdiction*, pages 12-16; *Herman on Estoppel*, Section 110 and *Frankel v. Sutterfield*, (1890) 19 Atlantic Rep 898".

6. We have thus to examine whether possession of territorial jurisdiction is of such essence in cases governed by Civil Procedure Code that without it any order passed by the executing court is to be treated as nullity. The jurisdiction of Civil Courts is defined by the Code of Civil Procedure. Section 16 of that Code lays down that suits for the recovery of immovable property with or without rent or profits shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. Section 17 provides for the case when immovable property is situated within the jurisdiction of different courts and it has been laid down that the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate. Section 21 lays down that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

There is no dispute in this case that the Civil Judge, Pali, had jurisdiction to entertain the suit in respect of both the plots of land and upto the stage the decree was passed, it had not ceased to have jurisdiction over those plots.

7. The Civil Procedure Code does not stop after defining the place of suing. It lays down separate provisions about execution. These provisions are contained in Part II of the Civil Procedure Code. In the mat-

ter of execution, these provisions govern the jurisdiction of the Courts which are to execute the decree. Section 38 provides that the decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Section 37 defines the expression "the Court which passed the decree" in relation to execution of decree. Section 37 runs as follows:

"The expression "Court which passed decree", or words to that effect, shall in relation to the execution of a decree, unless there is anything repugnant in the subject or context, be deemed to include,—

(a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) Where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try the suit."

8. There is some controversy about the interpretation of clause (b) of this section with which we are not concerned. But there can be no doubt that under Section 38, a decree may be executed by the court which passed it. This is what their Lordships of the Supreme Court have laid down in *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87 wherein it has been observed:

"And it is settled law that the Court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another court. Vide *Seeni Nandan v. Muthuswamy Pillai*, AIR 1920 Mad 427 (FB); *Masrab Khan v. Debnath Mali*, AIR 1942 Cal 321 and *Jaganath v. Ichharam*, AIR 1925 Bom 414".

9. Mr. Parakh has argued that these observations should not be taken to mean that the court which has ceased to have jurisdiction over the immovable property to which the decree relates has the jurisdiction to proceed to deliver its possession without transferring the decree to the court which has acquired jurisdiction over the immovable property as required under Section 39 of the Code of Civil Procedure. His argument is that the Court which passed the decree may entertain the application for execution, but in the cases covered by Section 39(1), it is incumbent on that court to send it for execution to the other court which has acquired jurisdiction over the immovable property which is to be delivered under the decree. He has argued that in none of the cases referred to by the Supreme Court the view has been taken that apart from entertaining the execution application, the Court which passed a decree could proceed on to execute the decree even in circumstances mentioned in Section 39(1) and that the force of Section 39(1) is that it is incumbent for the Court which passed the decree to transfer the

decree to the other Court in the circumstances mentioned in Section 39(1).

10. This leads us to consider the force of Section 39 in such cases. Section 39 runs as follows:

"39. Transfer of decree.—(1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court—

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limit of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court, which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send for execution to any subordinate Court of competent jurisdiction".

11. It is contended that even though the word "may" has been used in the opening part of Section 39, yet in all cases of the kind mentioned in clauses (a) to (c) it is incumbent on the Court which passed the decree to send it for execution to another Court for this simple reason that the Court which passed the decree has ceased to possess territorial jurisdiction either over the person or over the property of the judgment-debtor and it is only the Court which possesses such territorial jurisdiction which can execute the decree. It is urged that in such matters, the Court cannot travel beyond the local limits of its jurisdiction and anything done by a Court which does not possess territorial jurisdiction in these matters must be deemed to be void in the eye of law. In the international law, the possession of territorial jurisdiction by a Court in such matter may be considered necessary for passing a legally valid order. But the same cannot be said with regard to the domestic Courts, the local limits of whose jurisdiction have been laid down by statute only for the sake of convenience and effectiveness.

As pointed out by their Lordships of the Supreme Court in *Hira Lal Patni v. Kali Nath*, AIR 1962 SC 199 :

"It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objec-

tion as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like S. 21 of the Code of Civil Procedure."

12. This principle has been again reiterated by their Lordships of the Supreme Court in *Bahrein Petroleum Co. Ltd. v. P. J. Pappu*, AIR 1966 SC 634 where it has been observed that where the defendants neither resided nor carry on business, nor any part of the cause of action arises within the local limits of the jurisdiction of the Court, such Court has no territorial jurisdiction to try the suit under Section 20 of the Code of Civil Procedure, 1908. But Section 21 of the Code provided an exception and a defect as to the place of suing, that is to say, the local venue for suits cognisable by the Courts under the Code may be waived under this section. It is further observed that independent of Section 21, the defendant may waive the objection and may be subsequently precluded from taking it. Thus it is clear from these authoritative pronouncements that the judgments and orders passed by a court which has no territorial jurisdiction under the provisions of the Code of Civil Procedure are not void ipso facto. In this connection, we may quote the following passage from *Freeman on Judgments* Volume I" Article 368:

"An erroneous venue is rarely a jurisdictional defect. At most it furnishes reason for having the cause changed to the proper county and if that is not done as the result of oversight or neglect of the parties or unwillingness on the part of the Judge to allow the transfer, jurisdiction which has properly attached is not thereby lost. This would not be true, of course, where owing to the character of the suit and the nature of its subject matter the courts of the county where it is prosecuted would have no power under the law to entertain it. A case in point is that of a judgment for taxes, invalid because the suit is brought and prosecuted contrary to law in a county other than the one in which are situated the lands upon which the taxes are due. But in general it is not material collaterally that suits respecting land are instituted and carried on in counties other than that in which the land is located."

13. This being the position, there is no reason to be unduly oppressed by the doctrine that lack of territorial jurisdiction makes an order or judgment a nullity (doctrine which is no doubt applicable in international law) and to hold that under Section 39 C. P. C. it is incumbent for the Court which passed a decree to send it for execution to another court in cases provided in clauses (a), (b) and (c) of Section 39 C. P. C. and thus to infer that Section 38 is dependent of Section 39 to such an extent that the Court which passed a decree cannot proceed to execute it in the circumstances mentioned in clauses (a) to (c) of Section 39(1) and if it does so, the order passed by

the Court which passed the decree in taking any action in the matter provided in these clauses are to be struck down as nullity. Section 39(1) purposely used the word "may" and that this word "may" cannot be construed as "shall" or "must".

14. Again, the language of Section 39(1) (d) shows that under certain circumstances, the court which passed a decree may send it to be executed to the other court and in that case the Court should record an order to that effect. Thus under Section 39(1)(c) it is discretionary for the court which passed a decree to send it to such other court for execution and it is not incumbent on it to do so. The word "may" which occurs in the opening part of the section cannot thus be construed as "must" in cases falling under clause (d). Section 39 has been enacted for the purpose that it will be more convenient for a Court which passed a decree to get it executed by a Court within the local limits of whose jurisdiction the person resides or the property is situate in cases mentioned in clauses (a) to (c), but it does not debar a Court which passed a decree itself to execute if the circumstances of the case so warrant or it has the means to do so.

We do not mean to say that the court which passed a decree should itself embark upon executing the decree under all circumstances in cases provided in clauses (a) to (c) of Section 39(1). Normally it will send for execution to the Court within the local limits of whose jurisdiction the defendant resides or the property is situate, but it has the jurisdiction to proceed to execute it.

15. There are certain cases in which the view taken is that the word "may" in Section 39 may be construed as "must". In this connection we may refer to *Vasireddi Srimanthu v. D. Venkatappayya*, AIR 1947 Mad 347 (FB). After referring to Section 39, *Gentle C. J.* observed as follows:

"Since sub-section (1) of the Section requires a decretal Court to send its decree to another Court for execution when a judgment-debtor's property is within the jurisdiction of that Court, it must follow that a decretal Court cannot itself execute against property outside its own territory, if it could do so, transmission would be unnecessary. Further manifestation of this proposition is found in sub-section (2), which enables a decretal Court suo motu to transmit its decree for execution to a subordinate Court, but only to one of competent jurisdiction; this must mean a Court which has jurisdiction; that is to say, a Court within whose limits the property against which execution will lie is situate.

Section 42 of the Code enacts that:

"The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself."

Since a decretal Court can execute only in respect of property lying within its territory,

it follows that that is the extent of a transferee Court's jurisdiction.

The Code provides two exceptions to the above restriction upon the power of a Court to execute: (a) where a suit is to obtain relief respecting compensation for or wrong to, immovable property situate within the jurisdiction of different Courts, Section 17 allows a suit to be instituted in any Court within whose territory any portion of the property is situate; since such Court has jurisdiction to execute against the outlying properties, in respect of which it can pass a decree. (b) Under Order 21, Rule 3 of the Code, where immovable property forming one estate is situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate.

The above provision of the Code would be necessary if a Court could execute a decree against outlying property and the presence in the Code of those enactments manifests the ordinary restriction upon a Court's powers of execution.

"Section 39 is clear and unambiguous in its meaning and effect; a Court passing a decree must have territorial jurisdiction in respect of property against which it can order execution, if it has not got that jurisdiction, it cannot order execution and must send the decree for that purpose to the Court competent to do so."

16. With great respect, in taking this view the learned Chief Justice has construed an enabling provision as laying down a mandatory direction. The learned Chief Justice has conceded that under Section 17 a suit which has been instituted in a Court in which only a part of the property is situate, that Court has got jurisdiction to execute the decree passed in that suit against the outlying properties which are not within its jurisdiction. Section 17 mentions that a court may entertain a suit and try and dispose it of even in respect of the property which is not situate within its jurisdiction if some portion of the property in suit is situate within its jurisdiction in cases provided in that section. But in the matter of execution, separate provisions have been made in the Civil Procedure Code and they are contained in Part II. There is no reason to treat the provisions of Section 17 as an exception to Section 39.

Again, we find it difficult to draw a distinction between Section 16 and Section 17, in the matter of execution. If such distinction is drawn, the result would be that in cases provided under Section 17 if A property is within the local limits of jurisdiction of court X and B property is within the local limits of jurisdiction of court Y, the court X can try the suit in respect of both A and B, and can also execute the decree with respect to the property B without sending it to the court Y. But suppose in a case where section 16 C. P. C. is appli-

cable and both properties A and B are situated within the local limits of Court X and after the decree has been passed or even before that after the suit has been instituted, both the properties A and B by appropriate notification cease to be within the jurisdiction of Court X and fall within the local limits of the jurisdiction of Court Y, the court cannot execute the decree because of Section 39.

With great respect, we fail to appreciate this distinction. Of course, for the sake of convenience, the court X should send the decree for execution to court Y. But viewed from the point of jurisdiction, the court has the jurisdiction to execute the decree and does not cease to possess that jurisdiction simply because the properties A and B after the passing of the decree have gone out of the local limits of its jurisdiction.

17. Reference in the Full Bench decision has also been made to Order XXI Rule 3 Civil P. C. which runs as follows:

"3. Lands situate in more than one jurisdiction.—Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure."

From the presence of this rule in the Code it was inferred that had the court which passed the decree had jurisdiction to execute the decree about the immovable property which did not fall within its territorial jurisdiction, there was no necessity for making this rule. This rule is very general and may be utilised not only by the court which passed the decree but also by the transferee court or any other court. Even before that the Calcutta High Court had taken the view in *Ram Lal Moitra v. Rama Sundari Dabia*, (1886) ILR 12 Cal 307, that an estate or tenure situate within the local limits of jurisdiction of different courts may be attached and sold by anyone of such courts. Another rule which may be referred is Order 21 Rule 48. That is a specific provision providing for attachment of salary or allowances of a Government servant or servant of the railway company or local authority.

18. Another exception which has been recognised is that the court which passed a decree for enforcement of the mortgage or charge on immovable property has the power in execution of its decree to order the sale of such property though it may be situated beyond the local limits of its jurisdiction. It has been pointed out by Wallace J. in *Satrucharla Shivakanda Raju v. Rajah of Jeypore*, AIR 1927 Mad 627 that it is an inroad on the general proposition that a court has no power to sell property outside its territorial jurisdiction. If the territorial jurisdiction is a condition precedent to the court selling the property, the principle on which such inroad has been permitted has very little logical justification and in our opinion, it is better to construe Section 38 as giving the court which passed the decree

the full power to execute it at least in theory. If this view is taken, then there will be no necessity for adopting such subterfuges to meet the situations arising in case of execution of mortgage decrees.

19. Again, if territorial jurisdiction is to be made basis of the power of executing a decree, then great difficulties are likely to arise in cases where execution of a decree is transferred from one court to another under Section 24 C. P. C. In certain cases, transfer of an execution case shall have to be ordered to court which has no territorial jurisdiction over the property to which the decree relates. What is to be done in such a case? Is the court to which the case has been transferred a competent court? There can be no other answer than that such Court should be construed as competent Court. While construing the effect of word "competency" in Section 24 Venkatasubba Rao, J. in *Rajagopala Pandarathar v. Tirupathia Pillai*, AIR 1926 Mad 421 has taken the view that territorial jurisdiction is not to be considered in determining the competency of the Court. The argument that was addressed to the Court was that S. 24 does not apply to the execution case because an execution case cannot be transferred to a Court which has not the territorial jurisdiction to execute the decree. The argument was rejected. In this connection, it was observed :—

"Mr. Vardachariar next contends in the alternative that should Section 24 be held to apply to execution proceedings they can be transferred only to Courts competent under Section 39, Civil Procedure Code, to dispose of them. In other words he urges that the only Courts to which decrees can be transferred are those mentioned in Section 39, because they are the only Courts possessing jurisdiction. In effect, his contention is that S. 39 gives to the Court that passed the decree a power to transfer, whereas Section 24 gives a similar power, and no higher power to a superior Court. This construction is far-fetched and if adopted will render Section 24, so far as execution proceedings are concerned, almost useless."

20. Thus, viewed from any angle, possession by a court of territorial jurisdiction cannot be made the sole basis for proceeding to execute the decree to its final conclusion.

21. Learned counsel for the judgment-debtor has relied on *Setrucharlu Rambhadra Raju v. Maharaja of Jeypore*, AIR 1919 PC 150. In this case a court in British India ordered sale of property for recovery of interest due under a mortgage and the property was situate in several districts, it was held that the order of sale was without jurisdiction. It is quite clear that in that case, the Code of Civil Procedure did not apply to the Scheduled districts as Section 1(3) excluded the scheduled districts as by Act No. 24 of 1839 the district in which the lands above referred to were situate

was scheduled. Their Lordships held that the order of sale was bad under Sections of the Code of Civil Procedure which the Code itself says that they are not to be applied to the Scheduled districts. Thus there was total lack of jurisdiction to sell. This case is therefore entirely on a different footing and does not help in interpreting Sections 38 and 39 C. P. C.

22. After the decision of their Lordships of the Supreme Court in AIR 1956 SC 87 and *Dasrath Prasad Singh v. Baijnath Prasad Singh*, AIR 1960 Pat 285 it has been held that the proper court to execute a decree remains the court which passed it, and that, simply because a new court created later on got territorial jurisdiction in regard to the property in question was no ground to hold that the court which had passed the decree had no jurisdiction to give delivery of possession. The same view has been taken in *Chitraru Jathavedan v. Gopala Pillai*, AIR 1967 Kerala 81.

23. In our view in this case the Civil Court Pali had jurisdiction to order delivery of property to the decree-holders in spite of the fact that after the passing of the decree, these properties had gone out of its jurisdiction and had been transferred within the jurisdiction of the Court of Sirahi. In this view of the matter, the order of the Court of Civil Judge, Pali delivering the two plots of land to the decree-holder cannot be treated as nullity. The appeal is therefore dismissed.

Appeal dismissed.

AIR 1970 RAJASTHAN 59 (V 57 C 10)

JAGAT NARAYAN, J.

M/s. Pabudan Hiralal, Petitioner v. Shri Mahesh Industries and others, Respondents.

Civil Revn. No. 318 of 1968, D/-20-12-1968, against order of Civil J., Beawar, D/-5-4-1968.

Civil P. C. (1908), Order 18, Rule 17 — Recall of plaintiffs' witness as a witness of defendant with leave of Court — No prohibition if cogent reasons exist — Chitaley's Commentary on Civil P. C., Foll.

(Para 3)

D. P. Gupta, for Petitioner; H. C. Jain for Respondents.

ORDER : This is a revision application by the plaintiff against an order of the trial Court recalling a witness of the plaintiff as a witness of the defendant.

2. One application was made on 30-1-68 in which it was stated that Manak Chand had not brought his account books, when he made his statement and so he may be recalled for further cross-examination. No order was passed on this application and it seems that it was not pressed. Another application was made on 3-4-68 in which it was stated that if Manak Chand be not called for fur-

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ther cross-examination the defendants may be allowed to call his Munim or any other partner to prove his account books. On this application the Court passed an order for summoning Manak Chand on 5-4-68. On 8-5-68 another order was passed which shows that the intention of the Court was to summon Manak Chand as a witness of defendant No. 1.

3. There is no express provision in the Code for recalling a witness of the plaintiff as a witness of the defendant. There is however no prohibition against it and it has been held in a case cited in Chitale's Commentary on Order 18 Rule 17 that a witness of the plaintiff can be recalled as a witness of the defendant with the leave of the Court. No such permission should be granted by the Court unless there are cogent reasons for doing so.

The trial Court has not applied its mind as to whether or not there were reasons for recalling Manak Chand. But I am satisfied that it was on account of the inadvertence of defendant No. 1 that Manak Chand was not properly cross-examined as to whether any entry about the purchase of gram by him on 16-7-67 figures in his account books. Manak Chand is being recalled with his account books only for the purpose of showing whether or not there is any entry about the purchase of gram. No further question will be put to him.

4. The revision application is accordingly dismissed without any order as to costs.
Application dismissed.

AIR 1970 RAJASTHAN 60 (V 57 C 11)
D. M. BHANDARI C. J. AND
S. N. MODI, J.

Ram Kumar, Appellant v. State of Rajasthan, Respondent.

Criminal Appeal No. 685 of 1966, D/-23-4-1969, against judgment of Sessions J. Kota D/28-9-1966.

(A) Evidence Act (1872), S. 32 — Dying declaration — Reliability — To pass the test of reliability dying declaration has to be subjected to very close scrutiny — Once the Court has come to conclusion that it was true, there is no question of further corroboration. AIR 1958 SC 22, Rel. on.

(B) Penal Code (1860), S. 300 — Intention and knowledge — Difference between — Knowledge is awareness of consequences — Intention requires something more than mere awareness of consequences.

The framers of the Code designedly used the words "intention" and "knowledge" in Section 300. They intended to draw a distinction between these two expressions. The knowledge of the consequences which may result in the doing of an act is not the same thing as the intention that such consequences

should ensue. Except in cases where mens rea is not required in order to prove that a person had certain knowledge he must have been aware that certain specified harmful consequences would or could follow. This awareness is termed as knowledge. But if an act is done by a man with the knowledge that certain consequences may follow or will follow, it does not necessarily mean that he intended such consequences and acted with such intention. Intention requires something more than a mere foresight of the consequences. It requires a purposeful doing of a thing to achieve a particular end. (Para 10)

The noun "intention" denotes the state of mind of a man who not only foresees but also desires the possible consequences of his conduct. (Para 10)

For holding an offence of culpable homicide proved, it is necessary that specific intention must be proved. But even when such intention is not proved, the offence will be culpable homicide if the doer of the act causes the death with the knowledge that he is likely by his such act to cause death.

(Para 12)

(C) Penal Code (1860), S. 300 — Intention — Proof of — No presumption — Burden to prove intention — Extent of, stated — (Evidence Act (1872), Ss. 101-104 and 114).

It is not correct to say that the intention of an accused is a subjective state of mind which cannot be positively proved in every case except by the accused himself stating either in evidence or in his explanation that such and such was his intention when he performed the act and that unless such an explanation is forthcoming from the accused and accepted by the Court, he must be presumed to intend the natural consequences of his act. The presumption of intention is not a proposition of law but a proposition of ordinary good sense. The burden to prove intention is on prosecution. In one way Section 300 I. P. C. makes the presumption that a person intends the natural and probable consequence of his act irrebuttable to the extent that if it is proved that the particular injury intended to be inflicted by the accused turned out objectively to be sufficient in the ordinary course of nature to cause death, the accused cannot plead that he had not the intention of causing a bodily injury sufficient in the ordinary course of nature to cause death. The subjective test is confined to proving that the accused intended to cause such bodily injury as was likely to cause death and it is not necessary that it must further be proved by the prosecution that the accused intended to inflict bodily injury sufficient in the ordinary course of nature to cause death. It is sufficient if it is proved that the particular bodily injury was sufficient in the ordinary course of nature to cause death for holding the accused guilty for the offence of murder. AIR 1962 SC 605 and AIR 1964 SC 1563, Rel. on; AIR 1966 SC 1 and AIR 1961 AC 290, Expl.

(Para 20)

(D) Penal Code (1860), Ss. 299, 300 and 304 Part 2 — Intention — Absence of — Defence of accident under intoxication of liquor — Plea not raised specifically — Court can still take into consideration circumstances of case.

In spite of the fact that the accused has not taken any definite plea of accident and that he has not explained why he fired the gun at the deceased, the Court may minutely examine all the circumstances on record and see whether the facts and circumstances pointed out that the appellant must have intended to cause the death or to cause such bodily injury as was likely to cause death. Case law reviewed. (Para 22)

The appellant and the deceased together had gone for a picnic and were engaged in merry-making. They drank liquor and took their meals. The appellant had not taken any weapon with him but a gun was used by another for shooting at sparrows before the incident. No motive or enmity between the appellant and the deceased was proved. The shooting was performed in broad day light without any attempt to hide it and was consistent with the fact that the appellant may have tried to handle the loaded gun recklessly :

Held that no inference could be drawn that the appellant had either the intention of killing the deceased or that he had the intention of causing him such bodily injury as was likely to cause his death. (Para 23)

However, there was no room for doubt that the appellant must have had the knowledge that he was doing an act which was likely to cause the death. He could, therefore, be convicted under Sec. 304 Part 2 instead of under S. 302 I. P. C.

(Paras 24, 25)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 867 (V 55) =
1968 Cri LJ 1023, Harjinder Singh
v. Delhi Administration 20
(1966) AIR 1966 SC 1 (V 53) =
1966 Cri LJ 63, Bhikari v. State of
Uttar Pradesh 17
(1966) AIR 1966 SC 148 (V 53) =
1966 Cri LJ 171, Anda v. State of
Rajasthan 20
(1964) AIR 1964 SC 1563 (V 51) =
1964 (2) Cri LJ 472, Dahyabhai v.
State of Gujarat 16
(1962) AIR 1962 SC 605 (V 49) =
(1962) 1 Cri LJ 521, K. M. Nanawati v.
State of Maharashtra 15
(1961) 1961 AC 290 = 1960-3 WLR
546, Director of Public Prosecutions
v. Smith 18
(1958) AIR 1958 SC 22 (V 45) =
1958 Cri LJ 106, Khushal Rao v.
State of Bombay 8
(1958) AIR 1958 SC 465 (V 45) =
1958 Cri LJ 818, Virsa Singh v.
State of Punjab 20
(1942) 1942 AC 1 = 111 LJ KB 84,
Mancini v. Director of Public Pro-
secutions 21

(1935) 1935 AC 462 = 104 LJ KB
433, Woolmington v. Director of
Public Prosecutions 14, 15
(1915) 1915-2 KB 431 = 84 LJ KB
1371, Rex v. Hopper 21

O. C. Chatterji, for Appellant; B. C. Chatterji, Addl. Govt. Advocate, for the State of Rajasthan.

BHANDARI C. J.: Ramkumar appellant and Ramsingh were tried by the Sessions Judge, Kota, for causing the murder of Yuvrajsingh. Ramkumar has been convicted for the offence of murder under Section 302 of the Indian Penal Code and sentenced to imprisonment for life, while Ramsingh accused has been acquitted. This appeal has been filed by Ramkumar challenging his conviction.

2. Briefly the prosecution case is that Ramsingh, Ramkumar and Yuvrajsingh went from Kota for a picnic on the morning of 21st November, 1965 to a Talai near village Sakatpur. Ramsingh had a licence for a muzzle loading gun and he carried it with him.

At the Talai they took liquor and then food was prepared by Prabhulal P. W. 10 who also accompanied them and all of them had their lunch. Prabhulal P. W. 10 then left the place with the utensils, leaving Ramsingh, Ramkumar and Yuvraj at the Talai. At about 4 P. M. one gunshot was fired by Ramkumar appellant and it is alleged that it seriously injured Yuvrajsingh. The two accused thereafter ran away with the gun. Mst. Kishni P. W. 5 was near the Talai with her nephew Kanhaiyalal P. W. 6. On hearing the report of the gun she went to the place where Yuvrajsingh was lying in serious condition. Yuvrajsingh requested Mst. Kishni to take him to the hospital. Soon some other villagers assembled. Kanhaiyalal went to the office of Bundi Silika Company at Kunhari and asked Babu P. W. 9 to telephone the Police that a man had been shot at the Talai. Babu telephoned to the Police Station Bhimganjmandi. Vinod Dhane P. W. 11 Station House Officer received the message at about 4-30 P. M. On this message the first information report was prepared.

In the first information report it is mentioned that the name of the man who had received the gunshot was Yuvrajsingh and that the person who had fired at him was Ramkumar. The name of the other companion was Ram Singh. Vinod Dhane went to the Talai. He found Yuvrajsingh seriously injured on the road at about 150 feet away from the tank. He was taken to the M. B. S. Hospital at Kota. He was examined by Dr. Hukamchand Jain and admitted in the hospital.

The doctor noted in the bed ticket Ex. D. 1 that the person (injured) stated that he had been shot at by his class mate Ramkumar of Genta. Vinod Dhane, the Station House Officer, himself recorded the dying declaration in the presence of Dr. Hukamchand. The dying declaration is Ex. P. 3.

The gist of the dying declaration is that Yuvrajsingh, Ramsingh and Ramkumar had gone from Kota to have drinks. They had taken sufficient quantity of liquor which Ramsingh had brought. Ramsingh had also brought a gun for hunting. Ramkumar took the gun from Ramsingh and shot at him at the left hip of Yuvrajsingh. The gun was fired by Ramkumar. It was a double barrel muzzle loading gun. Thereafter both of them ran away with the gun.

3. The injury report shows that the deceased had three pea size gunshot wounds lacerated in nature on the left hypochondrium. They were skin deep and simple. There was one oval gunshot wound in the left hypochondrium $3/4'' \times 1/2''$ going into the peritonal cavity and bowels were visible. This last injury was grievous. There was also fracture of the left 10th rib and a tear in the posterior wall of the stomach. Dr. N. K. Sharma performed the operation and removed a pea size stone (shot). Yuvrajsingh, however, did not survive and succumbed to the injuries on 22nd November, 1965. The post-mortem examination on the dead body of Yuvrajsingh was performed by Dr. R. K. Gupta. The cause of death was perforation of stomach leading to peritonitis and shock.

4. Vinod Dhane arrested the accused Ramsingh and Ramkumar and recovered a gun from Ramsingh.

5. Both the accused were challaned before the Additional Munsif Magistrate First Class, Court No. 2, Kota who committed them for trial to the Sessions Judge, Kota. The accused denied to have committed the offence. Ramkumar in his statement under Section 342 Criminal P. C. stated that they had gone to the Talai at village Sakatpur for a picnic party. Yuvrajsingh forced him to take liquor and he became drunk. Thereafter he did not know what happened. Two defence witnesses were produced to show that Ramkumar did not take liquor.

The learned Sessions Judge held that the deceased had made a dying declaration to Dr. Hukamchand Jain which was recorded in Ex. D. 1, that he made another dying declaration to the investigating officer in the presence of the said doctor and that was recorded in Ex. P. 3 and both these dying declarations were proved by their evidence. The learned Sessions Judge found corroboration of these dying declarations from the other circumstances brought on record. He held that Ramkumar had shot Yuvrajsingh and Yuvrajsingh died on account of the gunshot injuries thus inflicted. He disbelieved the case put forward by the accused that he was made to drink forcibly and rejected the argument of the learned counsel for the defence that the accused Ramkumar was entitled to protection under Section 85 of the Indian Penal Code. Ramkumar was convicted under Section 302 of the Indian Penal Code and sentenced to imprisonment for life.

6. In this appeal, learned counsel for the appellant has challenged the dying declarations mainly on the ground that the dying declarations made at the hospital were not in conformity with the dying declaration made by the deceased to Kanhaiyalal P. W. 6 and Mst. Kishni P. W. 5 as before these witnesses the deceased had named Ramsingh and Ramkumar as his assailants. Kanhaiyalal has no doubt stated that Yuvrajsingh had named Ramsingh and Ramkumar as the persons who had shot at him. He admitted in cross-examination that he had no talk with the injured, that it was his maternal aunt who had a talk with injured person and that on her enquiry, the injured had named Ramsingh and Ramkumar. He further stated that his maternal aunt had a talk with the injured person in his presence. He was standing about 15 paces away from the injured.

Mst. Kishni P. W. 5 has stated that on enquiry the deceased told her that he was a resident of Genta and his name was Yuvrajsingh and the deceased had named Ramsingh and Ramkumar as the two persons who had come there. She did not state that the deceased had named Ramsingh and Ramkumar as his assailants. Kanhaiyalal has also stated that he had conveyed on the telephone the names of Ramsingh and Ramkumar as the assailants of the victim. Learned counsel has also relied on the statement of Babu P. W. 9 that he was informed by Yuvraj Singh when he was lying at the Talai where the witness went with the police that Ramsingh and Ramkumar and some other persons had shot him.

7. In our opinion, the trial Court has rightly held that the two dying declarations one contained in Ex. D. 1 and the other in Ex. P. 3 were made by the deceased when he was fully conscious and that they were consistent with each other and were not in any way in conflict with any other statement made by the deceased. Babu P. W. 9 has made a statement which was very vague. Kanhaiya Lal P. W. 6 had not himself interrogated the deceased and he merely stated what the deceased is said to have stated to Mst. Kishni in his presence. Mst. Kishni has not stated that Yuvrajsingh had named both the accused as his assailants. The evidence of these witnesses does not cast any doubt on the dying declarations Ex. D. 1 and Ex. P. 3.

8. Learned counsel for the appellant has argued that the appellant could not be convicted solely on the basis of these dying declarations. The law on the subject has been laid down by their Lordships of the Supreme Court in Khushal Rao v. State of Bombay, AIR 1958 SC 22 (29) in the following passage :

"Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the

statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration."

9. The circumstances of the case show that Ramkumar and Ramsingh were both present near Yuvrajsingh at the time of the incident, and there is no reason whatsoever for Yuvrajsingh to falsely implicate his class mate Ramkumar. Yuvrajsingh had also sufficient opportunity to see who had fired the gun. He has given consistently the name of Ramkumar as his assailant in his dying declarations. In Ex. P. 3 he has amplified that Ramkumar had taken the gun from Ramsingh and had shot at him and that it was Ramkumar who had actually fired the gun. In our opinion, the dying declarations made by Yuvrajsingh were true. On the strength of these dying declarations it is proved beyond any manner of doubt that it was Ramkumar appellant who had fired the gun at Yuvrajsingh.

10. The important question which has engaged our careful attention in this case is whether on the facts and in the circumstances of this case, we should maintain the conviction of the appellant for the offence of murder. The Indian Penal Code defines in Section 299 the offence of culpable homicide. Under this section it is to be proved that an accused has caused death of any person by an act and that act was done (1) with the intention of causing death or (2) with the intention of causing such bodily injury as is likely to cause death or (3) with the knowledge that he is likely by such act to cause death. Section 300 of the Code lays down that except in cases falling within the exceptions mentioned in that section, culpable homicide would be murder if the act by which the death is caused is done with the intention or knowledge as specified in that section.

Thus while defining the offence of culpable homicide and murder, the framers of the Code laid down that requisite intention or knowledge must be imputed to the accused when he committed the act which caused the death in order to hold him guilty for the offence of culpable homicide or murder as the case may be. The framers of the Code designedly used the two words "intention" and "knowledge", and it must be taken that the framers intended to draw a distinction between these two expressions. The knowledge of the consequences which may result in the doing of an act is not the same thing as the intention that such consequences should ensue. Except in cases where mens rea is not required in order to prove that a person had certain knowledge, he "must have been aware that certain specified harmful consequences would or could follow." (Russell on Crime, Twelfth Edition Volume 1 page 40).

This awareness is termed as knowledge. But the knowledge that specified consequences

would result or could result by doing an act is not the same thing as the intention that such consequences should ensue. If an act is done by a man with the knowledge that certain consequences may follow or will follow, it does not necessarily mean that he intended such consequences and acted with such intention. Intention requires something more than a mere foresight of the consequences. It requires a purposeful doing of a thing to achieve a particular end. This we may make it clear by referring to two passages from leading text-books on the subject. Kenny in his Outlines of Criminal Law, 17th Edition at Page 31 has observed:

"To intend is to have in mind a fixed purpose to reach a desired objective; the noun 'intention' in the present connexion is used to denote the state of mind of a man who not only foresees but also desires the possible consequences of his conduct It will be noted that there cannot be intention unless there is also foresight, since a man must decide to his own satisfaction, and accordingly must foresee, that to which his express purpose is directed. ... Again, a man cannot intend to do a thing unless he desires to do it."

11. Russell on Crime, Twelfth Edition Vol. 1st page 41 has observed:

"In the present analysis of the mental element in crime the word 'intention' is used to denote the mental attitude of a man who has resolved to bring about a certain result if he can possibly do so. He shapes his line of conduct so as to achieve a particular end at which he aims.

Differing from intention, yet closely resembling it, there are two other attitudes of mind, either of which is sufficient to attract legal sanctions for harm resulting from action taken in obedience to its stimulus, but both of which can be denoted by the word "recklessness". In each of these the man adopts a line of conduct with the intention of thereby attaining an end which he does desire, but at the same time realises that this conduct may also produce another result which he does not desire. In this case he acts with full knowledge that he is taking the chance that this secondary result will follow. Here, again, if this secondary result is one forbidden by law, then he will be criminally responsible for it if it occurs. His precise mental attitude will be one of two kinds—(a) he would prefer that the harmful result should not occur, or (b) he is indifferent as to whether it does or does not occur."

12. The phraseology of Sections 299 and 300 of the Code leaves no manner of doubt that under these sections when it is said that a particular act in order to be punishable be done with such and such intention, the requisite intention must be proved by the prosecution. It must be proved that the accused aimed or desired that his act should lead to such and such consequences. For example, when under Section 299 it is said

"whoever causes death by doing an act with the intention of causing death," it must be proved that the accused by doing the act, intended to bring about the particular consequences, that is, causing of death. Similarly, when it is said that "whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death," it must be proved that the accused had the aim of causing such bodily injury as was likely to cause death.

Thus, in order that the requirements of law with regard to intention may be satisfied for holding an offence of culpable homicide proved, it is necessary that any of the two specific intentions must be proved. But even when such intention is not proved, the offence will be culpable homicide if the doer of the act causes the death with the knowledge that he is likely by his such act to cause death, that is, with the knowledge that the result of his doing his act may be such as may result in death.

13. Learned Additional Government Advocate has laid much stress on the point that the intention of an accused is a subjective state of mind which cannot be positively proved in every case except by the accused himself stating either in evidence or in his explanation that such and such was his intention when he performed the act and that unless such an explanation is forthcoming from the accused and accepted by the Court, he must be presumed to intend the natural consequences of his act. He has relied on several cases on this point. But this maxim is not a substantive principle of law. It is only a maxim of great evidentiary value. In this connection, we may refer to the following passage from Glanville L. Williams, 1953 Edition, Article 27, page 81 :

"It is now generally agreed, in conformity with this opinion, that the maxim does not represent a fixed principle of law, and that there is no equiparation between probability and intent. This was pointed out by Stephen, although his words for some time had little effect upon the language used by judges. Recently Denning L. J. said: 'there is no 'must' about it; it is only 'may'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense."

14. In the same book (Article 227) while discussing the burden of proof in homicide the learned author has observed :

"Foster stated that every killing was presumed to be murder until the contrary was shown, and this statement was unintelligently copied from one textbook to another although it was contrary to the fundamental presumption of innocence. The heresy was extirpated by the House of Lords in Woolmington, 1935 AC 462; which decided that there is no persuasive presumption of murderous malice, and that when a defence to a charge of murder is accident or provocation, the burden of satisfying the jury still rests on the prosecution. Lord Sankey said: 'if the

jury are left in reasonable doubt whether the act was unintentional or provoked, the prisoner is entitled to be acquitted, i. e. of murder."

15. The Supreme Court referred to Woolmington's case, 1935 AC 462 in K. M. Nanawati v. State of Maharashtra, AIR 1962 SC 605, and observed as follows :

"As in England so in India, the prosecution must prove the guilt of the accused, i. e. it must establish all the ingredients of the offence with which he is charged. As in England so also in India, the general burden of proof is upon the prosecution; and if, on the basis of the evidence adduced by the prosecution or by the accused, there is a reasonable doubt whether the accused committed the offence, he is entitled to the benefit of doubt."

16. Another case is Dahyabhai v. State of Gujarat, AIR 1964 SC 1563. It was a case in which the plea of insanity was under consideration. It was observed :

"It is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Penal Code. The general burden never shifts and it always rests on the prosecution."

17. Learned Additional Government Advocate has relied on the following observations of their Lordships of the Supreme Court in Bhikari v. State of Uttar Pradesh, AIR 1966 SC 1 (2) :

"There is no doubt that the burden of proving an offence is always on the prosecution and that it never shifts. It would, therefore, be correct to say that intention, when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances. Thus if a person deliberately strikes another with a deadly weapon, which according to the common experience of mankind is likely to cause an injury and sometimes even a fatal injury depending upon the quality of the weapon and the part of the body on which it is struck, it would be reasonable to infer that what the accused did was accompanied by the intention to cause a kind of injury which in fact resulted from the act. In such a case the prosecution must be deemed to have discharged the burden which rested upon it to establish an essential ingredient of the offence, namely the intention of the accused inflicting a blow with a deadly weapon. Section 84 of the Indian Penal Code can no doubt be invoked by a person for nullifying the evidence adduced by the prosecution by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Now it is not for the pro-

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